



From Script To Screen

Copyright for Audiovisual Industry Professionals

A Training Tool

By Rob H. Aft

FROM SCRIPT TO SCREEN is dedicated to the memory of Carole Croella, whose work contributed greatly to this edition. As Senior Counselor in WIPO's Copyright Law, Culture and Creative Industry Sector, Ms. Croella was in charge of the development and implementation of international standards in copyright and related rights. Ms. Croella worked tirelessly to promote the creative industries and the rights of creators in developing countries, with a particular focus on Africa. Through her work, Ms. Croella enriched the lives of many and has left a lasting legacy.

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TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
ADA	Americans with Disabilities Act
ADR	Alternative Dispute Resolution
AFM	American Film Market
AP	Associate Producers
ARSOG	Audiovisual Rights Owners Society of Ghana
ASCAP	American Society of Composers, Authors, and Publishers
ATL	Above-the-line
BMI	Broadcast Music Incorporated
BTL	Below-the-line
CAMA	Collection Account Management Agreement
CARA	Classification and Rating Administration
CGI	Computer Generated Imagery
CISAC	International Confederation of Societies of Authors and Composers
CMO	Collective Management Organizations
CNC	Centre National de la Cinématographie
COT	Chain of title
CRC	Canadian Retransmission Collective
DDA	Disability Discrimination Act



DGA	Director's Guild of America
DRM	Digital rights management
E&O	Errors and Omissions
EIDR	Entertainment Identifier Registry
GDP	Gross Domestic Product
IFTA	Independent Film and Television Alliance
IPD	International Performers Database
IPDA	International Performers Database Association
IPI	International Party Identifier
ISAN	International Standard Audiovisual Numbers
MG	Minimum Guarantee
MIPCOM	Marché International des Programmes de Communication
MPA	Motion Picture Association
MPAA	Motion Picture Association of America
NGO	Non-governmental organizations
OTT	Over-the-top
P&A	Prints and Advertising
PRS	Performing Right Society
SAA	Society of Audiovisual Authors
SACD	Société des Auteurs et Compositeurs Dramatiques
SAG	Screen Actors Guild

SCAM	Société Civile des Auteurs Multimedia
SPE	Special Purpose Entity
SSA	Société Suisse des Auteurs
SVOD	Subscription video on demand
TIFF	Toronto International Film Festival
TRIPS	Trade-Related Aspects of Intellectual Property Rights
VOD	Video on Demand
WCT	WIPO Copyright Treaty
WGA	Writers Guild of America
WIPO	World Intellectual Property Organization



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Like films, this book is a collaborative effort. It is an update of a book first published by the World Intellectual Property Organization with the support of WIPO's Donna Hill in 2007. That edition was principally written by Los Angeles-based film finance and distribution consultant, Rob Aft, and included material by French Intellectual Property Lawyer, Charles-Edouard Renault. The book was then modified to form the basis of a set of lesson modules for WIPO called *Making a Living In The Film Industry*. That publication contained some content that originally appeared in other WIPO publications, including Bertrand Moullier's *Rights, Camera, Action and Educational Material on Collective Management of Copyright And Related Rights in The Film Field* by collective management experts Tarja Koskinen-Olsson and Nicholas Lowe. In most cases, the material has been updated and adapted to serve our purposes. Thanks are owed to these authors and the many experts who have helped shape the content and increase the usefulness of this publication.

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PREFACE

Films are important artistic expressions that communicate the creators' culture and perspective to the world. They have social, cultural and economic impacts on a society and their creation should be encouraged to the extent possible, taking local factors into consideration. Each film is a collaborative work, fusing the creativity and effort of a multitude of collaborators: the “creatives” – scriptwriters, actors, directors, musicians and designers of sets, costumes, sound, hair and make-up – and “business professionals” – such as bankers, lawyers, distributors and exhibitors.

Reference to the film and television industries encompasses all audiovisual (A/V) projects for both feature length and made-for-theatrical, DVD, VOD (TV)/new media productions. Similarly, for the most part, references to “film” should be read to refer to all A/V projects.

A film is usually an expensive business endeavor. It requires experienced producers and distribution professionals to realize the potential value of a film, and in order to repay investors and financiers. Production, distribution and finance professionals can be very demanding, and it is important that the creative elements have at least a basic understanding of their work so that all persons involved in making a film know the requirements and are able to effectively collaborate to realize their creative vision while satisfying the exigencies of the business process.

Copyright is present in all stages of the making of the film (development, financing, marketing and distribution), and it is important that key players in the industry know which rights are required and created as well as how those rights are managed and protected. It is necessary to establish contractual agreements defining copyright ownership and its use, not only to protect the interests of all concerned, but also to



facilitate financing and distribution, avoid costly disputes and reduce the risk of future legal problems and financial disputes.

To build awareness about the importance of copyright in the making of films, WIPO collaborates with public and private partners in the film industry and implements technical cooperation projects in the field of creative industries in coordination with other relevant entities. An important development in this area is the recent adoption and entry into force of the Beijing Treaty on Audiovisual Performances, which formally recognizes and strengthens the economic and moral rights of performers.

The WIPO website (www.wipo.int) contains many related publications addressing some of the topic covered in this book. The WIPO Academy programs as well as regional and local conferences organized in cooperation with local copyright and cultural authorities reinforce WIPO's educational mission around the world. WIPO places a specific emphasis on education in emerging markets, although experience has shown that all audiovisual stakeholders, including those in the most advanced production centers, will benefit from a deeper understanding of the material.

This publication is arranged in self-contained sections dealing with all copyright aspects of development, finance, distribution, collective management and artist's rights. The format lends itself to use in classroom/conference settings or by individuals. This allows a focused study on specific areas of interest to the user. In other words, it is not necessary to read every word of every chapter. Similarly, the format does not delve deeply into each topic; the writers therefore recommend additional resources where appropriate. Specific efforts were made to avoid overloading the publication with legal discussions, although, of course, the law is the basis for most of the topics. Instead, the focus is on the practical aspects necessary for success in the film and TV industries.

An example is the recent experience of Nigerian films that have been acquired by the US-based global subscription video on demand (SVOD) platform, Netflix. When WIPO held a film copyright conference in Lagos in 2008, most of the local practitioners did not use international standard copyright practices. Since there was a very small formal export market for their output, contracts for music, screenplay rights, directors and performances were rare. It simply was not necessary to prove ownership to generate revenues.

As film revenues and professionalism (see below) grew, so did distribution opportunities that required clear proof of chain of title (ownership). Today, Netflix is acquiring films and TV programs from around the world, but – and this is the whole point of this publication – only if the licensor can prove ownership. The producers of LIONHEART (a hit 2018 Nigerian production rumored to have received a multi-million-dollar license free from Netflix) clearly understood the value of the material contained in this book. Nigerian filmmaker Kunle Afolayan recently licensed his entire catalogue to Netflix and shared with the author his relief at having secured all of the appropriate intellectual property agreements at the time of production.

Professionalism

Understanding and applying business concepts, ethics and reliability are keys to being known as a professional in the world of film. That includes adhering to local laws regarding the establishment of companies, taxes, employment, transfer of copyright, financial transactions and, perhaps most importantly, local customs regarding how respectable businesspeople conduct themselves. Such respectability includes keeping proper accounting, paying bills on time and helping to strengthen the film community through education, government involvement and the same techniques other industries use to gain respect as important players in the national economy.



Professionalism separates the people that banks and investors want to work with and that governments and the creative community want to support from the unreliable and unscrupulous people that, unfortunately, are always going to be part of these industries. Professionalism engenders respect, which encourages governments to invest in infrastructure and even production. It convinces bankers and investors to entrust producers with their money and attracts major creative talent to work with professional companies.

This book will help readers understand many of the concepts the need to absorb to be professionals, but learning is a continuous process. It is sometimes said that producers make two films – on the first they make an incredible number of mistakes, which they hope to avoid on their next film. On the second film they discover that there are myriad new things that can go wrong, so they give up. Anyone who has made even one film knows that this is an industry full of potential disasters. They also realize that they could have avoided many problems if they had only understood the business side of things rather than just the creative side. These problems start in the development process and continue through production and distribution. This book should help, but its readers should never stop learning.

WIPO educational activities are based on three key principles. Firstly, the program activities are designed to respond to the local needs and conditions of the country. Some countries rely heavily on lawyers and written agreements, whereas other countries rely on personal relationships and lawyers are rarely used. In some countries, there are rich subsidies and support from governments; in others, there is no assistance at all. Distribution, production budgets, export potential and many other local factors must be considered when applying the lessons in this book. Secondly, the program activities are designed to be neutral and provide local partners with a variety of prospects. Accordingly, the program is based on a comparative business models and law approach. Finally, the activities encourage the flourishing of creative industries in

countries and regions with a view to promoting their economic, social and cultural development, while taking into account the business and legal environment.

It is in this spirit that the writers offer these materials, which are designed to empower film industry stakeholders in their careers. The goal is to educate these professionals in all aspects of the film industry in international standard practices prevailing in mature markets such as the United States and Europe related to copyright transfer, contracts, distribution and revenue tracking and disbursement. The book is expected to foster understanding and dialogue between the creative elements and the finance and distribution community in hopes that art, culture and local economies can flourish.

A Note on Case Studies

Case studies are used as “generic” examples that describe critical copyright and film-related issues that any A/V industry anywhere in the world might face. Case studies are an excellent means of learning how these issues play out in the real world. Real life is rarely as straightforward as it is in textbooks, but the cases illustrate situations that clarify topics in each chapter. Readers are encouraged to explore these cases in more detail to understand other aspects of each that have not already been covered. That could include reading scripts that might be available online, watching YouTube interviews with the producers, cast and crew and, of course, watching the trailers and features. Some of those links will be included in the case studies.

Accurate data related to budgets, finance arrangements, revenues and other topics is private and such details contained in the case studies should not be relied upon. That is not necessary for the case studies to be useful illustrations.



Cases are chosen to present broad concepts, not because the films were popular or profitable.

About the Author

Rob H. Aft is President of Compliance Consulting, a Los Angeles based media finance and distribution consultancy currently serving banks, law firms, producers, distributors and directors worldwide. After receiving his MBA in 1989, he spent 13 years as an international sales agent before launching Compliance. He has taught film business courses at USC, UCLA Extension and Loyola Marymount University. His writings include chapters on distribution and “Getting Paid” for the fourth edition of *The Movie Business Book*; *The Rules of Attraction*, an IFTA publication providing a framework for creating a production-friendly community; and the WIPO publication, *From Script to Screen: The Importance of Copyright in the Distribution of Films*.

INTRODUCTION

COPYRIGHT BASICS, PRODUCER ROLES AND CORPORATE STRUCTURES

This Chapter introduces the global structure of the film industry and foremost strategies industry stakeholders/filmmakers employ to ‘earn a living’ in the industry. It reviews, briefly, the film and TV value chain.

1. Introduction and Objectives

When one of the initial writers of this book told a producer friend of theirs that they had been asked to write a book that would purport to help people “Make a Living in the Film Industry” and her first reaction was, “But nobody makes a living in the film industry – look at how much money films lose!” the writer asked her if, when a film loses money, the star does not get paid, or the lawyers, or the bankers or the electricians. “Of course not, they all get paid – the lawyers and bankers make sure they get paid and no one else will show up for work if they aren’t paid.” Even when a film loses millions, most of that money has been spent paying salaries, renting equipment or engaging other service providers. In fact, many people make a living in the film industry, and this book seeks to help explain that process and what possible careers can be found both on the creative side and on the business side. What these groups have in common is that they depend on the creation and exploitation of copyright, and therefore the focus of this book will be understanding how copyright underpins value creation and ultimately making a living in the film industry.

Unless otherwise stated, the term “copyright” will be used as a generic term covering copyright in its strictest sense as this term is understood in Anglo-American, common-law systems, but also including author's rights, and related rights, which refer to similar forms of protection in



civil-law systems. In keeping with the practical approach to these concepts and regimes, their differences will be discussed in detail when necessary.

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

The book addresses the concept of earning a living from the creation and exploitation of motion pictures rather than the art of cinema, which would be a completely different book (though possibly of greater real value to world culture). This can be from the perspective of people working on the creative side of the value proposition (the director, stars, writer and people involved in other creative roles such as music, costume design and post-production), or on the business side, including the distributor, financiers and government workers. Broadly, the distributor 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, especially producers, 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 (to the extent it still exists) and new media distribution technologies, including VOD. The sales agent for his part, is responsible for the licensing of distribution rights to a territorial distributor in a country. This book describes the entire value chain, with emphasis on the distribution agreements and rights transactions between a producer and the creative elements,

between the film distributor and the producer or between the sales agent and the territorial distributor. The producer will license or assign rights acquired 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 talent and other agreements such as actor and director agreements, the acquisition agreement or the sales agent agreement, the territorial distribution agreement, as well as warranty issues including Errors and Omissions (E&O) insurance. Other 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.

Dispute resolution will be discussed, 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, including CMOs.

Finally, one chapter of the book is dedicated to pitfalls and solutions that will include a risk analysis checklist to 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 book is a very practical one, incorporating advice and case studies as well as the discussion questions. 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, for convenience, the language is limited to the film industry with few exceptions, the same rules apply to television and all other audiovisual productions. Though international norms and practices are generally the ones commonly recognized as



applicable in North America, Europe and other mature film markets, the book will also explore how those norms and practices differ in developing markets.

This book does not attempt to offer legal advice. Readers are encouraged to seek legal counsel locally and to make sure that their counsel is well versed in standard international copyright agreements and application.

2. Copyright Basics

“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 rightholders, including film distributors. The term “chain of title” refers to the documented collection of assignments to the producer, SPE, distributor or other entity that proves ownership of the copyright or distribution rights to a film. While differences exist in national copyright laws, the guiding principles are enshrined in the 1971 Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and other relevant international treaties as administered by the WIPO. Additional information on these topics can be found on the WIPO website and local copyright authority sites which may contain information specific to local concerns and legal systems.

2.1 Chain of Title

The chain of documents that confer ownership of the film's copyright to a person or corporate entity is called the chain of title (COT). The COT is essentially a passport that allows a film to earn money for the copyright holder and distributors. If copyright ownership cannot be proven, confirmed and, in many cases, insured through what is called Errors and Omissions (E&O) Insurance, it can make it impossible to generate revenues from the film. 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 they did not believe they owned or controlled, and no one would rent a store in that shopping mall if there was any doubt about the ownership of the space. 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 got 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.



2.2 Copyright Defined

“Copyright exists the moment an original work of authorship is fixed in a medium”

Copyright law confers on creators of original material the right to prevent others from copying or otherwise exploiting their work without their permission or to authorize legitimate distribution. No formal registration is required, although it is often advisable to register a work with the local copyright authority.

Ideas are not considered to be original works of authorship, but a synopsis of a story based on an idea is. The title of a film cannot be copyrighted. However, it may be governed by other intellectual property provisions such as trademark, or by local laws regarding unfair association, which might confuse the marketplace. The medium in which the intellectual property is fixed can be film, video, paper, oil on canvas, a photo negative or any other fixed creative medium, and the work must be original in that it is the end result of skill, knowledge and creative labor on the part of the artist (in practice, this is a very low standard to meet).

By rewarding copyright holders with exclusive rights, creators are encouraged to create new material.

Copyright protects the following types of works:

- original literary works including novels, instruction manuals, computer programs, lyrics for songs, articles in newspapers, some types of databases, but not names or titles;
- original dramatic works, including works of dance or mime;
- original musical works;
- original artistic works including paintings, engravings, photographs, sculptures, collages, works of architecture, technical drawings, diagrams, maps, logos;

- published editions of works including the typographical arrangement of a publication;
- sound recordings, which may be recordings on any medium such as tape or compact disc, and may be recordings of other copyright works, e.g., musical or literary;
- films, including videos; and
- broadcasts.

Though not required, the copyright symbol can be used to indicate that a work is subject to copyright protections, usually © followed by the copyright holder's name and the year of creation. In some places it is also wise to register a work with the appropriate copyright authority to help settle any potential disputes. This might even be a requirement for exploitation of the work.

In most countries, copyright of a literary or artistic work (including film) lasts until 70 years after the death of the last of the authors (often considered the screenwriter, director and composer). Where a copyright is a corporate creation, as in a work-for-hire situation, the copyright might only last for 50 years from first "publication" – usually meaning public showing or broadcast. These terms may vary, so be sure to confirm terms in your own country. The Berne Convention assures national treatment for copyrighted material created elsewhere, meaning that national laws apply equally to works created locally or outside the country.

2.3 Copyright Transfer

Very broadly, many of the economic rights contained in a copyright can be transferred from the creator to a third party. Exceptions including the concept of moral rights will be discussed in another chapter. It is important to note that copyright only transfers through WRITTEN agreement. That agreement must contain specific language referencing the rights transferred and the compensation given in exchange. Again,



the details will be discussed later, but it is important to remember that for a contract to be binding it must:

- be in writing;
- clearly indicate that there has been an offer by one party and acceptance by the other party;
- be clear overall – there must be certainty that the parties have the same understanding of the agreement;
- indicate consideration – meaning that something of value is given in exchange for the rights, usually money; and
- clearly indicate that both parties intend to enter into a legal relationship.

One other important point is that the terms of the contract must be fulfilled. The agreement must be signed by both parties and payment of any consideration must be made and documented.

3. The Business Entities

For business purposes, a film is essentially a collection of copyrights, i.e., a screenplay, possibly based on a book, music, directing talent, actors' performances and the contributions of creative technical crew such as costumers and set designers. All rights must be properly granted and acquired (by assignment or license) and documented for the rightholders to claim ownership of the film. Rightholders 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 the copyrights held in a film can be a paperwork nightmare. Nonetheless, it is a necessary part of the filmmaking process.

It is crucial that all stakeholders understand clearly the roles of the various businesspeople and corporate entities involved in the creation and transfer of the copyright to the film.

3.1 The Special Purpose Entity

Rather than assigning all the copyrights to a single person or an existing company, filmmakers create a new company to hold those rights. This company is called a Special Purpose Entity (SPE) or Special Purpose Vehicle. It can also be called a Single-Purpose Entity/Vehicle because it only has one purpose – to protect the economic integrity of the rights to the film. If the rights are all assigned to a person or an existing company, that company might go bankrupt or the person might disappear – leaving lenders, investors and distributors with no alternative means of access to the intellectual property they have spent time and money on. Similarly, if a dispute arises, the SPE might protect the corporation or person from judgements or personal liability. It is important to view a film as a single economic entity.

3.2 The Production Team and the Production Company

3.2.1 The Production Team

The Production Team consists of the producer, the executive producer and the associate producer. In most cases there are a number of people in each role. Associate producers generally have limited, specific roles and might do some of the work normally associated with the producer or executive producer, so their role will not be discussed in detail.

3.2.2 The Production Company

Often the producer and possibly the entire production team is part of a Production Company dedicated entirely to developing and producing movies. There are production companies associated with studios



(sometimes called “on-the-lot” producers because their offices are supplied by the studio and sit on the studio lot itself); major independents (such as Tyler Perry’s deal with Lionsgate in the United States); major TV outlets (Film Four or BBC Films in the United Kingdom or *Studio Canal* in France); and, of course, independent production companies. Some production companies are owned by directors (James Cameron’s Lightstorm Entertainment for instance); others are owned by actors (Tom Cruise’s Cruise/Wagner company which produces the *Mission: Impossible* films), and some are owned by directors who also appear in their own films (Kunle Afolayan’s Golden Effects in Nigeria). In some cases, they are even owned by distributors. A production company should not be confused with the SPE described above. They are separate entities, although the production company controls the SPE – usually through ownership of the corporate entity whereby the production company is a parent company (though financially separate).

3.2.3 The Producer

The producer is responsible for assembling the creative elements, developing the material, hiring the department heads and generally doing whatever is necessary to make sure that the film can physically and creatively be produced. They are the General of the army, the chief executive and the person everyone blames when things go wrong. They must make sure that monies are spent properly and that the director and actors are happy and behaving appropriately. It is often a thankless task requiring long, frequently unpaid hours, days, months and even years of work. Producers are regularly working on multiple projects at the same time – many of which may never be produced. May a time, they have a personal financial stake in the success or failure of a project.

3.2.4 The Executive Producer

Executive producers are involved in the finance and distribution of the film. They raise the funds, secure distribution and make sure that the financial terms are adhered to. They are often the link to the banks, investors and distributors. In many cases they are the actual investors in the project and as such may play a very passive role in the production itself – preferring to simply write the checks.

3.2.5 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 the 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, a VOD provider such as Netflix or Iroko TV, or a sales agent such as Lionsgate, which licenses rights to the “Hunger Games” films to territorial distributors around the world.

Sales agents fall into a special category and they are included here as distributors only in the broadest context. In many countries, especially 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.

3.3 Conclusion

Having explained these basic concepts, this book will now go into detail. This is complicated, challenging material. Not all of it will be relevant to



each reader's specific circumstances, but if you study it carefully, you will be better prepared for a career in the film industry than many people graduating from top film schools where many of these topics are never addressed. As with any career, it may take years of diligent work to achieve a level of skill an understanding of the film industry, but as is common knowledge, it could be the best career in the world.

CHAPTER 1

UNDERSTANDING THE EMPLOYERS: STRUCTURE OF THE FILM INDUSTRY

This chapter introduces the global structure of the film industry and foremost strategies that industry stakeholders and filmmakers employ. It also briefly reviews the film and TV value chain.

1.1 The Market and Economic Contribution of the Film and Television Industries

When a film like *Lord of the Rings* makes a billion US dollars at the box office around the world, what many people do not understand is that most of that money did not go to the producers. In fact, at least half of the money went to the cinemas themselves. That means that The 21 Group in Indonesia made millions of US dollars from the release of that film in the cinemas they own. Movies generate significant revenues in many different media and that revenue is spread widely. *Lord of the Rings* was produced in New Zealand with actors from around the world who paid taxes on their salaries – or at least what was left after their agents, lawyers and managers took their percentages.

One of the most important aspects of the film industry is that it requires by far the highest cost per unit of any consumer product – usually in excess of one million US dollars and, in some cases, more than 200 million. This is an up-front investment prior to any clear knowledge that the film will have any significant economic value when it finally reaches the consumer. Therefore, film investment is extremely high-risk, particularly at the higher levels of theatrical film and TV, which also require expensive marketing campaigns and access to limited distribution outlets.



Film production and distribution are highly labor-intensive activities whose labor is mostly considered part of the service sector.

1.1.1 Economic Contributions – GDP, Employment, Tax Revenues and Tourism

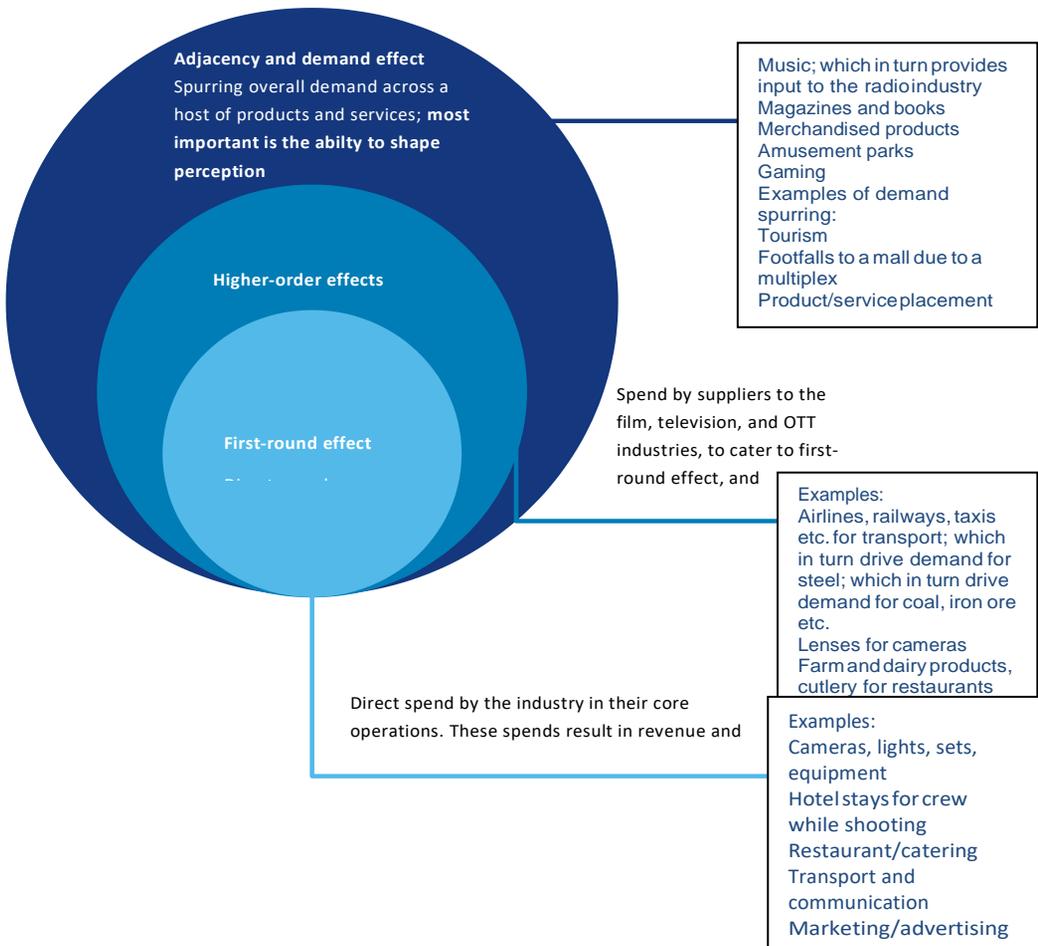
When assessing economic activities of the film industry, it is important to take into account what is sometimes referred to as the “blockbuster effect”. This means that it is ridiculous to discuss an “average” budget, box-office result, marketing spend or economic contribution regarding a single film. In every country around the world, there are a limited number of films whose budgets are extremely high, while others are extremely low. In India, for instance, there are dozens of high-budget (several million dollars) films released nationwide and even internationally each year, but there are more than a thousand others with budgets as low as 25,000 US dollars that might only be released in one small area of the country to a specific ethnic audience and only available in that local language. The average of these films says nothing useful about either group. It also reveals nothing about the vast balance of the films which fall in between.

In fact, even defining a “film” as an independent economic entity can be fraught with problems. Must an audiovisual work be shown in a cinema to be considered a film (this is an ongoing dispute between the streaming giant, Netflix and the Cannes Film Festival)? Must it receive any distribution at all? What is a “short” film compared to a “feature” film? Do regional, cultural or economic differences affect the terminology which should be used? These are all subjects which must be addressed when assessing the economic impact of the film industry.

Similarly, this is an industry that is constantly in evolution and, as the film industries of Nigeria and China have shown, reviewing statistics that are any more than a year old can be not only pointless, but potentially very misleading. Between the writing of this text and its publication, things will have undoubtedly changed again.

Because of the large number of participants in production and distribution (employment), as well as the heavy investments involved in filmmaking and distribution (materials, construction, equipment, hotels, meals, transportation, duplication, advertising, cinemas, etc.), legislation in many countries promotes these activities. While all contribute to a country's GDP, it is worthwhile examining the types of contributions the film industry makes in greater detail.

For a full report on the economic impact of the film industry in these areas, please see the MPA-APAC study at https://www.mpa-apac.org/wp-content/uploads/2018/05/India-ECR-2017_Final-Report.pdf. The following chart from that report illustrates the multiplier effect of spending in the sector.





Direct Economic Benefit to the Community – Productions can generate significant economic activity in a community. They create production-specific jobs; their members occupy hotel rooms, eat at restaurants or buy food from local sources, rent facilities or equipment, hire transportation or other infrastructure resources, use professional resources including banks, accountants and lawyers and sometimes even hire local crews, actors, directors and producers. They pay taxes, and in some cases construct studios or other infrastructure. The direct spending is subject to a multiplier or ripple effect. A study by the Los Angeles Economic Development Corporation show that every dollar spent on a production in California generates on average a total economic impact of nearly triple in addition to amounts realized by the state itself in taxes. Subsequent studies of existing programs have confirmed this multiplier effect.

Similarly, distribution activities generate huge revenues for various sectors of the economy including legal, banking, accounting, construction (cinemas), exhibition, TV stations and, of course, advertising.

Job Creation – Some communities rely heavily on productions to provide jobs and training for technical workers, thus encouraging additional indigenous and visiting production work as crews become more skilled and available. Of course, many visiting productions will bring most of the skilled workers they need from outside the community. If job creation is an important factor, the community must provide for significant training and incentives for producers to train and hire locally.

Tourism Promotion – From baseball fields in Iowa through beaches in Thailand to casinos in Las Vegas, a production can showcase the natural beauty or the excitement of a community and attract tourism spending. New Zealand continues to experience a tourist boom that can be directly attributed to the *Lord of the Rings* and *The Hobbit* film franchises which were shot there. If Wakanda were a real country, it

would be impossible to book a hotel there following the success of *Black Panther*.

Promotion of Local Culture – Of course, film is also a means of showcasing and promoting local culture, the value of which is often difficult to quantify. Telling the community's stories and introducing the culture to the world can provide political, social or even economic benefits. China has discovered that its people can tell their own stories in their own words and images and that through their film incentive programs, they can work with people from around the world to do so. The rapid rise in the number of productions in China and the quality of those productions has resulted in China making a major cultural contribution to global cinema in the past 10 years while greatly increasing the economic activity in both the production and distribution areas.

1.1.2 Market and Economic Contribution

Creative industries are among major contributors to the economic growth of a nation and to job creation. According to *the 2014 WIPO Studies on the Economic Contribution of the Copyright Industries*, these industries represent on average 5.2% of gross domestic product (GDP). In studies, the audiovisual sector is included in the figures for motion picture and video, but it is also part of radio and television.

The WIPO studies show that motion picture and video is one of the core copyright industries and its average contribution to GDP is 4% of the total contribution of copyright industries. The contribution of radio and television, including cable and satellite television, is on average 15% of the total. These figures are averages and the relative share of the contribution to GDP from the audiovisual industries varies greatly in individual countries.

The contribution of copyright industries to national employment stands at an average of 5.3%, with 6% of that amount originating from the



motion picture industry and 7% from radio and television. That means that the audiovisual sector represents approximately 0.6% of national employment. More information and occasional updates on these figures are available on the WIPO website.

The audiovisual industry makes a vital economic and cultural contribution. The following figures highlight a few examples of the magnitude of productions in different parts of the world. They were taken from the March 2019 *The Economic Contribution of the Motion Picture & Television Industry to the United States*, in which the Motion Picture Association of America describes the film and television industry in the United States:

- A national community of 2.6 million workers depends on the film and television industry, ranging from costume designers to make-up performers, stuntmen to set builders, writers to actors and accountants to dry cleaners.
- Nearly 1 million of those jobs are directly employed in production, finance and distribution activities.
- Salaries directly linked to those jobs total more than 76 billion US dollars (67 billion euros).

The following figures describe the European Union industry in 2018 and are drawn from the European Audiovisual Observatory's FOCUS Report of 2019:

- Gross box-office exceeded 6.8 billion euros (7.5 billion US dollars) with 956 million tickets sold.
- 1,847 feature films were produced in the European Union in 2018 (1,142 fiction features and 705 feature documentaries).
- Approximately 1 million people were directly working in the industry.
- There were 4,208 TV channels and about 1,270 on-demand platforms active in the EU at the end of 2017, with approximately a quarter of those in the United Kingdom.

Some Asian countries are major producers of films. For instance, according to statistics provided by the European Audiovisual Observatory, feature films were produced in India in 2018.

In Africa, major film producing countries are Burkina Faso, Kenya, Nigeria and South Africa. In Nigeria, for instance, more than 1,000 titles are produced yearly mostly for the home video market but increasingly for VOD platforms. The number of films produced there for theatrical release has been increasing, which has led to an increase in the number of cinemas, which has in turn triggered an increase in the number of films produced for theatrical release, and so on.

Major TV productions in Brazil have traditionally been produced in-house by the TV stations themselves. Now, the Brazilian independent production market is growing fast, boosted by new regulations and government incentives.

1.2 Film Economic Activities

1.2.1 Film Development and Production

There are many books devoted to film development and production, while few address the specifics of non-production-related aspects of the industry such as finance and distribution. In fact, most film schools around the world completely ignore these crucial aspects of the film industry to the great consternation of many of their graduates. People who work on the creative or production side of the industry must understand how monies are raised, how they are earned and how copyrights are owned and transferred. As will be seen, copyright ownership and transfer are at the heart of all financial transactions in this industry.

This book will not dwell on the development and production aspects of the industry in this chapter. These topics are covered more extensively in other chapters. At this point it is useful to address some of the basic



terminology and the people involved during the four major stages of film production: development, pre-production, production, post-production/delivery.

Development

Development begins with an idea. That idea could be an original story in the head of a writer but more often starts with a preexisting work – a novel, comic book, folk tale, magazine article, historical event or life story. In all cases, it is important that the rights to the underlying (preexisting) material be properly licensed by the producers. This process is addressed in a subsequent chapter.

Once the underlying rights are properly licensed, the next step is usually for a script to be written based on the material. In most of the world, there is no funding for the development stage of the process; however, in Europe and Canada, governments and some private funds do provide some level of funding through public support programs. If the film is an original idea from a writer, it is likely that the script has already been written. However, if not, a development executive or producer will work with writers to develop the story and script. Writers for hire are often represented by talent agents and usually belong to local unions such as the Writers Guild of America and their employment is subject to the terms of pre-negotiated agreements. These agreements will set minimum payments, credit obligations and circumstances under which the writer's work can be modified or rejected.

If a project originates with a director, then they are deeply involved in the development process. In many cases, a producer develops a project prior to engaging a director. Once the script is ready, the next steps are engaging a director and proceeding to casting. Depending on the level of cast and director, a film might proceed quite far into development without a director. A casting director might be engaged to work with the producer to select the right actors for the roles and to make offers (usually through their agents). During that period, the producer is trying

to attach a director if one is not already attached. Most top actors will not consider a film without a director attached, so that might be the priority even before casting is attempted.

Each film has different priorities for choosing a director and cast. In a perfect world, the top consideration would be the quality of the finished film, but usually economic considerations are paramount. There are two different primary economic considerations related to these choices.

Qualification for subsidies – Many subsidy programs base their support on cultural considerations and in particular the nationality of creative participants including the writer, director and actors. In order to qualify for the benefits, a point system is used with writers and directors accorded the most points. Often, this is the first question asked by producers – what is the director’s nationality? If the finance plan requires that the film qualify as a Canadian production, for instance, then nationality will be a major factor when considering the talent elements.

Bankability – Will this director or that star result in a film having a higher chance of being financially successful (or even financed at all)? This is often the most frustrating issue for people in the creative industries. The film finance and distribution business tends to be very “reactive” when it comes to talent. If the director’s last film was successful, it is assumed that their next film will be (unless it is in a different genre). A star might have won an Oscar in the 1980s but what have they done lately?

The great actor Shelly Winters was famously asked to audition for a role later in her career. At the audition, the first thing she did was pull one of her Oscar statues from her bag and put it on the table. Then she pulled another one out and declared, “Some people think I can act!” It is fairly likely that whether or not she got that part depended more on whether or not her name guaranteed ticket sales rather than whether or not she could act.



The cruel realities of choosing a director and cast for a film that must be financed based on potential revenues are that, too often, the best people will not be chosen for the creative positions and newer talent will lose out to established talent.

Of course, the choice of cast and director depend on many factors, including their availability for the project and the salary they are willing to accept. In many cases, a star will work for much less than their standard salary if they believe that the film will be good for their career. It is widely known that actors in Woody Allen's films are often paid much less than they would be offered for work in other films. Actors often happily accept roles to work with top directors and top directors will often accept less money to work on films they are passionate about.

The development process might also include elements such as set/costume design, location scouting, budgeting and financing. Many of these will be discussed in other chapters. A film usually passes from development to pre-production when a start date is set for shooting and the finance has been arranged. At the point where there are funds available to start paying below-the-line costs (explained in a later chapter but generally including costs associated with physical production and post-production), the film has usually entered the pre-production phase.

Since the director, cast, writer and many of the other creative roles involved in the development phase are contributing creativity that is subject to copyright, their contracts are copyright licenses or transfers.

Pre-production

During pre-production, all elements necessary to go into shooting are prepared. Contracts are concluded with all service providers for cameras, lights, sets, transportation, accommodation, food, electricity, costumes, post-production and visual effects services and anything else the picture requires. If there are stunts, then a stunt coordinator is engaged, and they begin designing those. All of this is coordinated by

the producer, line producer, assistant director and department heads to create the most efficient shooting schedule possible.

One basic lesson of filmmaking is that there is never enough money. A budget is prepared and almost instantly it is clear that the director will never be able to make the film they would like to make with those limited funds. Some films can go over budget but in most cases, there is a finite amount of money and that money is monitored and controlled by outside professionals (financiers, a completion bond company or an executive in charge of production) who will not allow spending beyond what is in the budget.

Additional people involved at this stage are supplying creative material subject to copyright (costumes and set design, make-up/hair and others) which must be properly licensed to the production.

Production

Many books have been written on film production, but they usually do not explain the financial side of the process. Whether a film's budget is 50,000 or 50 million US dollars, it is crucial that a production accountant control the funds to make sure they are spent as budgeted. Otherwise a production will run out of money before it is finished. This happens much more often than people would like to admit, and many filmmakers spend years looking for "finishing funds" long after they completed photography.

Payroll issues are always very complex, and many productions hire payroll services that can deal with income taxes, union dues and other issues that are outside the expertise of most producers. Payments must be made to service providers, suppliers, builders, rental companies, insurers, labs and a huge range of other people and companies.

Missing any of these payments can be disastrous for a production, so it is important that an experienced professional handle the business aspects of the production phase. Imagine if the rental fees for cameras



were not paid and the rental company demanded their return (or never supplied them) – the cost to the production could be enormous.

Completion Bonds

Independent productions in the United States and Europe are often covered by a completion bond – insurance that guarantees that a film will be completed per the production schedule and the budget. This is usually required if there is a bank or other outside entity financing the production. To qualify for a completion bond, a film must employ professionals that the bond company deems acceptable and the director and actors must also be “bondable”, meaning that they do not have a reputation for behavior that might cause delays or harm to the production. Obviously, this can be another factor in the casting process and producers often must confirm with the bond company that they will bond a production with a certain “problem” actor or director attached.

Post-production

Post-production is often when the serious work begins. Men and women in dark rooms begin assembling the footage, working with the sound, preparing the visual effects and generally turning the raw material of production into a film. The process is led by the editor and the director working closely together. Other members of the post-production team are described in subsequent chapters.

The post-production phase lasts considerably longer than the production period. Whereas a film might be shot in as little as a few weeks to as long as a few months (with some taking longer), it is rare for post-production to take any less than six months and it often lasts as much as a year.

Delivery is the completion of the post-production process. Usually, there are very specific technical and creative criteria required to complete delivery per the terms of existing distribution contracts. These can include running time (usually no less than 90 minutes and no more than

150 for a feature film), aspect ratio (1:1.85 is standard) and much more technical specifications including contrast, sound levels and the quality of the sound mix (including effects – often called “Foley”) and re-dubbing (also called or automated dialogue replacement (ADR)). In some cases, there will be requirements regarding censorship issues like nudity and violence. It is common for films in the United States to be required to qualify for an Motion Picture Association of America (MPAA) Rating no more restrictive than “R” (meaning “Restricted” – anyone under 17 requires a parent or adult guardian accompany them).

1.2.2 Territorial Film Distribution

Generally, a film’s “primary” and most economically important territory is its country of origin. A French film will always find its biggest audience in France and an Indian movie will find its biggest audience in India. In each case, however, their primary export markets will be different. Indian films are quite popular in Africa and many former British colonies, where there are significant ethnically Indian populations, whereas French films are usually considered “art house” films and might be more popular in Japan than they are in other European countries. Most films that are not produced in the United States or the United Kingdom struggle to find distribution in the United States. However, there can be interesting opportunities there for certain types of films – in particular, films that are critically acclaimed and win prizes at festivals.

That said, it is useful to examine briefly the top film territories around the world. This does not mean that they are the top import economies or the top producers. Some, like India and China, might import very few films but in India, the economic impact of imported films is minimal whereas in China, they constitute nearly half of box-office revenues. According to the 2017 MPAA statistical survey, global box-office rose 13% from 2013 to 2017 when it totaled 40.6 billion US dollars. The box-office of China surpassed that of Japan in 2013 as the top international market and is now four times its size at 7.9 billion US dollars. Below is a chart



indicating the top 20 box-office territories outside the United States and Canada. It is important to note that if this were for any other distribution medium (VOD or TV), the list would be very different.

2018 Top 20 International Box-Office Markets – All Films (Billion US dollars)

1.	China	\$9	11.	Spain	\$0.7
2.	Japan	\$2	12.	Brazil	\$0.7
3.	UK	\$1.7	13.	Italy	\$0.7
4.	S. Korea	\$1.6	14.	Netherlands	\$0.4
5.	France	\$1.6	15.	Indonesia	\$0.4
6.	India	\$1.5	16.	Taiwan	\$0.3
7.	Germany	\$1.0	17.	Poland	\$0.3
8.	Australia	\$0.9	18.	UAE	\$0.3
9.	Mexico	\$0.9	19.	Malaysia	\$0.3
10.	Russia	\$0.9	20.	Hong Kong	\$0.3

Source: HIS Markit and Local Sources – MPAA THEME Report 2018

Production is consistently challenging to measure owing to issues previously discussed – principally, a lack of a uniform definition for what constitutes a film. More than 4,000 feature films were submitted for the 2018 Sundance Film Festival in Utah. There were also thousands of films made around the world that were not submitted. However, published statistics will claim that fewer than 4,000 films were produced in the entire world that year, simply because they define a film as something released in cinemas.

1.2.3 Distribution Windows – Order of Commercialization

Theatrical Distribution

Theatrical distribution is often the largest generator of revenues, particularly outside of North America and Europe, where revenues from TV and new media distribution can be limited or non-existent. There are two revenue streams from theatrical distribution – one to the cinema and one to the distributor. The price of the ticket is split between these

two revenue streams. In many places, the amount is divided equally but in others, the cinema takes a much larger share (75% for imported movies in China and an average of 35% for all films in the United Kingdom). The share of box-office revenues can also be subject to negotiation, as in the United States, and there has traditionally been a significant level of fraud involved in the exhibition business. This can take the form of not reporting revenues or, in some cases, simply not paying the distributor amounts due.

There are two other very important areas that should be noted: the very high cost of theatrical distribution and the difficulty in accessing screens. Booking a screen (the job of a booker working within the local distribution company) can be extremely difficult owing to a very high number of films seeking distribution on a limited number of screens. Many cinemas will only work with certain distributors who can guarantee a high level of marketing spend – in many countries this amount can exceed the cost of producing the film. This is always the responsibility of the distributor, not the exhibitors. In Japan and the United Kingdom, distributors might wait six months or more for access to screens even if they agree to spend more than 20,000 US dollars in advertising per print.

The cost of releasing the film consists of two components usually referred to together as Prints and Advertising (P&A). The print component has obviously changed as cinemas have converted to digital projection and will often charge a Virtual Print Fee to cover those conversion costs, although this is quickly being phased out. There is also the cost of producing the element from which the film will be screened (usually a Digital Cinema Package (DCP) – essentially a hard drive).

The advertising component is handled by the distributor's marketing and publicity personnel. They are responsible for preparing marketing campaigns (posters, trailers, Internet marketing, tweets, print ads, etc.).



Preparation and execution of a major marketing campaign can take the better part of a year and cost millions of dollars. In addition to traditional advertising, it might also include publicity – which is usually “free” marketing from newspaper/magazine/Internet stories, interviews with the talent and even personal appearances, particularly at the film’s premiere.

Theatrical success will often determine a film’s success in other media and a film that does not recoup its P&A spend might expect to see a profit from other media (usually TV and VOD).

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-United States films in many places are extremely low. This is partly due to the number of films available and partly because 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 South 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 distribution and therefore more difficult for producers to arrange on their own. TV tends to be very relationship-driven and those relationships take years to develop. Among the various other complications is the issue of overspill, where the broadcast signal “leaks” from one geographical 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. Overspill might violate the copyright granted to territorial distributors in these other countries, but is most often provided for in the various distribution agreements. Frequently, a producer receives compensation for this through CMOs.

New Media Distribution (VOD and Over-the-Top (OTT))

New media is clearly the fastest growing area of distribution and is usually collectively referred to as VOD because the viewer chooses when to view the film rather than relying on a TV schedule. Internet, cable and satellite VOD 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 IV.

There are three principal revenue models for VOD distribution:

- (i) transactional (including Pay-Per-View – PPV and Download to Own, where payment is made for a specific film either for a limited time or in perpetuity and revenue is very easy to track);
- (ii) subscription streaming, where a flat monthly fee is paid for unlimited viewing of a set of films (very difficult to track revenues owing to the variety of complicated models in place for sharing revenue); and



- (iii) ad-supported streaming, 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).

Transactional VOD has been evolving quickly as distributors experiment with when the film is released relative to theatrical release. For instance, “Ultra VOD” is when the film is released prior to the theatrical release at a higher price and “Premium VOD” is when the film is released at the same time as the theatrical release at a premium price. These “day and date” simultaneous releases might also include a DVD release.

The general rule is that the Licensor (often an “aggregator”, a company that has a deal with a VOD service such as iTunes, Amazon or Hulu to provide films as discussed below) of the film to the Internet VOD service receives 50% of the gross revenues the VOD provider receives from the consumer. The rightholder in turn receives between 50% and 70% of that amount. Obviously, 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, encompassing download, streaming and OTT exhibition, which is Internet distribution without a subscription to a cable or satellite TV provider. 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”. Although some organizations, such as the Independent Film and Television Alliance (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. In most of the world, these technologies have almost entirely replaced DVD.

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 retransmit broadcast programs through the Internet on a free access

basis for a limited period of time immediately after the first broadcast in a territory. Most broadcasters in the United States, through their proprietary websites 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 SVOD (Subscription VOD) of the same film concurrently. However, in some territories, the distributors attempt 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 must 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 websites. Proving that there is significant consumer interest in the film can lead to a better distribution deal.

A Note about Aggregators

Exploiting new media outlets is very different from bypassing the traditional distribution system. Unfortunately, the companies dominating film 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 COT, 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 somewhat like sales agents on behalf of rightholders but can be the only way to access 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 best-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 in this area.

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 must monitor websites closely to make sure they are receiving their due. Many of the same concepts apply, namely that rightholders 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 pirates. If producers are truly ambitious and feel that they can assemble a suitable line-up of films, they might wish to launch film site themselves.



1.3 General Structure of the Global Film Industry and Opportunities in Local Markets

The film industry is a true global economy, a thriving collaboration among creative talents, 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 total film revenues to well over 60%. Major studios took notice and increased their efforts to secure the best international talent (four of the past five “Best Director” Academy Awards have gone to Mexican directors – Alfonso Cuarón (twice), Alejandro Iñárritu and Guillermo del Toro). 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 markets which resulted in the proliferation of for-profit channels – benefitting both 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 appeal of local content in many parts of the world and 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-United States 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 United States 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.

1.3.1 The Major Studios (Sony, Fox, Warner Bros., Disney, Paramount, MGM and Universal)

Worldwide Box-Office 2018 Studio Rankings

	RANK	STUDIO	DOMESTIC GROSS	INT'L GROSS	INT'L MARKET SHARE	TOTAL GROSS
	1	Disney	\$3.092B	\$4.233B	14.2%	\$7.325B
	2	Warner Bros	\$1.95B	\$3.62B	12.15%	\$5.57B
	3	Universal	\$1.94B	\$2.92B	9.8%	\$4.86B
	4	Sony	\$1.288B	\$2.334B	7.83%	\$3.622B
	5	20th Century Fox	\$1.09B	\$2.38B	7.99%	\$3.47B
	6	Paramount	\$757M	\$975M	3.27%	\$1.732B

Source: www.deadline.com – January 10, 2019

The major studio side of the film distribution business is straightforward. They maintain their own wholly-owned distribution offices in each of the principal territories. These offices then book their films into cinemas, manage local VOD and DVD distribution and handle local marketing. For example, a Fox film opening in the United Kingdom will be managed



by Fox distribution executives based in their offices there under the supervision of the international distribution, marketing and publicity teams at the Fox studio on Pico Boulevard in Los Angeles, the United States. Many of the Major studios also operate so-called “specialty” divisions, which are comparable to independent production and distribution entities. They are usually United States 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, releasing in as many territories as possible within a few weeks and often on the same day. In this way, studios benefit from the huge publicity generated by the United States release, while limiting damage from piracy. The Internet, MTV, CNN and global media ensure that on a Monday, a global audience knows which films were in the United States Top Ten over the previous 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 News Corp (Fox, although the film division was recently sold to Disney), 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 United States and select non-United States 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. Major studios also invest overseas to penetrate local markets and bypass local film distribution regulations, such as quotas. This is currently very important in the growing Chinese market, where local co-productions benefit from preferential distribution terms.

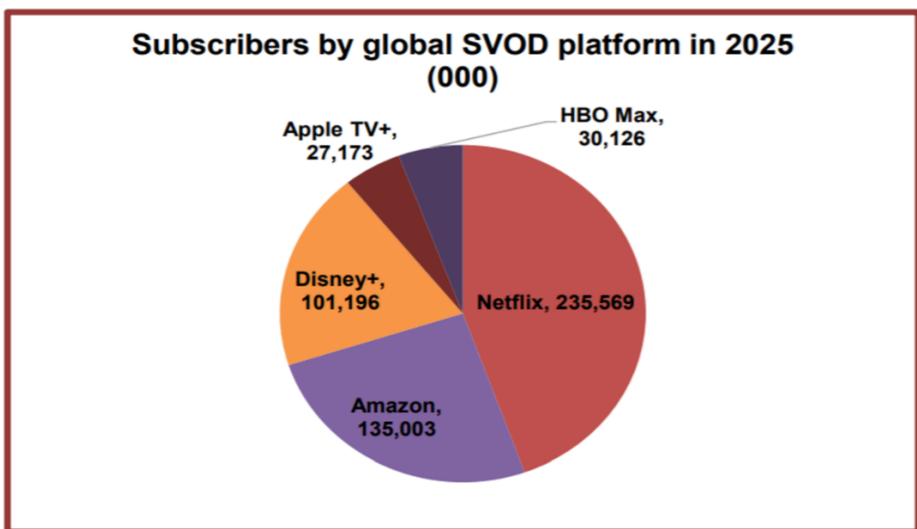
There are limits to the power of the major studios. Many countries restrict the growth of local activities of the studios for both cultural and business reasons through quotas or laws against certain anti-competitive business practices. In South Korea, for example, some credit the rise of local films 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 Korean films abroad.



1.3.2 Global VOD Providers – Netflix, Amazon, YouTube, iTunes, etc.

There was hope among local producers and distributors that each territory would develop its own successful streaming video platforms (subscription (SVOD) or ad-supported (AVOD), which might also include OTT services) that would feature local content and provide significant revenue streams to local producers. There are a few success stories, most notably China, where restrictions on international services such as Netflix have led to the dominance of three local SVOD platforms, as shown in the projections below (Iqiyi, which is owned by Internet giant Baidu, Tencent and Yuku Tudou, which was acquired by Alibaba in 2016). IrokoTV is managing to thrive in Africa despite a major push into the region by Netflix. However, the global VOD landscape is dominated by a few players with roots in the US – Netflix, Amazon, iTunes and YouTube. There is a limited market for Transactional VOD (TVOD) through local cable and satellite providers, and of course, these outlets make content they have licensed available through OTT and Catch-Up services.

From November 2019



The business models for each service have evolved quickly and it is likely that they have changed again since this writing. The tendency has been towards the ownership of global rights with limited provisions for local exploitation. In other words, when Netflix licenses the rights to a Nigerian film, they want the Nigerian rights and might or might not allow the film to receive a theatrical release prior to their broadcast. This is a crucial point for producers.

A producer in Nigeria was approached recently with a worldwide offer that was attractive, but he would have to give up the Nigerian rights which he believed would be 90% of the film's revenues. He really liked the worldwide offer, but it was for only a fraction of what he thought he would earn in Nigeria alone. It was surprising the pull this offer had on him. It appeared at first glance to be a simple decision based on how much more money he would earn in Nigeria. He eventually rejected the offer after trying to negotiate a local theatrical window. An offer from a studio or a large company like Netflix can be flattering, but it is not always the best choice for the financial prospects of a film.

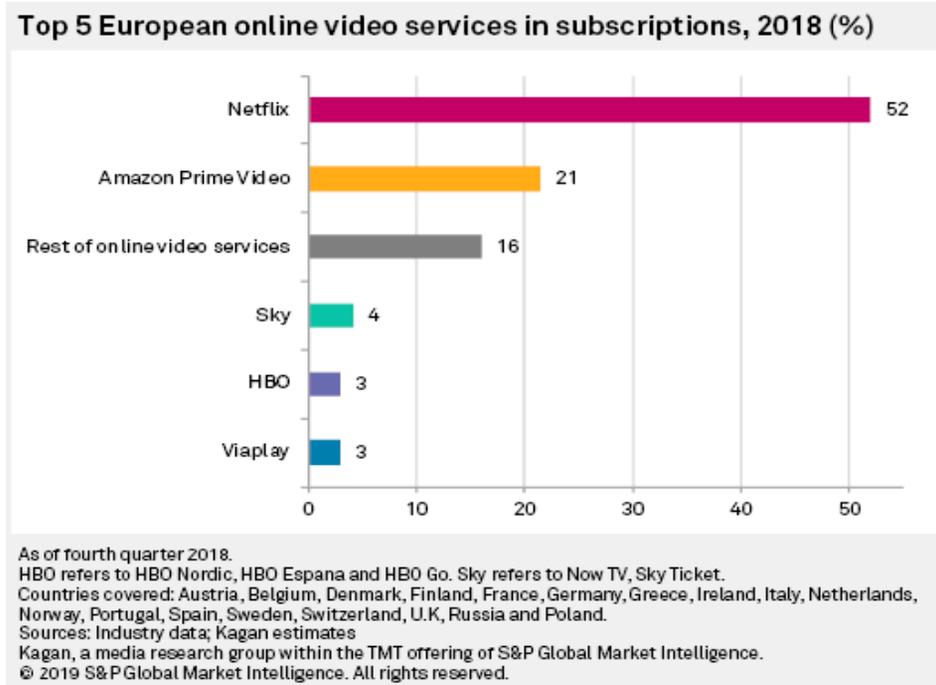
That said, the priority of many of these platforms is to grow their subscriber base in territories such as India and Latin America and they have therefore been buying films and TV series for good prices. It should be borne in mind that the value a film has to an SVOD service is how many new subscribers it will attract.

Local VOD Platforms and Evolving Services

Despite the challenges, there are an increasing number of territorial or regional VOD providers. Major players in Europe such as Canal+ (with Canal+ Series), BBC (iPlayer), BSkyB (Now TV and Sky Ticket) and RTL (TV Now in Germany and Videoland in the Netherlands) are managing to gain audience share. In Southeast Asia, iFlix has 15 million subscribers across the region. According to Digital TV Research, Televisa's *Blim* service dominates local services in Latin America,



although Netflix accounted for two thirds of the SVOD market there at the end of 2018. In Africa, Showmax from South African media giant MultiChoice Group and Nigeria-based IrokoTV have had significant success, although Netflix still dominates on the continent.



Direct-to-Consumer Platforms

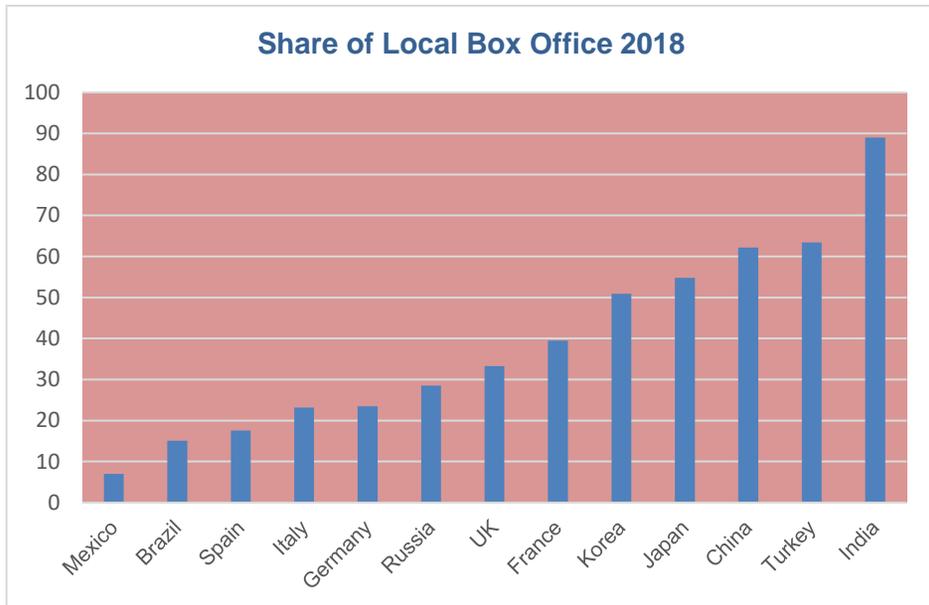
The latest iteration of VOD services are the Direct-to-Consumer platforms being offered by major content owners including CBS/Viacom, Disney, HBO and others. These are stand-alone offerings based on material owned or created by these entities. However, it is still unknown how consumers will react to paying a separate monthly fee for each service.

1.3.3 The Independent Distributors

Independent distributors are basically all distributors everywhere in the world who are not associated with the major studios. These include huge territorial distributors like UGC and Pathé in France and E1 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 can specialize in more than one area. The one thing they have in common is that they are not part of the global, vertically integrated major studio distribution system. Yet, as indicated above, the 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 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 – many of which have seen a rebirth in recent years, offering significant employment growth in diverse areas of these local film industries. In recent years, the rise of local production in many other countries around the world has had a major impact on the independent sector and local film economies.



Source: FOCUS 2019 – European Audiovisual Observatory

1.3.4 The Economic Role of Territorial Distribution

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 major studios have significant power in most markets and often dominate cinema screens, making it difficult even for local independent films to find bookings. However, in many territories like India, Japan, South Korea and France local films and distributors dominate the box office.

Although the United States films can take as much as 70% of the global box-office, non-United States films are still competitive in local markets. In 2018, Japanese films took 54.8%¹ of the local ticket sales revenue, while in France local films received 39.5% of the box-office revenues of France, with United States films accounting for 45%². Distributors in

¹ FOCUS 2019 – European Audiovisual Observatory.

² FOCUS 2019 – European Audiovisual Observatory.

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. These support mechanisms are managed by government employees and can be an excellent career for people with experience in film distribution and marketing.

Between 600 and 800 films are released in cinemas in the United States every year – roughly 12 to 16 every week. Several times that number are released on various VOD platforms every week and compete for consumer spending. 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. The number of films produced 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 MPAA, there are approximately 170,000 movie screens in the world, with about 43,000 of those in the United States alone. The rapid rise in the number of 3D screens means that 59% of cinemas worldwide are 3D, with the vast majority of those in Asia. Of the 777 films released in cinemas in the United States in 2017, about 650 were independent films. The average American buys only 4.7 cinema tickets per year (24% 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 must be aware of the current market difficulties to negotiate the most favorable distribution agreements.

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



- (i) the major studio films – wide 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; and
- (iii) everything else, for example, those films that will only be theatrically released locally, direct-to-DVD/VOD or TV films and art films that fail to find international acclaim.

1.3.5 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 (the *Marché International des Programmes de Télévision* (MIPTV), and the *Marché International des Programmes de Communication* (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 negative 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.

1.3.6 Distribution Media

The previous section discussed these categories in more detail, but in this section, what is being discussed is their position in the global economic structure. Each medium is treated differently for licensing purposes, including where and when it is licensed and by whom, and is often handled by a separate distribution entity. The line between television and home entertainment/new media continues to blur. Increasingly, consumers are “cord-cutting” – no longer receiving entertainment media into their homes through traditional cable/satellite/broadcast TV, but exclusively through Internet on-demand services.

- *Theatrical* – This is usually the domain of the top sales agents and heavily dependent on stars, directors and festival success. The top sales markets for theatrical films are usually associated with the top festivals – Cannes, Berlin and Toronto. There are two main theatrical markets that are not associated with festivals – the American Film Market (AFM) in Los Angeles and FilmArt in Hong Kong. The buyers are the local theatrical



distributors in each territory. These are often also cinema owners (called exhibitors).

- *Television* – TV rights are licensed either as part of all-rights deals or directly to TV stations at one of the major TV markets – MIPTV and MIPCOM in Cannes, France or the National Association Of Television Program Executives in Miami, Florida, The United States. Many sales agents will attend both the film and TV markets and even many of the buyers will attend both. However, there are also many sellers and buyers who deal exclusively in the TV area.
- *Home entertainment/new media* – This covers not only the DVD market but also Internet delivery of content. Though there are no dedicated sales markets for home entertainment, both theatrical sales agents and TV sellers offer these rights.

1.3.7 Sales Agents and International Licensing

The sales agent is a pivotal player in the complex game of international film financing. It is important for producers with ambitions to make films for an international audience to cultivate relationships with those sales agents best able and willing to support the type of films that correspond to their creative and business vision. Such relationships will pay handsome dividends over time, helping to raise the profiles of the films in world markets and developing producers' own sense of what may be suitable for audiences outside their country.

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 United States distributors and may be involved in securing an international sales agent. They will receive a fee, usually around 5-10%,

for closing a deal in the United States and may receive a portion of the revenues generated by the sales agent. The United States deal may involve an up-front 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 P&A commitment, for example), or both.

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 must 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 they have behaved properly, supported distribution, etc. in the past.

A typical arrangement with a sales agent may involve a recoupable advance paid to the rights owner, usually the producer and will require the recoument 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 sales, they 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 US dollars than 30% of 1 million US dollars.

All entities in rights transactions, including rightholders, 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 feeling 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 of that film. 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 must 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 rightholder, 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 also wants to 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 they should give them up to someone else who will not exploit them.

Many major independent films are developed to a certain point by the producer and director and then a sales agent, often acting as an executive producer, will present the elements – screenplay, actors, director, budget and domestic release plan – to buyers from around the world who will license the right to distribute the film in their territory. Those territorial distributors can also be called sub-distributors or national distributors. 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 book will try to be as precise as possible to avoid confusion.

When the distribution agreement is concluded prior to production it is called a “presale” and in many cases these presale contracts are used as collateral for a production loan (to be discussed in a later chapter). Some of the top movies in the world are financed through presales, including the top box-office film in the United States in 2013 – *Hunger Games Catching Fire*. Other notable ones are Peter Jackson's *Lord of*



the Rings trilogy (2001-2003), *The Twilight Saga* (various directors, 2008-2010) and *The Expendables* series. 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 and China), English-language films.

Producers capable of setting up their own international presales as well as dealing with all the other demands of film development and production are few and far between. These are the senior producers with track records, access to the best talent and a history of working with established rights buyers in foreign countries. Some sales agencies are small, not capitalized and generally specialized in smaller, “auteur” and local films that are highly dependent on success at international film festivals such as Cannes, Venice and Berlin. They usually do not have known stars, although some of the directors may be considered stars on the festival circuit. These companies are often dedicated enterprises with an impressive level of commitment to specialized films and a readiness to find a market for them abroad, often against great odds. What these companies cannot do, typically, is offer the producer a minimum guarantee on the sales of the film in foreign territories: the risk is simply too great, and the capacity of the sales agents to advance any money against the value of the rights is therefore limited. What these companies offer is state-of-the-art handling of the film’s foreign sales potential after its completion. This includes developing a marketing plan and festival strategy that will maximize potential revenues if the film is a festival hit. The producer enters into a straightforward agency agreement whereby the sales agent is given the exclusive right to commercialize the rights in the film in pre-defined foreign territories in exchange for a fee from revenues. The sales agent is also allowed to recoup expenses. Producers should make sure they understand the expense projections and cap expenses at a reasonable amount. Many of these sales companies benefit from some form of government

sponsorship. There are at least 100 of this type of seller in the marketplace.

At mid-range in the market, some sales agents have the capacity to offer the producer a minimum guarantee (MG) against future sales or licensing of relevant rights to foreign buyers. The MG is an amount of income from future sales that is guaranteed to the producer, whether or not the agent achieves his sales targets. It therefore involves companies with sufficient selling power and strong cash flow, because it represents a risk. Usually the MG is in the form of an advance paid upon delivery of the completed film or as a contribution to the production budget. The sales agent recoups the advance from the producer's share of revenues along with expenses and their fees. Generally, fees are higher if there is an MG as the risk to the sales agent is greater. In some cases, these mid-level sales agents can provide presale contracts that producers may use to secure the funding of the production budget through a bank loan. At least 100 sales companies could be classified under this group.

At the top end of the market, some sales companies may become involved financially and creatively during the development stage; they may have the power to deal with talent agencies to secure star talent and may be capable of raising a significant proportion of the film's budget (if their own creative requirements have been satisfied) through their own equity sources or through bank loans against presales. These companies may have output deals with powerful distributors or broadcasters around the world and may be confident that they can obtain the right value out of the marketplace to cover their risk. They will occasionally advance their own funds towards the production cost and they have relationships with banks or "gap" financiers who are prepared to make loans against presales and even loan against the value of unsold distribution rights. Many of these top-level sales agents can even be instrumental in organizing international co-productions.



These companies can also act as executive producers on the project and secure very long-term licenses for the sales rights to the projects. They may receive executive producer fees in addition to their sales fees and might even be paid a profit participation depending on their financial involvement. The number of films distributed and financed in this way remains relatively low and tends to be limited to high-budget international films with stars. There are perhaps 20-25 sales agents in this category.

1.3.8 Film and TV Distribution 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 in the marketplace.

The United States studios are organized in a trade organization called the MPAA, and independent distributors have a similar organization called the IFTA. Approximately 60% of IFTA members are non-United States companies. In addition to its other functions, IFTA organizes the 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 as well as local distribution groups in many countries and regions such as the Film Distributor's Association (United Kingdom 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 is the United Kingdom trade association representing and promoting the commercial interests of independent feature film, television, digital, children's and animation media

companies. In Hong Kong, the Trade and Development Council works with the Movie Producers and Distributors Association of Hong Kong 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 the *Instituto Mexicano de Cinematografía* (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.

	MAJOR STUDIOS/MEDIA CONGLOMERATES	REGIONAL MAJOR INDEPENDENT DISTRIBUTORS	INDEPENDENT TERRITORIAL DISTRIBUTORS	INTERNATIONAL SALES AGENTS	PRODUCER'S REPS TALENT AGENCIES
ACTIVITY	Sony, Fox, Viacom/Paramount, Universal, Disney, Warner	Lionsgate, Canal+, Pathé Village Roadshow Entertainment One, RAI	Metropolitan (France) Ster-Kinekor (South Africa) Toho-Towa (Japan)	Bankside Films Match Factory Fortissimo Films	Cinetic, CAA, WME, UTA, Cassian Elwes
Finance independent films	Yes	Yes	Sometimes	Sometimes	Sometimes
Produce independent films	No	Yes	Sometimes	Sometimes	Sometimes
Distribute independent films	Sometimes	Yes	Yes	No	No
Local theatrical distribution	Yes	Yes	Yes	No	No
Local DVD distribution	Yes	Yes	Yes	No	No
Local TV station ownership	Yes	Sometimes	Sometimes	No	No
Local TV licensing	Yes	Yes	Yes	Yes	No
Local VOD licensing	Yes	Yes	Yes	Yes	No
Global theatrical distribution	Yes	No	No	No	No
International all-rights	No	Yes	No	Yes	Sometimes

licensing to Territorial distributors					
International TV licensing	Yes	Yes	No	Yes	No
International TV station ownership	Yes	Sometimes	No	No	No

1.4 Digital Production and Distribution

A few years ago, the discussion of digital versus analog was much more interesting because it was a choice producers and directors needed to make based on quality, cost and distribution venue. The first video projection systems were installed in cinemas in 1999 and the first major theatrical film shot entirely with digital cameras was George Lucas's *Star Wars: Episode II – Attack of the Clones* (Lucas had previously shot portions of *Star Wars: Episode I* with digital cameras). Programs distributed directly to DVD and TV were shot with digital cameras before that, but there were often problems creating elements of sufficient quality to broadcast in some countries. Who was going to pay the cost of converting cinemas to digital projection was a common discussion in the early 2000s.

The transition to digital in both production and distribution is almost complete and it is increasingly difficult to find reasons to even have the discussion. However, there are still some issues that should be addressed, but this section will not dwell on them.

1.4.1 Digital Production

For all intents and purposes, all post-production is currently done digitally. Although some productions still use analog film cameras during the production phase, the film is then transferred to digital files that are used for post-production.



The days of shooting film, processing it in a lab, looking at “dailies” (the scenes shot that day are usually screened at night by the director and other key crew) and then splicing together a “work-print” from sections printed from the processed negative, are long gone. This has brought costs down considerably but has also given many filmmakers a false sense of confidence in the technology. Directors feel that they can also be the cinematographer and the editor because these jobs have become more automated and less technical. Of course, in reality, a skilled cinematographer and editor are key to making a great movie and any expense saved by allocating these tasks to the director is usually ill-advised.

In fact, that is one of the lessons many producers have learned about digital technologies. They make things faster and cheaper, but they are no replacement for talent and experience. It still takes a long time to properly light a scene and to time edits to make a scene play correctly.

Both workflow (the process by which the shot footage becomes a completed film) and post-production careers have changed and, in many cases, this has meant a loss of jobs and the forced retirement of technicians who were not able to adjust to the new technologies. Job losses seem to have peaked around 2014, when the conversion was nearly complete, and have since been rising owing to increased overall production around the world as VOD platforms have multiplied.

1.4.2 Digital Distribution

Analog distribution technologies (35mm projected film prints and analog TV signals) are quickly disappearing. It is currently very difficult and prohibitively expensive to create a 35mm print, and very few cinemas have the necessary projectors. All new cinemas being built around the world are equipped only with digital equipment. There are significant potential savings for cinemas and distributors. Currently many cinemas charge a “digital screening fee” to cover the cost of the upgrades they have made but that is

expected to be phased out soon. Even the cost of the digital cinema package is likely to be eliminated with the adoption of direct transmission technology.

Of course, this has put many people out of work, including the old-style film projectionists, and rendered obsolete duplication facilities that until recently struck hundreds of thousands of 35mm prints every year.

Security has always been a concern with physical prints (that can be duplicated overnight in a lab) or with digital copies. The fact is that by the time a film is released in cinemas, pirates have usually managed to get their hands on a perfect digital copy already. Given the high level of security surrounding the new projection systems it is not likely that there will be any increase in piracy from elements delivered to cinemas.

Since the advent of DVD, there has not been analog home entertainment. All demand-view is delivered digitally. Television is the final analog frontier, but in most of the world the conversion to digital signals has either been completed or is scheduled for completion in the next few years. Already, TV stations expect master elements delivered to them for broadcast to be in digital format, so the impact of the conversion on the production/delivery concerns of filmmakers is probably insignificant. However, as will be discussed later, digital TV greatly increases the number of potential channels and lowers broadcaster costs, creating interesting opportunities for everyone involved in the industry.

1.4.3 Changing Distribution Windows and International Considerations

Distribution windows are traditionally theatrical, home video, TVOD, SVOD, PTV, FTV and AVOD, in that order. Prior to digital distribution, a film would have a theatrical window of about six months (the time from the opening of the film to when it would be available on DVD). The ease of distribution through digital channels has encouraged the shift to shorter release



windows and day-and-date releases (usually DVD, Transactional VOD and Cinema release). The growth of VOD will certainly have an impact on these windows and it is expected that thanks to digital technologies, there will soon be simultaneous global release of some films in various media depending on location. The film might be expected to perform well theatrically in Italy, but to have VOD success in the United States and satellite TV success in Japan. It is currently possible to coordinate that type of release and therefore achieve maximum revenues from each market while heading off potential piracy (discussed in the next section).

However, this technology has spawned a number of controversies related to the question, “What is a Film?”. The French would argue that a film (a *long métrage*) is not only released in cinemas but enjoys a significant period of theatrical exclusivity prior to being available on DVD or on VOD platforms and television. In 2018, Netflix released Alfonso Cuarón’s *Roma* in a limited number of cinemas in the US and then on their worldwide SVOD platform three weeks later. Because of this short theatrical window, major cinema chains around the world refused to play the film, which went on to win three Oscars including Best Director and Best Foreign Language Film.

Since the DVD market has collapsed in most countries, the length of the theatrical window is currently the most contentious. However, France maintains a fixed system of release windows that still includes a home video window.

French media windows after French theatrical release

Window	Media
4 months	DVD, Blu-Ray
8 months	Canal Plus & Orange (French pay TV channels)
17 months	Other pay TV channels
22 months	Free TV
36 months	Netflix, Amazon & other pay streaming services

* streaming windows can be reduced to 17 months when there is investment in French production

** windows are shortened for films with less than 100k admissions

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1.5 Access Issues

Film is a powerful visual and audio medium. A good film that makes the best use of both is a joy for the audience. However, that does not mean that the hearing and/or visually impaired cannot also enjoy a good (or bad) film. Some governments have implemented access protocols that open the world of cinema to audiences that have previously never had the opportunity to fully enjoy films. Below are a few examples.

1.5.1 Legislation and Protocol Implementation

The Audiovisual Media Services Directive

Article 7 of the Audiovisual Media Services Directive (AVMSD) of the European Union states that “Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.” In practice, this means providing closed captioning (subtitles in the local language) or versions with audio description. The quality of audio description varies greatly but reports indicate that it is improving.



The Americans with Disabilities Act

Title III of the Americans with Disabilities Act (ADA) requires a portion of cinemas (the goal is 50%) to provide closed captioning and audio description for hearing and visually impaired patrons. They are also required to provide adequate seating for their guests who use wheelchairs. In many cases, funds are available to create closed captioned versions (these funds are also available for TV and home entertainment delivery). Audio description is a growing area, although not yet as common as closed captioning.

The Disability Discrimination Act

The Disability Discrimination Act (DDA) in the United Kingdom requires service providers to make “reasonable adjustment” in order to meet the needs of disabled staff and customers. There are Arts Council funds available to support these efforts. Interestingly, in addition to closed captioning and audio description, many cinemas in the United Kingdom offer sign-interpreted screenings. English Sign Language is considered a separate language and the “first” language of many hearing-impaired people in the United Kingdom, English being their second language. Therefore, cinemas strive to provide their hearing-impaired patrons the best possible experience: interpretation in their first language. The largest multiplex chain in India, PVR, has announced that it is increasing accessibility to people with mobility, hearing and sight issues. This includes audio description available through mobile phones as well as dedicating at least one show a day to screenings with local subtitles.

1.5.2 Dubbing and Subtitling Considerations

This topic is closely related to the issue of dubbing and subtitling a film that is in a language different from that of the local market. This can be because the film was made in another country or because not everyone in a country speaks the same language. In either case, there are countries where

audiences expect a film to be dubbed (most of Latin America), where a film is usually subtitled (Japan) and where audiences have a choice between the two, as in France.

This invariably leads to issues of employment, creativity and originality. Translations, whether for dubbing or subtitling purposes are frequently flawed versions of the original writer's intent. In many places the quality of the "acting" by the local performers creating the dubbed version is not as good as might be hoped and subtitles notoriously truncate important dialogue owing to space limitations and the audience's ability to read quickly while trying to watch the images. There are notable exceptions such as France, where dubbing is an art form unto itself and actors who perform the lines have certain moral rights which are usually reserved for the primary performers.

Other complaints include the quality of the sound recording/mixing of dubbed versions and incompetently created or unreadable subtitles. Usually, all of these factors are beyond the control of the original creators of the film and are accepted as one of the many flaws in the system.

1.6 Censorship, Ratings and the Unlawful Distribution of Films

1.6.1 Censorship and Classification

In many jurisdictions, governments and private industry groups exercise considerable control over what content may be included in film and TV productions. Usually, TV programs and films are more strictly controlled as they are intended for wider audiences.

In most places, the government has established a ratings system as part of the censorship process. This allows films to be made for more mature audiences while maintaining local standards regarding sex, violence or political content. Without discussing ratings specifics in any particular



territory, it is generally agreed that European censors are more concerned with violence than they are with sex, whereas the United States and Asian censors often allow what many consider extreme levels of violence while restricting sexual content.

The ratings system in the United States differs in that it is not a government program but a private initiative of the MPAA through their Classification and Rating Administration (CARA). Though not technically “censorship”, if a film is given the most restrictive rating of NC-17 (no children under 17 allowed), the distributor will be shut out of many cinemas and may find it hard to place advertising in mainstream newspapers and on television.

Ratings systems provide a content advisory for parents – often indicating whether a film is appropriate for all audiences (G in the United States; U in the United Kingdom; L in Brazil, etc.), for a more mature teenage audience (PG-13 in the United States; 12A or 15 in the United Kingdom; 12, 14 or 16 in Brazil) or for a mature audience (R in the United States; 15 or 18 in the United Kingdom; 16 or 18 in Brazil).

A ratings or censorship system can have a negative impact on the creativity of the filmmakers but can often provide a sense of security for investors. Restricting the ability of a director to include content that might not be appropriate for the target audience is an important way the investor can try to limit potential losses. Including a ratings restriction in a director or producer’s contract allows the financiers or distributors to rely on an impartial third party (the ratings board) to determine whether or not the director has violated the terms of their agreement. In countries with strong moral rights regimes, this is one way that producers, distributors and financiers can ensure that they are delivered a film that will have economic value and still offer the director their full moral rights.

Of course, pirated films are rarely, if ever, censored and some of the most restrictive countries for censorship are also the places most plagued by piracy. The result is that the local population is able to see everything that

the government deems inappropriate while the creative freedom of their local filmmakers is restricted.

1.6.2 Piracy

Copyright infringement in the film industry ranges from cases involving the producer not clearing rights for the use of a specific copyrighted 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 and dissemination of copyrighted works 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 Hadopi “three strikes” system was adopted in 2010 to deal with peer-to-peer (P2P) piracy by issuing warnings, levying fines and removing Internet access for copyright violators. More than 2,000 cases have been referred for prosecution and Hadopi reports a slight decline in infringements. However, a significant portion of that decline might be ascribed to the increased access to streaming services such as Netflix. Previously, many series were only available to consumers on DVDs, the contents of which were then uploaded by pirates to P2P networks. It appears that French consumers are willing to pay a reasonable monthly fee to access content rather than seeking it through pirate outlets or paying for expensive DVD versions.

It should also be noted here that Article 13 of the new EU Directive on Copyright in the Digital Age, which takes effect in 2021, will hold major online service providers who host content directly responsible and liable for filtering and removing infringing copyrighted material. Similar initiatives are



being proposed in other markets, although the United States, in particular, has struggled in attempts to make these service providers responsible for the content they host.

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. United States 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, South Korea, France or Italy, who is not aware that he has the right to file a copyright infringement complaint against the offending shop, duplicator or website. 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 rightholders. 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 theft.

Since most illegal distribution occurs online, systems exist for monitoring Internet downloads of films. Armed with the knowledge of infractions and the contact information of the infringers, rightholders have a range of actions they can take from simple cease and desist letters to lawsuits against the offending parties or even the Internet Service Providers (ISPs), depending on the jurisdiction.

CASE STUDY: MAN OF TAI CHI

Global Structure of the Film Industry

Narrative Feature Film

Director: Keanu Reeves, Canadian

Writer: Michael G. Cooney, Irish

Cast: Keanu Reeves (Canadian)
 Tiger Chen (Chen Hu), Chinese (HK)
 Karen Mok, Chinese (HK)

Budget: Approximately US\$25 million:
 Village Roadshow Pictures Asia- \$5 million;
 Dalian Wanda Group - \$7.5 million;
 Universal Pictures - \$5 million;
 China Film Group - \$7.5million.

Producers: Lemor Syvan, Noah Weinzweig and Daxing Zhang

Distributors: Village Roadshow (Australia and parts of Asia), China Film Group (China);
 The Weinstein Company and Anchor Bay (United States);
 and
 Universal Pictures (the rest of the world)

Copyright Aspects

- Work-for-Hire
- Rights sharing among producers
- Distribution sharing among producers
- Division of distribution rights by territory

Development and Financing

Keanu Reeves, Yuen Wo Ping and Tiger Chen start to develop the script in 2008 as a Chinese/US co-production. They must find a Chinese producer willing to finance part of the film in exchange for Chinese rights. They would like to find a major studio willing to distribute in the rest of the world in exchange for an investment in the film. They hope this will be enough to make the film.



It is not. They must find a way to complete the financing of the film from other sources.

They seek additional investment from another Chinese source – the very successful Chinese independent company, Dalian Wanda Group, as well as Village Roadshow. Wanda is willing to invest money in the film provided that they are involved in the production and can share in the profits. Village Roadshow is willing to invest in the film provided that they can share in the profits and take distribution rights in Australia and some other territories in the Asian region.

The script was written as a work-for-hire by Michael G. Cooney, a member of the Writers Guild of America. He was paid to write the script from the original idea developed by Reeves, Ping and Chen. Besides his fee, per the terms of Writers Guild of America (WGA) agreement, he is entitled to residual payments when the film is exploited in secondary markets (everything but theatrical in this case).

Since Universal Pictures is a signatory to all major guild agreements, Keanu Reeves' agreement was also subject to guild requirements (in this case the Directors Guild of America) and he was paid accordingly and entitled to residuals. Though he was an executive producer, it is unlikely that he was entitled to 100% creative control (final cut), and since the agreement would conform to United States copyright laws, his copyright would have transferred to the production company and, although he would have contractual rights to certain revenues, he would not have any copyright – even though he would retain certain moral rights.

All actors, composers and other people contributing their creative talent would have been hired by the production company as work-for-hire.

Distribution Preparation and Strategy

Keanu Reeves is a movie star, but this was his first feature as a director. Clearly, his strategy and the strategy of his distribution partners was to promote him heavily as well as promoting his connection to Kung Fu and Tai Chi in the hugely successful Matrix series where he met his co-star.

After 105 days of production, the trailer premiered at the Beijing Film Festival in April, 2013. Keanu Reeves is there to promote the film. The following month, scenes from the film are shown at the Cannes Film Festival as Universal tries to find a distributor in the United States for the film (having clearly decided not to release the film there themselves). Keanu Reeves continues to champion the film and display his commitment to its promotion – securing a deal with The Weinstein Company through their Radius division.

In June and July of 2013, Reeves and Tiger Chen promote the film in China prior to the theatrical release there. They probably found out around then that Tiger Chen is not only *not* a star in China, but that he is a negative factor. The film performs poorly.

In September of 2013 the film is presented at the Toronto International Film Festival to poor reviews. The United States release follows in early November with Keanu Reeves continuing to do what he can to promote the film.

Financial Results

This film's financial results were a disaster. Universal chose not to release the film themselves in North America and sold the rights to independent distributor The Weinstein Company, which released it in the United States on 110 screens in November of 2013 and made \$61,054. That is less than \$600 per screen – anything under \$2,000 per screen in such a limited release would be considered terrible. Entertainment One bought the rights in Canada and experienced similar results. In China, the film was not only poorly received, but critics brutalized the film in a way that was embarrassing for both Wanda and China Film Group. There are no results available for Australia but it can be assumed it did not perform well.

Universal released the film in most of the rest of the world directly to DVD – sometimes as Universal and sometimes as UIP, their joint venture with



Paramount. Thus, they saved the high cost of theatrical release but limited their potential revenues to DVD and TV rights.

CHAPTER 2

LEGAL, REGULATORY AND GOVERNMENT AREAS

This chapter introduces the international regulatory framework for copyright and related rights and for the film industry in general. It provides an overview of how the film industry is regulated at the national level. The chapter also elaborates on key developments in copyright law and other related regulatory changes of consequence to the film industry, most notably the Beijing Treaty on Audiovisual Performances.

Objectives:

- **Understand the main issues related to the legal structure of copyright**
- **Understand the issue of moral rights as it relates to film production**
- **Understand clearance procedures and working with copyright attorneys**
- **Understand government bodies involved in the film industry and, in particular, film commissions**

2.1 Copyright Law - The Creation of Intellectual Property

Broadly, there are two legal approaches to understanding copyright, one from the common-law perspective and 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* (Author's Rights) system is prevalent in civil-law countries. This concept is also central to the Berne

Convention³ (adhered to by the vast majority of countries) 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.

In both systems, the creation and transfer of copyright are at the heart of the business of film production and distribution. This chapter will explore how these systems are used to create value, including how the treatment of intellectual property as property for legal purposes can be the foundation for film finance. There are legal systems in nearly every jurisdiction around the world to protect copyright holders and confirm the legality and effectiveness of copyright claims and transfers. There are also systems to resolve disputes, which will be discussed. In all cases, it is important to remember that no one in the value chain should expect a third party – be they a lawyer, business advisor or partner – to administer their copyright issues. Everyone should understand how they fit into the picture and what rights they have in their work or in work they have financed or are distributing.

2.1.1 Global Copyright Overview – Establishing Ownership

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

- *Exclusivity* – authors or rightholders have the right to decide whether to authorize or prohibit certain use of a copyrighted work by a third party;

³ At the time of writing, 164 countries are signatories of the Berne Convention on the Protection of Literary and Artistic Works.



- *No formalities for establishment* – ownership of copyright exists from the time of creation and does not require any formal registration;
- *Contractual freedom* – authors or rightholders 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 rightholder decides on the geographic scope of a license;
- *Enforcement* – the author or rightholder can enforce their rights against any unauthorized use of the work.

2.1.2 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 United States Code such as statutes related to defamation and unfair competition. Under Section 17 of the United States 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 (meaning that they cannot be assigned or waived). 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 is 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. This notwithstanding, the right to final cut (the right to declare a film to be in its finished form with no changes permitted) may rest in the hands of the authors except, notably, in 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 scriptwriter, director, cinematographer, lyricist, composer and other authors of a film also have certain moral rights, but they can waive those rights, which 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 United States 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 versus La 5* – French Supreme Court, May 28, 1991).

Economic Rights encompass all rights from which revenues can be generated – such as the right to authorize public performance or duplication. These rights can be primary or derivative rights. Primary rights



include the right to use the creation (direction, music, performances and screenplay) for the intended primary use (showing it to the public, duplicating DVDs, broadcasting, etc.). Generally, only composers/musicians and screenwriters create derivative rights, which may or may not be assigned or otherwise transferred or conveyed to the producer. For example, screenwriters create different sets of economic rights depending on whether they are creating original material or basing the screenplay on underlying material such as a novel (in which case they may still own sequel and remake rights, but only with authorization from the owner of the underlying agreement). If the screenplay is an original work, the screenwriter might convey to the production the economic right to make a film based on that screenplay and nothing else or they might convey all rights including sequel and remake rights – in which case the contract should provide for additional compensation should those derivative works be produced. In all cases it is important to understand what copyrighted elements are being created, conveyed and exploited and to ensure that the contracts are clear on those points.

2.1.3 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 their 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. In the United States and Europe, the copyright term is the life of the author or co-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, 95 years from the date of publication, or the later, 120 years from the creation of the work.

2.1.4 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. Perhaps more importantly, the stories and characters in those films are available for new works including sequels, remakes, TV show, animated versions or anything new creators can imagine. 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).

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.

2.1.5 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 the authors and co-authors or either the producer or a Single-Purpose Entity (SPE) as described herein, controlled by the producer. The latter is the norm in common-law jurisdictions such as the United States and the United Kingdom. In civil-law countries such as France, the film author or co-authors are usually the initial owners of the copyright (subject to limited presumptions of assignment to the film's producer or the employer), and the film's producer controls the copyright in the film through contracts with these authors.

If one is dealing with a “work-for-hire” under United States 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 COT confirming ownership of the rights to the film. That SPE is the owner of the copyright to the film and has the mandate to secure financing for the film, hire the talent, produce the project and deliver the film to the distributors. The distributors must license the right to distribute the film from the SPE or from that company's agents (such as a Sales Agent or Producer's Representative).

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 COT) that the producer can legally transfer, assign or license to them the right to generate revenue (distribute).

2.1.6 Formal Aspects of Establishing Copyright Ownership

In the Berne Convention signatory countries (as mentioned, that is almost all countries), there is no formal requirement such as registration that is necessary for authors to obtain copyright protection for their works. Subsequent international copyright treaties and conventions (available to review on the WIPO site) including the WCT, the WPPT and the Rome Convention uphold this non-formality approach to copyright ownership. In contrast, written agreements are essential for the further transfer of rights. In the film industry context, these are agreements between the rightholders (for example the music composer or the screenwriter) granting rights to the producer (or SPE) and then from the producer to the distributors (usually through the producer's agents). As discussed above, proper documentation of the transfer of rights throughout the film value chain is of the utmost importance for the establishment of copyright ownership.

2.1.7 Collective Management Organizations

The CMOs administer the collection of secondary rights monies and can distribute these funds on behalf of the authors, performers and producers. These include monies paid to CMOs for blank media levies, retransmission, music use and certain public performances, among other purposes. National and, in some cases, multinational organizations such as the Association of International Collective Management of Audiovisual Works (which acts as an international umbrella federation, a type of pan-European clearinghouse for independent producers and rightholders), the Canadian Retransmission Collective (CRC), the *Société pour la Rémunération de la Copie Privée Audiovisuelle (Copie France)*, the Copyright Society of Nigeria (COSON), and the Performers Rights Society of Kenya collect these



monies and disburse them to the registered rightholders – 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.

In many cases, CMOs are regulated by local governments and membership is usually a requirement to receive these monies. The right to be paid these monies may also, in many cases, be assigned to third parties or SPEs. CMOs are discussed in more detail in chapter VIII.

2.2 Regulatory Framework

2.2.1 International Law

As discussed, international copyright law is generally based on the Berne Convention as embodied in national law. In international terms, this generally means that signatories are obligated to respect copyrights created in other signatory countries. This also means that copyrights exist from the moment that “an original work of authorship is fixed in a medium”. Though there is no formal registration requirement for copyright protection, registration exists in most countries and is discussed below.

The concept of international law is probably better understood as “international standards”, because the actual laws are generally national laws. The respect for these laws by other countries is what makes them international and the agreement to accord that respect is embodied in international treaties (such as the Berne Convention, the WCT and the recently signed Beijing Treaty on Audiovisual Performances).

In fact, the pursuit of violations of these national laws must be conducted locally (as discussed in chapter VII).

2.2.2 National Law

As discussed above, national laws related to copyright can vary. Many nations have promulgated local “film laws” or “film policies” that also offer protection to their local industries or support for local filmmakers and distributors. Countries as diverse as the United Kingdom, Spain, China, Brazil and South Africa have or had local laws that must be carefully considered when making business decisions whether in those countries or globally (China currently has the second highest box-office in the world and a very complex set of import quotas and co-production/support structures).

Given the huge diversity of national laws governing filmmaking and film distribution as well as protections for practitioners and stakeholders, this book will not attempt to discuss them in any detail. However, as you will see if you examine your local film laws, these chapters provide you with the skills and knowledge necessary to understand them.

2.3 Entertainment and Copyright Lawyers

Of course, as with most laws, it is important to understand how the laws are applied and what recourse you may have if you feel your rights have been violated. Many countries now have skilled legal practitioners who can provide detailed explanations and advice.

There are thousands of lawyers around the world employed in the film industry either on the creative side (negotiating talent agreements), or the finance side (including banking, equity investment, tax and bankruptcy), distribution, production or, unfortunately, litigation and dispute resolution.

Most of these lawyers did not originally intend to work in the film industry. They secured legal degrees and then worked in general business areas that eventually led them into the film industry in their particular specialty – tax, litigation, etc. Legal professions tend to be apprenticeship-driven and



anyone seeking a career in film law should, upon securing their degree, apply to firms already specialized in the area.

2.3.1 Importance of Choosing the Right Legal Representation

One of the 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. No matter whom they represent, when they are negotiating an agreement, they need clear instructions on the points to pursue and the ones to concede. An effective lawyer can make the difference between a producer getting the best deal from a distributor or a star getting paid what they are due.

The question of when to engage a lawyer for the project is often discussed and the answer is simple – as early as possible. One of the first issues that will arise in the development process is licensing the screenplay rights or the rights to underlying material on which a screenplay will be based. If that is not done properly, the entire project can be put in jeopardy. If it is not practical to pay an attorney during the production process, it is important to at least engage an attorney prior to distribution to confirm that all contracts are valid, and all rights have been properly transferred. This is always easier before a film is released – even to festivals. Imagine winning the Cannes Film Festival and then trying to go back and properly license the

music from the film for international release. That will be a very different negotiation from doing it before the festival.

2.3.2 Understand the Agreements You Sign

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 defense, 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 defense 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.

2.3.3 Clearances Procedures: Registration of Copyright and Copyright Clearance Reports

Based on laws, regulations, legal advice and common sense, 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. Annex III at the end of this book 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 must 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.

2.3.4 Registration of Copyright

Distributors can check copyright ownership by consulting 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 United States government's system, which is open to works from around the world (www.copyright.gov/forms/). A copyright holder can file a Form CO online, pay a fee of 35 US dollars 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 up to a point and will often provide out-of-date or even misleading information. For example, recent research on the United States registration site (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) – 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 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, 2010 by Warner Bros. and assigned the number 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 and 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, they 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 he or 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 organizations and guilds (the WGA provides a service for screenplay registration, as does the *Société des Auteurs et Compositeurs Dramatiques* (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 could 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 Audiovisual 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.

2.3.5 Copyright Reports and Other E&O Requirements

Ideally, the producer will have files containing all of the items listed below, 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 he or she will not encounter any challenges to ownership of the copyright to the work or to the ability to transfer the distribution rights and derive revenue. In the United Kingdom, E&O coverage is obtained by an attorney signing off on paperwork and clearance procedures (confirming that it is correct and has been handled properly). In other jurisdictions there are other procedures in place to obtain the same result and producers are encouraged to consult their local insurer and IP attorneys.

- Copyright Report/Clearance Report/Clearance Opinion – Reports often issued by law firms or other specialized entities which provide data regarding other registration or uses of the copyrighted material as well as the proper assignment and transfer of the rights to the production. 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 goodwill 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 ensure that there are no matching numbers. Of course, it is important to extend this fictionalization to e-mail 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), although 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, confirmation 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 the insurance to confirm that 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.

2.4 Government Bodies

Governments employ a huge number of people in the film and TV industries. These government employees are charged with promoting the jurisdiction as a production location, developing and implementing legislation related to CMOs and industry support or even making and distributing films through government film promotion agencies or TV companies. They can be powerful arbiters of who received government funding for projects and what constitutes an official co-production. They negotiate international treaties and ensure the distribution of secondary rights monies to the proper parties.

Their level of expertise varies widely and in places where corruption is a problem, they are certainly not immune. However, they can be a producer's best friend, and many government employees are dedicated public servants with vast knowledge of the industry and of how to get a film made and distributed. No matter what part of the business you want to work in, it is good to get to know these people and if you have the skills, it can be a wonderful career to pursue.

2.4.1 Film Commissions and Promotion Organizations

Local employment, finances, culture and tourism all may benefit from film and TV production. There is a strong sense of community excitement when a major production moves in. How many communities are really ready to host a steady stream of film or television production to the satisfaction of both the producers and local residents? How is the decision made to commit the resources needed to promote the film industry instead of other industries, education or health care? Will it be possible to build a

sustainable industry, or will the government need to continue supporting the effort indefinitely?

Once a decision to spend resources to attract outside production or encourage local production is made, one of the first steps in the process for local governments is usually to establish a “Film Commission” as the producer’s principal point of contact. These entities deal also with television and commercial productions. In fact, television and commercial production may well be the major drivers of the local production sector in many communities.

Fiscal vigilance dictates that the economic and cultural impact of the program be monitored, and the programs adjusted to meet the community’s goals. There are various methods for quantifying these effects and regular, independent audits performed by competent authorities.

Subsidies and Other Financial Incentives:

One of a producer’s strongest considerations in deciding where to shoot is the amount of financial support they can get from a community. They want the most money possible, but they also want ease of use, certainty of payment and the ability to finance the incentive if it is not paid until after the production is completed. Below is an overview of the various types of programs offered and some additional advice about structuring attractive programs but, given the huge variety and variable success of programs around the world, local communities are encouraged to learn as much as possible from existing programs. Refinements over the past ten years have improved and refined production incentives to the point where they are achieving local goals more effectively with much less waste and fraud. However, as with any expensive government program, ongoing supervision including strict auditing procedures, is an important component.

It is worth emphasizing again that an incentive program should have a specific goal. In addition, if monies are being distributed in the form of



subsidies, it is even more important to make sure that those subsidies are creating the desired result. Most subsidies require a significant local spend, including employment of local workers. Other incentives require support of local filmmaking and culture, whether with training programs for technicians and creative workers or with cultural tests to qualify for monies. Local businesses, workers and culture should benefit from these programs and the distribution of monies should depend on auditable proof that these benefits have accrued to the intended local beneficiaries.

In recent years, there have been a number of problems with subsidies which should serve as lessons for those designing these programs. In some cases, the people charged with administering incentives have committed fraud (see below), some have simply run out of money (see below) and in others it was determined that the benefits have not been worth the cost of the incentives (this tends to be the most common reason for programs being altered). A study dated September 30, 2019 by the Price School of Public Policy at the University of Southern California found that film incentive programs might not always bring the promised benefits to the community. The report was met with predictable skepticism from the beneficiaries of those programs, but the debate continues everywhere that government benefits are available.

It can be difficult to measure the direct and indirect benefits of these programs and even harder to convince cash-strapped governments that these benefits are real.

In 2010, three people (including the Iowa Film Office director) and three companies were charged with fraud in relation to \$1.85 million in film subsidies in the US state of Iowa. This stalled film industry development in the state for more than five years.

Florida's 2012 incentive program allocated nearly \$300 million to attract productions to the state but had allocated all of those funds years before the

program ended in 2016, frustrating filmmakers and the local production community.

Direct Subsidies: Some communities will actually pay producers to locate their productions there. This can come in the form of government grants or free use of government facilities or personnel. It is important that these subsidy programs are clear and well administered and that anticipated benefits do not disappear before applications are satisfied. Governments should ensure that the rules and regulations are understood by local officials and that the information is effectively communicated to producers in a way that will allow them to access the subsidies without abuse or waste.

Co-Production Treaties and Co-Finance Arrangements: Some countries have chosen to establish arrangements with other countries that will encourage production by offering incentives for producers from more than one country to work together. These arrangements can take the form of treaties or regulatory frameworks that usually offer tax incentives to parties in both countries. Sometimes these tax benefits are transferable to producers in third-party countries. The United Kingdom, Germany, Canada, Ireland and other countries have seen production spending within their borders grow based on such treaties. These arrangements can offer direct economic benefits, such as the non-refundable 10-15% of budget benefit offered by the now-defunct United Kingdom Sale and Leaseback program (which required a minimum 40% United Kingdom spend and the participation of a United Kingdom producing partner), or the 20% refundable benefit offered by some of the German tax funds. They can also result in a film being considered a “local content” production for purposes of quotas or distribution incentives – providing a significant boost to potential revenues or reduction in distribution costs. The writers recommend studying various co-production and co-finance arrangements carefully before attempting to submit legislation, as the potential for outright abuse or



of benefits being given without the intended goal being attained is quite high.

The constant adjustment of existing benefits in these areas can be detrimental to a community's effort to attract production, as demonstrated by ongoing changes in the United Kingdom and German film promotion legislation. Producers must have confidence that the benefits offered will continue to be available.

Tax Breaks: Tax incentives have become a major factor in producers' choice of location. Many communities provide rebates of sales tax, or waivers of local occupancy taxes, while others provide significant income tax benefits to taxpayers to invest in production in that area. Some of these incentives have been extremely successful not only in attracting economic activity from outside the community, but also in developing local production for cultural and economic reasons. It is important to design these incentives to effectively produce the intended results. Again, for producers and investors, the crucial issue will be certainty that the benefits will be available as promised.

Bankability of Incentives

General finance topics will be covered in other chapters, so without launching into a broad discussion of the topic, it should be noted here that one of the main advantages of the above incentives is their "bankability." In short, that means that the financial benefits of promised incentives can be used as collateral for a production loan through a bank or transferred to an investor in exchange for equity investment. Producers consulted stressed the importance of this factor and the importance of working with banks to ensure the collateral value of the incentive.

Banks have become very sophisticated in the use of incentives for single-picture finance and there are a number of non-bank financial groups that specialize in lending against subsidies. In the case of tax incentives that must be resold to third parties (transferable tax credits) some states in the

United States have recognized the value of guaranteeing a “floor” amount that places a minimum value that banks will lend against (for example, Louisiana will buy its own tax credits from filmmakers for approximately 85% of their face value and banks will lend against this amount). When designing an incentive program, it is important to remember that producers need the money during the production, but most incentives will not pay out until after the film is delivered (which could be a year later). The producer will need to finance the benefit and making it easy to do so dramatically increases the value of the incentive.

Financial Incentives and Co-Production

As discussed above, financial incentives usually take the form of tax breaks or subsidies. These benefits should be sustainable (well-funded and reliably available), marketed to producers in a clear way, have easy-to-follow procedures and confirmation protocols (producers must be told with certainty what paperwork is required, what benefits they will receive and when those benefits will be paid), be well understood by the local government, monitored for compliance and fulfillment of local goals (through auditing and strict supervision). Benefits available only to producers from that country can be shared with other territorial partners through co-production treaties, which are essentially cooperation agreements between countries through which each partner benefits from local benefits in each territory.

There are many examples of extremely successful financial incentive programs as well as disasters, as noted above. Colombia has recently launched an admirable program based on existing incentives in other countries. Their new film law is meant to attract foreign production and does not supersede or change the existing law which encourages local producers. Foreign productions can receive up to 40% of their local spend in the form of a direct rebate upon presentation of receipts.



Until several years ago, France offered limited financial incentives to films that did not pass their strict cultural tests (which usually required that the film be shot in the French language – an impossible requirement for most productions). However, with the January 2016 reform of the French tax credit for cinema and television productions, France now provides up to a 20% cash rebate on monies spent locally. This has attracted many significant English-language productions as well as visual effects work. Many developing countries offer very strong incentives to attract or promote production. These include the South African Producer's Offset, accessible to many outside producers through partnerships with local producers; although many simply offer a financial incentive to shoot there – Fiji famously offers a 40% cash rebate, Morocco attracts productions such as *Game of Thrones* and *Mission Impossible: Rogue Nation* with a 20% rebate combined with experienced local crews and a secure production environment.

Many of these programs require a true exchange with the local filmmaking community whereby local department heads and technicians are trained and actors and other artists are engaged for the production.

Fulfilling Goals and Confirming Benefits

Most importantly, any financial incentives should have a specific goal in mind and ongoing monitoring to make sure that the goal is achieved. Usually, there is a government entity that is tasked with confirming nationality and compliance with co-production requirements prior to subsidy monies or other incentives being provided. The concept of nationality varies with jurisdiction and there are local experts who can advise producers on how to comply with all necessary terms. For the most part, this takes the form of a points system where the nationality of writers and directors are the most important factors (followed by actors, producers, funding, location and perhaps other creative or job-creation criteria).

3.4.2 Censor/Classification Boards

Among the more controversial aspects of government's involvement in the film industry are censor or classification boards. These are groups charged with limiting and restricting the type of content that can be shown in cinemas to certain audiences (or at all) and on television. Submission to these entities is usually mandatory and their decisions are very difficult to challenge. They can be extremely restrictive, as in China or very loose, as in much of Western Europe. They might have no problem with sexual content but abhor violence, as is the case in Scandinavia, or they might take the opposite approach, as in Indonesia. The requirements for obtaining certain classifications (which usually restrict by age category) can be explicit or mysterious. They might simply try to preserve social order or not offend, or they might seem completely arbitrary or capricious to those not familiar with the government policies or social standards of a particular country.

It is important that filmmakers and distributors understand the restrictions in the primary territories where their films will be distributed and adhere to those requirements.

In the United States there is technically no censorship because the government is not involved in classifying films – that is the responsibility of a private organization called the CARA which is part of the MPAA. The most restrictive rating is the dreaded “NC-17” which suggests to cinemas that no one under 17 be allowed to watch the movie (there is no law that requires this – simply general agreement that the suggestions will be adhered to). In practice, however, most production contracts state clearly that a film must be able to obtain a rating no more restrictive than “R” – meaning it cannot be “NC-17”. Most cinemas will not play a movie that is NC-17 and most newspapers and TV stations will not run ads for the film. So, in practice, there is a form of censorship in the United States and it is often a controversial topic for filmmakers and distributors.



2.4.3 Other Regulatory/Governmental Bodies

As previously mentioned, depending on the jurisdiction governments might be very involved in other areas such as CMOs and negotiating international agreement (such as trade treaties). Of course, the extent to which a government chooses to be involved in regulating the film industry depends largely on the importance of the local production/distribution industry. These other functions are usually embodied in national film laws that might provide for the enforcement of protection of the film industry through quotas or other restrictive trade practices, or combatting the illegal distribution of films.

Many governments maintain national film education programs focused on film production. This is either through direct support of private institutions or through national film schools. In some countries, governments also promote the preservation of films of national importance, their restoration when necessary and their use for educational efforts. Even the United States maintains a National Film Registry as part of the Library of Congress – although it was only authorized in 1988 and many feel that it strives to limit any potential controversy that its choices for inclusion might create.

CASE STUDY: COMISIÓN FILMICA COLOMBIANA

Colombian Film Commission

Government Involvement in the Film Industry

Main Mandate (from their website):

“Make other countries, and especially audiovisual producers and directors, aware of all the things Colombia has to offer.”

“Inform producers and directors interested in Colombia of the best possibilities and alternatives for their projects in terms of logistics, locations, accommodations, Colombian talent, authorizations, contacts, etc.”

“Consult with producers and directors so they are aware of Colombian

legislation regarding taxes, financing, hiring, Customs, permits, visas, co-production, etc.”

“Facilitate contact with the various businesses, producers, institutions and authorities related to their productions in order to make their work quicker and more effective.”

“Advise producers, directors and staff on the most efficient manner of carrying out their projects in Colombia.”

Authorization and Connection to the Government

The Colombian Film Commission operates under the authority of Proimagenes Colombia, the government agency charged under Law No. 814 of 2003 with the promotion of the audiovisual industry in Colombia. Proimagenes is responsible for the administration of the *Fondo Filmico Colombia* (Colombian Film Fund), which was created by Law No. 1556 of 2012 and provides a 40% rebate to filmmakers who choose to shoot in Colombia.

The Colombian Film Commission, Proimagenes and the Colombian Film Fund work closely together to promote audiovisual production in Colombia.

Preparation of Film Law and Administration of Film Subsidies

Each of these organizations had significant input into the new film law – Law No. 1556 of 2012. They coordinated disparate opinions from the filmmakers, financiers, distributors and other stakeholders and did their best to ensure that their program would be competitive with similar programs in other countries. Since the law was enacted, the Colombian Film Commission has helped filmmakers coordinate with the film fund and Proimagenes to assure smooth functioning of the process.

International Promotional Activities:

The Colombian Film Commission attends major film festivals and markets around the world, including the AFM (where it hosts an industry lunch), the Cannes Film Festival (where it hosts a party on the beach) and the Location Show in Los Angeles.



It also brings groups of film executives to Colombia to show production facilities and locations and to try to make people fall in love with the country and want to film there.

At all of these events, it educates the film community including financiers, bond companies and others about the benefits of filming in Colombia – both financial and creative.

Promotion of Local Production:

Part of the Film Commission's role is to promote local filmmaking. It helps to administer a 41.25% tax rebate program for local production and work to try to make the filmmaking process easier for them. This can include facilitating shooting permits, securing locations and establishing co-production agreements with other countries such as Spain.

CHAPTER 3

COPYRIGHT CREATION, OWNERSHIP AND TRANSFER – GETTING PAID FOR YOUR WORK

This chapter introduces the pool of talent required to make a film and identifies the main careers along the filmmaking value chain, including a brief introduction to the stakeholders not usually identified in film schools, namely the distributors, legal practitioners and financing communities. These will be covered more extensively in other chapters. Copyright documentation, which includes all chain-of-title documentation, is explained and related talent agreements issues are elaborated.

Objectives:

- **Understand how copyright is established**
- **Understand the film development process including option agreements**
- **Understand contracts with directors, actors and composers**
- **Understand licensing of other copyrighted or trademarked material that might be in a film**
- **Understand music licensing**
- **Understand the producer roles**
- **Understand the other creative positions**
- **Understand how creators are paid for their work**

3.1 How to Preserve Creative Efforts of the Authors/Performers

Authors are, of course, the foundation on which a film is built. This is why they benefit in most territories from a protective and extensive set of



copyright rules and a definition of related rights for the talent. This is also why they have all come together in **Unions/Guilds** and “**Collection societies**” in order to strengthen their position relative to the producers.

3.1.1 Copyright Protection for Authors and Other Creative Elements

Under the Berne Convention, exploitation rights and moral rights are granted to the authors of a film. This includes not only the director, the scriptwriter and the composer of the original soundtrack, but also the author of the adaptation and of the dialogue. In addition, if the picture is adapted from a preexisting work or script that is still protected, the authors of the original work will be included as authors of the new work.

In some jurisdictions, the authors of the film are deemed vested with all copyrights that will then be licensed under specific conditions to the producer, who will obtain exclusive exploitation rights over the film.

In Europe, exploitation rights such as right of reproduction, right of satellite broadcasting and any other right of communication to the public are therefore considered to be in the hands of the director, from the very beginning. To be completely accurate, the director shares control of the copyright of the Film with the scriptwriters and other co-authors of the film. A piece of legislation that would exclusively grant copyright to the producer of the film from the beginning would violate European Union regulations. It is possible to provide for a presumption of transfer to the producer as long as it is not permanent. As previously discussed, every Berne Convention signatory requires a written agreement to transfer copyright.

Since those rights are vested in the authors, the question of “final cut” (the right to approve or dictate the final version of the film) is legally held by the authors or, more specifically, the director. Even if, under the moral rights principle, the position of the director and possibly of the co-authors will prevail, the idea is that the film shall be deemed completed when the final version has been established by common agreement between (the

authors), on the one hand, and the producer, on the other. This does not apply in countries where the authors can be hired on a work-for-hire basis, such as the United States.

Five Golden Rules of Copyright

- exclusivity, which engenders the value of the transfer of copyright;
- contractual freedom that lets authors choose the appropriate licensees;
- equitable remuneration compensating the commitment and work on the film;
- territoriality, in order to limit exploitation and to optimize revenues; and
- enforcement, to defend against violation of any of the previous four rules (including piracy).

This section will focus on the important notion of equitable remuneration for the authors.

Securing Equitable Remuneration

In the Berne Convention, Article 11 *bis* on “Broadcasting, Related Rights, Compulsory Licenses and Recording” and Article 13 on “Possible Limitation of the Right of Recording of Musical Works” emphasize the right of an author to obtain equitable remuneration, which could be determined, in the absence of agreement, by a competent authority.

The Berne Convention, in its “Special Provisions Appendix Regarding Developing Countries”, stipulates that emerging markets, in consideration of their economic situation and their social or cultural needs, might not be able to provide for the protection of all the rights indicated in the Berne Convention. Nevertheless, the Berne Convention still underlines the principle of fair compensation and states that it has to be consistent with the standards of royalties normally paid for freely negotiated licenses.



Irrespective of the finance structure or revenue distribution arrangements, authors must be fairly compensated. Under common-law regimes, the payment could be a global amount of money paid up front, with the possibility for the strongest talent to negotiate and obtain additional payment. In civil-law countries and according to European Union regulations, the principle of a fair remuneration is that it be in proportion to the global revenue of the film. In other words, actors and authors are entitled to a share of the global revenues generated by any of the various types of exploitation (box office, DVD sales, TV broadcasting, Internet downloads and streaming, VOD, EST and SVOD platforms).

The producers and executive producers are responsible to the authors and must pay each of them on a regular basis their respective shares of revenues, with a statement of income and costs in each medium. Under French law, the producer is obligated, if requested by the authors, to provide all necessary evidence to establish the accuracy of the accounts. In common-law countries, the right to examine the accuracy of accounts (audit rights) are subject to negotiation and contained in the agreements.

3.1.2 The Talent Maze

In filmmaking, “development” refers to the time and actions necessary to move from an idea to a completed script (or screenplay), as well as the engagement of actors and the director and securing finance.

Many copyright creators are assembled to make a film, but not all of them are considered “authors” and not all of them are accorded the same rights. This section will discuss individual roles of these various creative elements including directors and writers (often considered the “authors”) as well as principal actors and “below-the-line (BTL) creatives”. The “line” referred to exists in formalized film budgets and delineates two critical groups in the filmmaking process. The “above-the-line” (ATL) group consists of producers, actors in the principal roles, writers and the director. They are usually the group critical to the finance and production and the first group

assembled during the development process. They are usually paid more and have more control over the final film than those working “below the line”.

BTL is the domain of the technicians, bit-players and labor. They are, of course, crucial to the production of a film and are the real unsung heroes of the film industry. Some of these are honored with Oscars or other awards (cinematography, costume design, set design, sound design, music and others) and their work can be as creative and important to a production as those working ATL. In some cases they may even be better paid. One prolific film producer was known to have paid his cinematographer and sound man more than his director or stars because they were the most important elements that would allow him to deliver a high-quality production (technically, at least).

The copyrights created by BTL creatives are usually more limited than those created by ATL (with the exception of music, which will be discussed in detail) and these rights are usually fully assigned to the production, often under pre-negotiated guild/union agreements. Many of the details of these agreements are similar to details of other talent agreements and differences are discussed below.

3.2 The Development Process

The script is the most important part of the development process. A script can be an original story, or it can be based on a novel, comic book, an old TV show, a non-fiction book, theater play, a magazine article or somebody’s real life story. The script itself is always an original creation to which intellectual property rights are attached. However, if it is not an original story but an adaptation of an existing creation, other intellectual property rights will be involved. These other creations are generally referred to as the “underlying work” or “underlying material”.



A large part of the development process, therefore, consists in the producer making sure that all the rights on all the underlying material used to produce a completed script are duly acquired or licensed, as well as the rights of the writer (or writers) commissioned to write the film's script. The producer also needs to be able to produce written evidence that they are in control of all those rights. In the Anglo-American film business, the term for all this paperwork is "COT". The COT is important because no bank or other source of funding in Europe or the United States will put money behind a film unless they have the assurance that the production will not be forced to stop halfway through by a disgruntled author or other rightholder whose work will have been used without due permission and financial compensation.

As noted in the introduction, in some other parts of the world, development may be less formally legalistic and the process may vary. For example, whereas the British or United States producer often initiates the original idea, commissions a professional script writer and then proceeds to attract a director to the project, in France or Italy, it is more usual to have the director writing his/her own script and looking for a producer to raise the financing. In India, until recently, the script simply did not have the same status as it does in the United States/European context: stars, and the promise of spectacular set pieces ably choreographed and directed by experienced artists are deemed more important. Projects are most often sold to movie stars by the director literally acting out and mimicking every scene, not always with reference to a printed script.

For all the differences in the approach to script-writing, there are common characteristics and standards which are increasingly those adopted by the international independent film sector the world over. This chapter focuses primarily on these, because they are likely to be most useful to fledgling filmmakers in an industry that is fast becoming interconnected on a global scale.

3.2.1 Passion and Eloquence – Attracting Funds for Development

At first glance, passion and eloquence may not seem especially relevant to films and intellectual property rights, which are the topic of this chapter. However, they play a crucial role. Negotiating for the licensing or acquisition of underlying rights and getting the best possible standard of work out of a commissioned scriptwriter require as much emphasis on human relational skills as on a good working knowledge of intellectual property transactions. The authors of the works will often want to see evidence of your passion for the project and your connection with their work before considering a deal.

Development also requires money, often quite a substantial amount. Most production companies do not generate enough income to sustain their own development activities. As a result, producers spend a lot of their time convincing third parties (banks, broadcasters, larger distribution companies, private investors and public funds) to finance the development costs of their projects. There again, passion and eloquence are essential.

There are many sources for development funding in Europe and Canada, but in the United States those monies are essentially non-existent. The European Commission in Brussels offers to support production companies over a group (or “slate”) of film projects, by providing up to 50% of the budgeted development costs. It does so through its MEDIA Program.

For most producers, however, public funding is a limited or non-existent option. Development loans from the private sector are a more likely prospect and the terms tend to revolve around comparable principles wherever you are:

Reimbursement – Funds are loaned generally on the basis of the presentation of an itemized development budget, i.e., a budget in which every major item of planned expenditure is detailed. Reimbursement is



most often required if the film reaches production, on the first day of the shoot, also referred to as “principal photography”.

Premium and profit participation – The financier will normally charge a premium on the money loaned, also collectable at the start of production. Percentages vary according to the nature of the risk, the budget of the film and the term of the loan. Many financiers will additionally negotiate for a percentage of “net profit” from the exploitation of the finished film, typically 25-50 %. The notion of net profit will be discussed later.

Turnaround – This refers to the terms of a contract under which a financier may be entitled to recoup all development costs including option fees, writer payments, legal costs, other fees and interest if a project is subsequently produced by a third party.

Security – In order to minimize risk, the financier may take an assignment of all the rights secured by the producer in the project over time and prevent him or her from selling them to a third party without consent.

3.2.2 Buying Time – the Option

In an “option”, the producer secures a period of time from the rightholder of the underlying work during which they are the exclusive entity entitled to adapt the property into a potential new film. The option takes the “property” (i.e., the book, screenplay, or other source material) out of the market and gives the producer a monopoly advantage over anyone else who may be interested in it. The object of the option can be any kind of underlying work including a book, or a preexisting script or the right to make a sequel or remake. The option also gives the producer the right to “exercise the option” by purchasing the rights to the work – or not – at a later stage (usually just prior to production).

The option may require a payment or simply action on the part of the producer (in which case it is called a “free option”). The action is usually a requirement to engage a screenwriter or make firm offers to a director or

cast at some point during the option period. An option is obviously much cheaper than having to purchase the rights in the work immediately. Consequently the option limits the producer's initial development risk. It also allows the producer to fix the ultimate price of the rights acquisition and avoid the risk of price escalation. Only about 30% of film projects developed in Hollywood are produced. Consequently, any money channeled into development is entirely at risk, because the majority of projects never go into production. Millions of dollars are thus written off worldwide each year. Considering the risk, the option allows the producer time to raise further funds and attract key talent and financiers to the project without having to spend too much at an early stage.

There is no standard duration for an option agreement. In Hollywood, 18 months is typical, renewable thereafter for an equal period. European option agreements tend to be shorter at around one initial year with possible renewal for another six months or a year (or two additional six-month terms). Before granting a renewal, the rightholder may sometimes ask to see evidence that progress has been made by the producer during the preceding option period. In such cases, it is important to ensure that the option agreement does not give the rightholder, as author of the underlying work, the power to decide arbitrarily what constitutes progress. Defining specific, realistic targets may help avoid misunderstandings about this aspect of the negotiation.

Option payments are generally treated as an advance on what will become the rights' acquisition payment if the producer chooses to exercise the option. The fee will not be refunded by the rightholder if the producer chooses not to exercise the option. In the English-speaking Anglo-Saxon film industries, the fee is typically about 5-10 % of the price of the rights purchase and the figure is comparable elsewhere in the world where options are used.



The option will also include the terms of the rights acquisition in the event the option is exercised. This will include both the rights acquisition payment and usually net profit percentage. The percentage will vary between 2 and 5 % depending on whether the work is a book or a script, and – if it is a script – on whether there is a sole writer or multiple writers. In the film industry, net profit is generally defined as the profit to the producer from the commercial exploitation of the film. It is made up of whatever money is left after the bank has recovered its loan(s) and interest; after the international sales company has collected its fees and deducted its marketing costs; after the financiers have recouped their investments, and any “deferred” fees which were not paid fully to the cast, crew, director or producer during production. However, most films worldwide do not meet with sufficient success to even recover their full costs of production and pay back deferred salaries and fees, let alone make a net profit.

Some rightholders may also choose either to waive the option fees or reduce them considerably in exchange for a commitment by the producer to secure their active participation in the production should the project be successful in raising finance. This is an approach which all but the most experienced and established film producers will normally seek to avoid. Financiers may not look favorably on the underlying right holder taking a credit on the film for anything other than the authorship of the underlying work itself, especially if the author has little or no prior experience working in film or if the intention is only to base the film very loosely on the underlying work.

One of the most important tasks for the producer before signing an option is to run a thorough check on the status of all the rights involved and obtain the legal assurances (“warranties”) from the author that there are no known obstacles to prevent the transfer of rights to the producer upon exercise of the option. An entertainment lawyer may be helpful to the independent producer at that stage. Failing this, there are specialized companies offering a tracking and checking service for copyrighted works.

3.2.3 Assembling the Creative Elements - Talent Agreements

After the script and underlying rights issues are confirmed, the talent agreements (Writer, Director and Actor Agreements) form the rest of the foundation of the COT documentation. 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 and Screen Actors Guild – www.sag.com, and for director agreements, Directors Guild of America, Director's Guild of America (DGA) – www.dga.org and Society for Audiovisual Authors – 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.

Talent 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.

A Few Notes on Contracts:

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 recommended 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 that 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 normally found in other rights agreements, it is useful to analyze 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 must confirm to make sure they are going to be able to release the film.

The Writer and the Screenplay

The easiest way to approach this discussion is by assuming that the necessary underlying rights have been acquired or that the writer has had an original idea and written the first draft of a screenplay under an option

agreement. The script development process proceeds from there along a difficult route to a final or shooting draft – usually following many intermediate drafts. During this time the producer, often in cooperation with the director, is assembling cast and finance and working towards a projected start date.

Imagine that the producer has completed these stages and is now ready to “exercise” the option, meaning that they will buy the underlying rights specified under the option agreement at the agreed terms. In many cases, the rights’ acquisition price is expressed as a percentage of the estimated budget of the film to be made from the work and will be typically between 1 and 3.5 % for smaller films. In most cases, the purchase price is set at the time when the option is negotiated, and the option price is expressed as a percentage of the purchase price (often 10%). There are often pre-agreed “floors” and “ceilings” to the final number if it is based on the budget and the term of the option can usually be extended for an additional payment if more time is needed.

Specifics of the Rights Purchase Agreement Contract

Rights purchase agreements require a good deal of detail if the producer is to avoid unresolved issues and legal problems further down the development and production process. Here are the main contractual points that should be considered:

Often, the development process fails to produce an actual film. For this reason, many writer agreements take the form 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 COT, 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., it 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 recoument 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, 2003).

The producer should also acquire sequel, remake, character licenses, merchandising rights and anything else they think 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, or securing distribution). If a producer invests time and money into developing the material, they 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 rightholders; 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, 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 must confirm that the party claiming the rights is truly the owner and 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 United States 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 rightholder 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 US dollars and no more than 200,000 US dollars"). One hundred per cent of this amount less previous payments may be due on exercise, or the payments could be spread out during the production. For example, 50% could be due on the 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 (re-writes, 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 this is applicable, as in the United States for example), if the author is a member of a union such as the 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 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 recommended WIPO model contract clauses and submission agreements in Annex IV 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 V 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 rightholder. 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 rightholder. In the United States, 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 United States 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.

Other Writer Considerations

Assignment or license? – The advantage of an assignment over a license is very clear from a producer’s point of view: a license only grants rights for a limited period of time (which might or might not be the full term of the copyright) and is revocable, whereas an assignment is most often a full-period-of-copyright term, where legally permitted and is irrevocable. The choices available to the producer in this part of the negotiation may vary according to what their needs are (a limited license may be cheaper than an assignment), and the legal regime under which the negotiation is taking place. In the three leading common-law countries, the United States, the United Kingdom and Ireland, the *legal presumption* is favorable to a full transfer of ownership from, say, the published author to the producer as a person or a company. The legal presumption simply means that – unless the individual contract says otherwise – the rights will be presumed to have been assigned. This is not the case in the so-called *droit d’auteur* countries (e.g., most of Europe, French-speaking Africa and Latin America), where authorship of the work is vested in the individual and it may be more difficult to negotiate in-perpetuity assignment. French writers, for instance, use this presumption to impose license-based agreements for more limited periods of time.

Moral rights – It is vital to get absolute clarity over the application of moral rights in any rights’ purchase agreement. There again, the room for maneuver will vary according to the legal regime: In *droit d’auteur* countries, moral rights are assimilated to human rights and cannot be assigned to – or waived in favor of – the producer or anybody else. The United States holds the reverse philosophical position: where they are asserted, moral rights may be waived. A *waiver* constitutes a written undertaking by the author not to prevent in any way the commercial

exploitation of the work derived from the underlying source (a book, script or theater play, for instance) whose rights are the object of the purchase.

Reserved rights – authors of underlying works will normally want to exclude some sets of rights from the purchase agreement. The most obvious one is book publishing, especially if – as is generally the case – the book on which the film is to be based is already in the bookstores. Radio and stage versions of the work are also a standard exclusion. Reserved rights are not just rights which the author of the underlying work is allowed to exploit without constraints: most agreements have the author agreeing not to exploit those rights for a set period of time (holdback), to permit the full exploitation of the rights purchased by the producer without competitive threats. In general, the producer will insist on a *right of first negotiation* whereby, prior to any sale of the reserved rights the author wishes to undertake, the rights have to be offered to the contracting producer first. Equally, the producer may be granted a *last refusal* right whereby the author is obliged to offer him a sale of their reserved rights on terms equal to those offered by another bidder.

Writers of scripts are authors – The scripts they write may be seen by the filmmakers as a template for a director to take and turn into an audiovisual narrative, but most national intellectual property laws also recognize it as a work of authorship in its own right.

As a result, an agreement between a producer and a writer is generally both an employment contract and a rights acquisition agreement. The producer typically hires the script writer to produce a *treatment* (a short narrative canvas for the film) and a first draft script; the agreement may also specify any further drafts, re-writes or *polishes* that they expect for the agreed fees.

The legal status of the writer's contract varies according to prevailing copyright and related rights legislation. In the United States, unless a script



is written and spontaneously submitted by a writer (referred to as a *spec script*), the contracting producer is presumed to be the sole author of the work and therefore is entitled to the copyright and all rights in the script commissioned by him or her. Under this *work-for-hire* doctrine, the writer merely fulfils a service contract and has employee status. They own none of the intellectual property in the work.

In the United Kingdom, the writer of any script, whether commissioned or unsolicited, is deemed to be the author, not of the resulting film, but of the screenplay itself. The British writer's contract is therefore both an employment contract and a rights acquisition contract: remuneration is specified for the various stages (treatment, first draft, first draft re-writes, second draft, second draft re-writes). The rights held by the writer in their screenplay are listed and assigned separately to the producer. The different rates paid constitute both remuneration for a service and a purchase of the rights in the material generated by the writer. Typically, when the rights in a feature film script are acquired for use on television, the initial remuneration for the script writer will cover only a limited number of transmissions on *free-to-air* television. Any further transmission thereafter is covered by collective bargaining between the local writers' guild and the producers' trade body, with specific *residual* payments corresponding to specific forms of exploitation after a specific number of runs, for subsequent use. The script writer's entitlement to authorship may seem weak at first glance, because their rights are almost always assigned to the producer as a matter of course. However, the power to assert their rights is useful on at least two counts:

- (i) If there are issues over late payment (or non-payment) by the producer of fees agreed upon, the writer may withhold the assignment of their rights to the producer and let other parties to the financing of the film be aware of it, until such time as money has been received.

- (ii) Some established writers may use their authorship status to negotiate a limited license over certain rights to their work, rather than a straight assignment, and to retain or reserve certain rights.

Equally, although the US work-for-hire approach suggests no rights are retained by the script writer, influential writers can successfully negotiate to retain some sets of rights. These *separated rights* are granted only when the script is an entirely original work, not based on previous works. They are also only granted to writers who do not share a screen credit with other writers who may have been brought in by the producer to *polish* or *doctor* the script. The rights secured by these more powerful writers may include the right to publish a book derived from the script, or to produce a live theatrical performance. Another important right is that which allows the writer to buy the script back from the production company after a time (normally three or five years), if the film has not started production. Unlike the more limited *turnaround* provisions which may allow a writer to try to get the film made once the producer has given it up, this right is not limited in time – it is an outright re-purchase which allows the writer to enjoy full and ongoing ownership of what he or she wrote.

In practice, the advance will represent most of the writer's remuneration, as the majority of films fail to generate sufficient net revenue and this revenue has to be shared proportionately with other creative contributors who co-author the work. In France, for example, there is separate authorship status for the script writer, the writer of the film's dialogue (the *dialoguiste* is sometimes separate from the writer of the overall script), the writer of the adaptation of an underlying work, the film's director and the composer of the film's score.

Producers, Writers and Their Agents

Like actors, directors, composers and other creative people, many script writers use a talent agent to represent them with the producer and ensure



the best possible terms for their work engagement and/or assignment of rights.

Agents have been a growing force in the worldwide film industry. In Hollywood, film studios regularly complain that agents – as exclusive gatekeepers to the best talent – have far too much power. According to disgruntled film executives, the big agencies are making a major contribution to driving movie production costs upwards by negotiating high fees and revenue shares for the stars, directors and writers.

Agent representation is a major asset in a script writer's approach to the film industry. On the whole, writers are vulnerable because their work – while being described as vital to a film's success – is often treated as disposable by the producers and film financiers during the process of development. Acting out of their own sense of necessity, producers will frequently decide to replace the writer or bring in an additional one in order to get the final *shooting script* which satisfies their expectations and those of the director. The role of the agent is therefore not limited to making sure their client gets paid well, but also extends to doing everything in their power to ensure the writer will be kept creatively involved by the producer throughout the life of the project, from concept to filming.

This is not always easy to secure. Historically, writers in mature film industries in North America and Europe have not always enjoyed the security of guaranteed payments. Over time, their unions have negotiated standard clauses whereby a producer may not withhold payment on a commissioned script if he happens to be disappointed by its content. In return, producers have approached writers' contracts in such a way as to limit their risk past the first draft stage: they will sometimes insist that the contract be flexible enough to enable them not to go ahead and commission the writer for re-writes or a further draft. In this so-called "step-deal" approach, the writer can count therefore on a guaranteed "flat fee" for the initial work, regardless of the producer's intentions thereafter, but the producer has the power not to exercise their contractual option to use the

writer's services for further re-writes and/or drafts. The standard deal structure will then be to negotiate a set fee payable in full to the writer if and when the film goes into production. The original flat fee (for the first draft of the script) and any further payment made to the writer for further drafts will then be treated as an advance on this production fee and deducted from the final amount payable when the film is finally being shot.

However, this deal only works well if the writer does not have to share credit with another writer who may have been brought in by the producer after the first draft stage. An established writer with a good agent can insist no second writer can be brought in to re-write their first draft or that – if one is – the initial draft has to be thrown away first.

LOAN-OUT COMPANIES

Many producers (and performers and directors, for that matter) execute agreements through a company which owns their services. The Agreement is little different from the Producer Agreement attached, save that it is executed by a loan-out company described as “the Lender.” It is usual to have a direct agreement with the producer indicating that, if anything happens to the lender, the producer will be deemed a party to the original agreement. A loan-out company is usually used for tax planning purposes.

Director Agreements

General considerations:

The obligation to respect a director's work is often included in director agreements. A true final cut provision is rare in agreements in the United States and the United Kingdom, 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.



The director's 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), which won the Fipresci Prize at the Venice Film Festival, exercised his moral rights when he realized that the film's distributor had replaced the original 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 versus AB International* – Paris Appeal Court, June 29, 2001).

Directors' agreements can be considered both talent deals (holding a corresponding copyright) and employment agreements (they will be paid wages from the producers during pre-production, principal 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 usually considered the primary author. This gives them specific rights that are different from the rights granted to actors in their agreements.

The director is widely recognized as the pivotal creative artist and technician in the making of a feature film. The mystique surrounding the work of world-class directors attests to the powerful influence of a consistent personal vision behind the success of many films. Over many decades and through many memorable films, great directors have often shaped a body of work with an instantly recognizable style signature, recurrent themes and narrative devices.

Under some legal regimes, the director is presumed to have the initial authorship in the film and their contract with the producer will be structured around the transfer or licensing of all exploitation rights, against negotiated remuneration and a participation in revenue streams. The contract will also define the respective powers of the producer and the director, especially with regard to the strategic issue of who has the *final cut*.

In France, the producer hires the director under two separate and inter-linked agreements: a technician's contract to direct the film and an author's contract taking a transfer of all exploitation rights in the work and laying out the specific arrangements for revenue-sharing.

In this configuration, the director's advance remuneration is typically split into two halves, with one sum allocated as a one-off fee for technical services and the other as a minimum guarantee deductible by the producer against future revenues.

The *final cut* refers to the power to decide about the final shape of the film. Under a *droit d'auteur* legal regime, it would be contrary to IP statute for the director to have this power taken away from them; they will see it as an important expression of their moral right, whereas the moral right itself cannot be waived, transferred or assigned.

In regular custom and practice however, pragmatism always prevails: it is therefore standard for French directors' contracts to provide that the final cut will effectively be a joint decision between the producer and the director. The agreement also typically provides that "*the director will have the possibility to supervise foreign versions [of the film]*". This is another example of how the exercise of the moral right is accommodated through contractual practice, as there is no mention here of the director having to authorize the said foreign versions, despite the fact that these may include cuts made to accommodate censorship requirements in foreign countries. Elsewhere, the contract even specifies that no modification may be made to the final cut of the film without the director's prior written approval, "*except however, those demanded by censorship*".

This type of director-as-author agreement is very detailed with regard to the director's further income streams as an author of the film: each market, from theatrical down to small ancillaries such as theatrical or radio spin-off



programs, carries a percentage pegged either to the price paid by the public (*gross deal*), or the producer's share of net income from exploitation.

In the US, the director's status recalls that of the actor in that it is normally a work-for-hire contract involving no characterization of related rights to be transferred. The director is remunerated for providing a service over the lifespan of the production, which will include pre-production and tasks linked to the development period, such as script meetings.

The director's treatment as a technician in the United States, rather than as an author, does not necessarily mean that their actual contractual terms will be any less advantageous than the director in *droit d'auteur* countries: the difference between the two regimes in this respect is that while the *droit d'auteur* contracts will provide an innate set of advantages (final cut, participation in film revenues) to all directors, the work-for-hire system will only grant such advantages in the context of a market-driven negotiation based on the perceived competence and box-office drawing power of each director.

It is a known fact that, although moral rights do not feature in the negotiations, a few of the most famous *A-list* Hollywood directors will insist on a final cut provision or – at the very least – a joint final cut. This facility is made somewhat easier by the fact that directors operating at this level in the Hollywood hierarchy will often be involved as producers as well as directors on their projects. Even for the less powerful directors, union agreements provide for the director to initially deliver their version of the film's cut, before any final decision can be made. This *director's cut* may be exploited separately at a later stage.

Equally, while the majority of work-for-hire directors have to contend with the standard residual payments negotiated through their union, those with a sound commercial track-record will negotiate hefty shares of a film's net profits or – in some rarer cases – a percentage of revenue from before the

point at which the film's cost is fully recovered (*adjusted gross* deals; see section on actors, above).

In the United Kingdom, a hybrid contractual system prevails. Since it was harmonized in the mid-nineties with the dominant *droit d'auteur* continental system, the Copyright Act has provided that the principal director of a film is its author or one of its authors. Prior to this, the British film director was hired along similar lines to their United States colleague, and – much like in the United States – copyright law established the producer or production company as the sole author of the film.

The statutory change of the British director from a technician-for-hire to an author has not led to any substantive changes to their contractual position. Most directors' contracts take an assignment of all the director's rights against advance remuneration. United Kingdom producers, like their US counterparts, also insist on a waiver of the director's moral rights. A standard waiver clause will read like this:

"[...]... and the director hereby waives the benefits of any provision of law known as moral rights of authors or the "droit moral" or any similar law in any country of the universe and hereby agrees not to institute, support, maintain or permit any action or lawsuit on the ground that any Film and Soundtrack [...] produced and/or exploited by the company in any way constitutes an infringement of any moral rights or "droit moral" of the director or is in any way a defamation or mutilation of the Film..."

The reasoning behind Anglo-Saxon moral rights waivers is that leaving the work open to an author exercising their moral right would be a devastating deterrent to most film investors, all of whom want legal certainty before deciding whether or not to take a substantial risk on a film. They argue that, although custom and practice in the film industries in *droit d'auteur* have had decades to adapt to non-waivable moral rights and developed a number of risk-minimizing practices, the only existing recourse under



existing common law would be blunt instruments such as an injunctive relief. The prospect of a film being stopped in its tracks over a moral right dispute is one that Anglo-Saxon film industries find difficult to adjust to, given the high-risk nature of the film business and the size of the financial investments required.

Actor Agreements

In most countries outside the United States, actors own related rights, including the right of recording (*fixation*) of their performance in the film, reproduction rights, communication to the public right (broadcasting) and the right of “making available to the public” (VOD for example) as well as 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.

Many countries still accord virtually no rights to actors/performers who are hired on film work purely as employees of the production, with no assignment or license being negotiated. In some countries – the United States is the most salient example – although actors are not related rightholders, they benefit from powerful union representation that ensures that the pay scale for non-stars is reasonable and includes further payments linked to the exploitation of the film (residuals). Although United States actors who are members of the Screen Actors Guild - The American Federation of Television and Radio Actors (SAG-AFTRA) are contracted as work-for-hire employees, they earn at least a minimum salary level and additional funds from a complex scale of residual payments administered through the film studios (or other signatories to the union agreements) and rigorously policed by their union.

In many other countries, however, the lack of related rights, combined with weak union representation or non-representation in CMO’s, has left screen

actors vulnerable in contractual and economic terms. The International Federation of Actors has been campaigning actively to rectify this imbalance by introducing statutory related rights in primary legislation across the world.

The European Union has adopted harmonizing legislation which makes it binding for all its Member States to recognize related rights for actors and performers in national law and to ensure they are enforced accordingly.

In many European jurisdictions, the law also builds in a presumption that these related rights are fully transferable to the film's producer when the actor signs their contract. This presumption may be qualified or not. For example, it may be *rebuttable*, meaning that the presumption applies unless the performer proactively specifies that they are unwilling to let their rights go. Even if it is a straight legal presumption and non-rebuttable, most European legal systems will provide that the condition for the full transfer is adequate remuneration.

In the French intellectual property code (L 121-4), the condition for the presumption of transfer is that remuneration should be offered by contract and that any advance remuneration should be treated as a minimum guarantee against a share in exploitation revenues from the finished film. Consequently, French actors' contracts, while specifying remuneration against a buy-out of all related rights for their entire legal term (50 years from first release), also provide for *supplementary remuneration*, generally expressed as a fixed sum for each cinema admission above a certain threshold.

Moral rights are also an issue for actors worldwide, as legislations vary in the extent to which they grant those to creative contributors other than the authors of the film and the underlying works. However, even when working under a jurisdiction which does not grant them a moral right, the actor may



be capable of ensuring the protection of their own image and a degree of approval of the use of it as part of the promotion for the film.

The implications of the Beijing Treaty on Performers Rights (WIPO, 2012) will be addressed in a future section. However, when legislation is drafted in accordance with this Treaty, it is expected that the rights of actors will be secured – in legislation if not in actual practice. This will include moral rights in many countries (though there can be exceptions) but, more importantly, there will be an obligation to provide actors and other performers with “equitable remuneration” throughout the chain of exploitation of the film.

Hollywood Stars, Their Agents and Inflationary Effects

For a film producer living and working in the Anglo-Saxon world, the ability to attract movie stars to a project has a significantly positive impact on the valuation of the IP rights in the film by potential buyers. It is therefore an essential plank in the strategic deployment of the producer in search of financing for their project.

However, the challenge of attracting a bankable lead to a low-budget project is considerable and becoming more daunting with each passing year. One of the reasons is that many stars from outside the United States are also pursuing Hollywood careers. Examples of Hollywood luminaries with non-United States passports include Lupita Nyong'o (Kenya), Fan Bing (China), Salma Hayek (Mexico) and Chiwetel Ejiofor (United Kingdom). Known or unknown, a growing number of actors from outside the US also have agents in Los Angeles and are members of the extremely powerful SAG-AFTRA, the United States union which insists on extending jurisdiction over its members even for productions filmed entirely outside the United States

This relative "Hollywoodization" of actors from outside the United States creates substantial obstacles for lower-budget filmmakers aspiring to cast lead actors. On the one hand, stars willing to appear in a low-budget movie can make a huge difference to the perceived value of the project. Their commitment to the film will often be the most significant factor in helping raise finance to meet the target budget. On the other hand, popular actors who have appeared in Hollywood films have what agents call a "quote", meaning a standard rate for the films in which they are willing to appear, based on their perceived attractiveness to the audience. The "quote" however, is rarely affordable for movies with lower budgets (in fact, star quotes usually exceed average budgets for films shot outside the United States).



The producer's two main assets in persuading a star to work for a price well under the quoted one are:

- (i) the quality of the story and screenplay; and
- (ii) current shifts in the way leading actors tend to manage their careers.

There was a time when stars took few risks that may have tarnished their image with the public and might have showcased their true “range” as actors. Today, however, taking such risks is part of most leading actors' strategies to acquire credibility with younger, more discerning audiences by accepting roles that do not necessarily fit their standard screen persona. Tom Cruise took a risk playing the deranged sex coach in Paul Thomas Anderson's *Magnolia*, a saga set in Los Angeles in the United States, or Bruce Willis's down-on-his-luck boxer in Quentin Tarrantino's *Pulp Fiction*. These are two films distinctly out of the mainstream, directed by young filmmakers and with budgets well below those two stars' normal market rate. In these examples, both stars reaped substantial career dividends from great reviews, even if their salary was far below their usual rate.

So, having managed to attract stars to their project, how does a producer negotiate a deal with them?

A good example is the 2014 Academy Award winner for Best Picture, *12 Years a Slave*, directed by Steve McQueen. The film's budget of 20 million US dollars would have been considered quite high if the film had not had significant international potential. The director was respected but not known for commercial films and the star, Chiwetel Ejiofor, was known as a great actor but had never “carried” a film to success. The film was produced by Plan B, Brad Pitt's production company. Pitt took a small role which instantly boosted the film's overseas potential and the strength of the material, director and budget attracted rising stars Lupita Nyong'o and Michael Fassbender.

Not only was the film a commercial success both in the United States (through Fox Searchlight, a division of Fox Studios, previously a division of News Corp and now of Disney) and overseas through a mixture of independent territorial distributors and studio divisions in some territories (Fox, Universal and Disney). The independent territorial distribution deals were concluded by one of the top sales agents, Summit Entertainment.

This strategy was a huge success for everyone. The film performed well in the US (about 57 million US dollars box-office) but performed well beyond expectations overseas where it earned 131 million US dollars.

Coincidentally, this was a 30/70 split, which is about average for a very commercial major studio film, but extremely rare for a lower-budgeted arthouse film. So, the producers, financiers and distributors were very happy. The benefits for the stars were huge. Three Oscar nominations (Fassbender, Nyong'o and Ejiofor), and a win for Nyong'o. It could be argued that the film propelled them and the director to much higher future salaries and better roles. It is also highly likely that the deals the talent negotiated were for up-front payments that were less than their "quote" but included lucrative "back-end" participation in the film's profits.

The film winning the Oscar for Best Motion Picture has incredible value for everyone involved. Keep in mind that Brad Pitt has earned a salary equal to the entire budget of this film for previous films. This was a gamble that paid off for everyone involved. Of course, this was only possible because of an excellent script, based on a previously existing work that was old enough (published in 1853 with the author, Solomon Northrup dying in 1863) that it was in the public domain (and did not need to be licensed as it no longer benefitted from copyright protection). Similarly, there was no issue with the real-life subject's life rights.

With non-star actors (secondary roles, day-players, extras – all part of the BTL talent), producers will tend to agree to deals made up of advance fees (or salaries) based on published union rates combined with residual



payments calculated either as a fixed amount for each sale of the film rights in a variety of media and territories, or a royalty based on a small percentage of the value of the sale. Standard actors' union agreements vary in Anglo-Saxon countries in that respect. There are also some differences in the distribution of net profits. In some agreements, there is no specific clause providing for a share of a film's net profits in favor of the actors – the negotiation on this aspect of an actor's remuneration is left to the negotiating power of the agents, which is itself predicated on the perceived value of their clients to the project. In practice, this means that if a standard agreement does not have clauses for profit-sharing then only the leading roles tend to impose such terms on the producers because of their perceived market value.

Other union agreements ensure that every one of their members hired on a production may choose to claim a profit share: in the United Kingdom, the Actors' Equity agreement with independent producers gives the actor a choice between a profit share (2% of net profit to be shared out between all), or a royalty based on the value of all sales of the film rights, after sales revenues have exceeded 50% of the cost of producing the film.

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 cancelled check, bank transfer confirmation or signature for cash payment.

3.3 COT Basic Documents

Distributors must 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.

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 their logo T-shirt or turn the TV in the background off.

3.3.1 Public Domain and Fair Use

As previously discussed, and as with *12 Years a Slave*, there are situations where the term of copyright protection has expired and the materials has passed into the public domain. These terms vary based on many factors including date of first publication, the death of the author and the laws in a given territory, so it is important to confirm that material is in the public domain prior to use.

3.3.2 Preexisting 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. 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 all films, from 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 United States 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 versus Dune* – French Supreme Court, February 19, 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, 2004 decision declaring a French sequel to the film *Alien* 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 WGA and SACD of France.

3.3.3 Music Licenses and Clearances

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. Because of these complications, music licenses will be discussed in more detail later in this chapter.

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 the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Incorporated (BMI) to end users: cinemas, broadcasters or other public outlets.

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 an actor 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, especially broadcasters, will ask for confirmation of music clearance for the specific usage. Changing 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 who 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.

3.3.4 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 it is 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* (1965), 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 versus ADR Productions – Paris Appeals Court, September 14, 1999*).



3.3.5 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.

3.3.6 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 their private life out of the public eye. Licensing "life story rights" from someone usually means that they waive these rights. This is a complex area and laws differ among countries.

On April 10, 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 schoolteacher, 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 versus Georges Lopez* – French Supreme Court, November 13, 2008).

3.3.7 Contractual Publicity Issues for Actors

Distributors also must 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.

3.3.8 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.

3.4 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 III 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 United States and United Kingdom distributors). These usually cover up to 3 million US dollars 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.



Mike Tyson's Tattoo in Todd Phillips' *The Hangover Part II* (2011)

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, United States 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.

E&O insurance provides protection from lawsuits that allege:

- invasion of privacy;
- plagiarism or pirating of idea;
- infringement of copyright;
- libel or slander (defamation);
- degrading or defamation of products (trade libel); and
- infringement of trademark, slogan or title.

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.

3.5 Music Licenses and Clearances – Composers, Song Writers and Performers

As mentioned 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 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 rightholders 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 rightholders through CMOs 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).



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.

3.5.1 The Composer Agreement

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).

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.

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.

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.

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 must 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 although controlled by the producer.

Whether the producer exclusively holds the copyright or if it will be shared with the composer is a negotiated point although 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 in the United Kingdom, but members of the Performing Right Society (PRS) there cannot assign public performance rights). 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 related 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 related 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 United States) 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.

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.

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.

Preexisting 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.

Dispute Resolution – This must include the forum, such as court litigation or an 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 recommended model contract clauses and submission agreements in Annex IV 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 V.

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

3.5.2 Contracts for Preexisting 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. Firstly, 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.

If a production licenses preexisting tracks, the composer of those tracks is not considered to be 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 website. 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*, 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 preexisting 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, 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.

3.6 The Producer and Production Staff

One of the great myths in Hollywood is that producers make a lot of money and have a lot of power. In reality, they are very often the beggars of the industry – begging for finance, begging for distribution, and, ultimately, begging to not have their fees cut to zero. Unlike the creatives discussed previously, there are no guild minimums or standard terms for producers. There are various designated producer roles that often overlap and many producers receive no compensation unless a film is successful. Line producers are not discussed here since they are BTL employees of the production mainly concerned with the smooth functioning of the physical production (on-set).

Not only does the producer have to embody pure creative skills (involvement in script development and casting for instance) but they also have to exercise this creativity within the constraints of the budget and in the context of the financing of the film. The producer will also need knowledge of the various ways of financing the film, including tax deals, bank finance, equity investment and others.

3.6.1 Executive Producers generally are involved with raising the money, dealing with banks, financiers and sales agents and seeking distribution for a film.



3.6.2 Producers generally are in charge of all aspects of the production from assembling the creative elements, developing the material, budgeting, financial management of the production, managing the various department heads and pretty much anything else that needs to be done.

3.6.3 Associate Producers (AP) might do pretty much any job on the production staff. There have been wonderful assistants that were so instrumental to the success of a film that they receive AP credit and genuine producers who have been forced to take an associate producer credit because of politics, money or other issues.

3.6.4 Producer Organizations exist around the world, but they do not function as labor organizations. Among those are the Association of Motion Picture and Television Producers which represents the major studios in their negotiations with the United States talent guilds. The Producers Guild of America represents, protects and promotes the interests of all members of the producing team in film, television and new media by facilitating members' health benefits, encouraging enforcement of workplace labor laws, the creation of fair and impartial standards for the awarding of producing credits, as well as other education and advocacy efforts. The International Federation of Film Producers Associations' (FIAPF) members are 32 producers' organizations from 28 countries on five continents. FIAPF's mandate is to represent the economic, legal and regulatory interests which film and TV production industries around the world have in common.

3.6.5 Remuneration and Contracts

Even though the producer may be contracted by the SPE which might be owned by the producer, it is essential to have the producer enter into a binding contract. As has been indicated above, the producer is the interface between the business aspects and creative aspects of filmmaking. It must be clear that the producer's role is defined, particularly if they are a "hired hand." The agreement itself will address the producer's remuneration -

fixed fees, deferrals and shares of net profits payable to the producer as an individual. Although the individual producer is usually not accorded any copyright interest in the film, the producer may contribute copyright to the script, and the Producer Agreement should include an assignment of any such rights to the SPE. As well as the expected representations and warranties, there will be a termination and suspension provision, particularly to satisfy the completion guarantor so that it can remove the producer if it wishes, whether for cause or not.

As noted throughout this book, producers are parties to most of the agreements. Generally associate producers are hired for a defined period for a fixed salary and rarely receive contingent compensation such as net profit participation.

The roles and compensation for executive producers and producers can vary significantly and this book can only address the most general issues (outside of the specific obligations in the other contracts discussed). Very broadly, the executive producers raise the funding for the film. They strike deals with equity financiers, sales agents, banks, sponsors and anyone else that might contribute support to the film. They might receive a payment for their work on the first day of principal photography or might only receive a share of profits.

Producers are often not paid until the film starts shooting (and presumably all of the funding is secured). They might receive very high fees if they are well-known and have a track-record of success, or they might receive only a share of profits. Their fees might be defined but deferred until all investors and loans are repaid or until other criteria are met.

There is a general rule of thumb that profits (however they are defined) are shared equally between the “Money” – investors usually – and the “Talent” – including the producer. When a share of profit is paid to the creative elements, it comes from the “Talent” or producer half of the profits. A



producer's compensation often depends on how much of this half of the profits they can negotiate for themselves.

3.7 Other Creative Roles

All of these are considered “BTL” and, except in limited cases, never qualify as “authors” and have no moral rights to their creative work. They generally do not share in a film's net revenues and many are covered by pre-negotiated guild or union agreements. That does not mean that they are not absolutely crucial to a film's creative success. In fact, a film can be ruined because of poor cinematography or sound recording and many directors credit their set designers and editors with a good portion of their success, working with them again and again on award-winning films (Quentin Tarrantino, Martin Scorsese and Federico Fellini are among the directors who work with the same technical teams on most of their films). Mr. Scorsese and his editor, Thelma Schoonmaker, have worked together for more than 40 years and she has won three Oscars for her work on his films.

Most of the principal technical positions below are recognized for their creative work with Academy winners, despite being treated contractually as mere technicians-for-hire. In developed film markets, many of them have agents or representatives much like actors, directors and writers do. They all require significant technical training and often years of on-the-job experience in assistant positions. Whereas some writers, director and actors have soared to fame after their first film, technicians spend years honing their skills in order to reach a level where they can be steadily employed. Their role is often defined as a “Department Head” – for example, the costume designer is the Head of the Costume Department. Next time you watch a film pay close attention to the costumes, sets, sound and cinematography and appreciate the skill (or lack of skill) of the various practitioners.

Assistant Directors – Depending on the size of a production there might be more than one – sometimes referred to as a first AD or second AD. This can be a deceptive term as an AD can do many of the tasks often done by a production manager (also called the UPM – Unit Production Manager) – organizing the day’s shooting, making sure everything is running smoothly, making sure that the actors are present and ready to shoot, etc. In some cases, an AD might actually do some directing, but that is usually for “second unit” portions of the shoot not involving the principal actors (exteriors, some stunts, shots necessary for visual effects (VFX)).

Cinematographer – Also known as the cameraman or the director of photography, the cinematographer is one of the key people affecting the ultimate creative success of a film but, outside of France, they are not accorded the respect or recognition they so often deserve. Generally, the director and the cinematographer work in close collaboration and wise filmmakers ensure that the two work smoothly together to realize a shared look for the film. This includes lighting, framing and even the way the final film/video element is finished. In the United States, cinematographers usually belong to the American Society of Cinematographers (ASC - www.theasc.com), while in France they belong to the one of the following:

Fédération Nationale des Syndicats du Spectacle, de l’Audiovisuel et de l’Action Culturelle (FNSAC-CGT), Fédération Européenne des Industries Techniques de l’Image et du Son (FEITIS), or the Fédération Internationale des Syndicats des Travailleurs de l’Audiovisuel (FISTAV).

Film Editor – The film editor works closely with the director to cut the raw footage shot during production into a film. In the United States, editors are usually members of the Motion Picture Editors Guild (www.editorsguild.com). With the advent of digital technologies, editing is rarely done on film and many directors also act as editors, with many films even edited on laptop computers.



Sound Technicians – These include the on-set sound recordist (the sound mixer or sound engineer), post-production sound designers, sound effect (Foley) designers and re-recording technicians (responsible for the final sound mix including re-dubbing – also called ADR). In the United States, sound techs are represented by the Motion Picture Sound Editors (www.mpse.org).

Production Designer – The production designer is Head of the Art Department and responsible for designing the overall “look” of the film. This can include creating a believable nineteenth century Japanese village or finding the right artwork for the walls of a 1950s advertising agency office. The International Alliance of Theatrical Stage Employees (www.iaatse-intl.org) represents many of the technical workers behind the scenes, including production designers, art directors and costume designers.

Art Director – The art director is responsible for physically realizing the production design, including supervising set construction (by set carpenters and scenic performers) and dressing – by the set decorator or set dresser (which can include snow in the middle of the summer or a Babylon in the California desert). In the United States, they are represented by the Set Decorators Society of America (www.setdecorators.org).

Costume Designer – The costume designer (also called the Head of the Wardrobe Department) works with the director and actors to make sure that the characters convey their traits through their clothing. They usually have a fashion or fashion history background. They are also often responsible for fittings, sewing costumes and purchasing or creating clothing and accessories for extras.

Special and Visual Effects (VFX) Supervisor – They are responsible for all of the special (usually on-set) and visual effects (usually created in post-production and also sometimes referred to as Computer Generated Imagery (CGI), although that term is falling out of favor). Their on-set role has expanded as more films rely on effects to achieve their required look

on their budgets. This can be one of the most technically demanding roles on a film set and requires a thorough understanding of the workflow from shooting to the final post-production output. VFX Supervisors in the United States belong to the Alliance of Special Effects and Pyrotechnic Operators (www.asepo.org).

Stunt Coordinator – If you ask a stunt person what their job is, they will always tell you that it is to keep the actors safe. The stunt coordinator keeps the stuntmen and stuntwomen safe while making sure that the audience gets an exciting show and insurance costs are kept as low as possible. Increasingly, the stunt coordinator works with the VFX supervisor to make sure that stunts can be combined with effects to create stunning action sequences never before possible. Stuntmen and stuntwomen in the United States belong to either the Stuntmen Association (www.stuntmen.com) or the United Stuntwomen’s Association (www.usastunts.com), or both.

3.8 Collective Management and Other Talent Rights

Collective management will be discussed in much more detail in chapter VIII. However, a few collective management issues related to the topics covered in this chapter will be discussed here.

Certain rights pertaining to the talent are normally not under the direct control of the producer. These are very specific rights whose exercise requires collective consent and licensing rather than individual transactions in order to make practical sense.

A perfect example of this type of right can be found in the music industry: it involves the use of musical tracks by radio and television broadcasters who air a large volume of recorded music across their schedules on an ongoing basis. No such broadcasting service would be remotely viable if individual clearance was required for all such usage.



In this instance, rights are represented through large CMOs which provide blanket authorization for use and negotiate umbrella rates with the broadcasters, collect bulk revenue from them and re-apportion this revenue to individual authors or performers through a complex set of calculations.

Collectively managed rights that are specific to the audiovisual medium consist mainly in cable retransmission rights and private copying remuneration and, in some countries (Belgium, France, Spain, Switzerland and Slovakia, for example), broadcasting rights.

The contract with the producer will specify that nothing in the contract will prejudice the actor or author's assignment or mandating of these rights to their CMO and to receiving revenues accordingly. Some jurisdictions specify that authors and actors may only be permitted to license their cable retransmission right and collect cable revenue through a CMO of their choice.

Collective compensation for rightholders against private copying has been dependent on statutes developed in countries where private copying is formally recognized. In most jurisdictions, CMOs representing the various sets of rightholders (directors, other authors, producers, actors, other performers) may collect their share of a centrally managed private copy levy entity: a set levy is collected by this entity on blank media, including video or recordable VCD/DVD units sold, computer hard drives, flash drives, tablet computers and mobile phones with data storage capacity. The revenue is re-apportioned to rightholders according to an elaborate weighting system.

As might be imagined, this results in substantial revenues that are shared among various rightholders and applied to other cultural purposes.

According to the 2017 WIPO International Survey on Private Copying (available on their site), the total of blank media levies collected by Swiss CMOs in 2016 was € 13.3 million.

3.9 Conclusion

This chapter sought to impart a sense of the basic dynamics of IP rights clearances and attendant negotiations which shape the most important types of producer/talent relationships. Obtaining these rights and ensuring that these relationships are balanced and fair is an essential step on the ladder of filmmaking success: without a fluid dialogue between producer, director and leading actor, the film is more likely to be poor. This issue goes well beyond a matter of understanding the rights and obligations of each. From a producer's perspective, yet again, it requires a willingness to subordinate everything to the overall goal of making a movie the audience will not forget. Intuitive people skills are as much a part of this equation as a firm grasp of copyright law or related rights.

CASE STUDY 1: THE FARMER WANTS A WIFE FACTUAL WORKS AS THE SOURCE FOR A FICTION FILM

Narrative Feature Film Project – Developed but not yet produced

Copyright Aspects:

- Life rights licensing
- Licensing a journalist's work on a factual story
- Maintaining copyright documentation

The Farmer Wants a Wife is to be the "true story" of how the life of a female journalist is affected by researching and writing a series of magazine articles about a matrimonial agent dedicated to helping lonely farmers in England's remote rural areas to attract a wife.

This bittersweet comedy project, developed by a British film company, was based on a television documentary series, itself based on a series of feature articles written by a freelance female journalist and published by a UK lifestyle magazine. The filmmakers made the journalist, a real-life character, the core of the story, pitting her urban sophistication sharply against the more innocent scene of rural England.



The film producers were initially approached by the company which had produced the documentary series. This company believed the story had a wonderful potential as a feature film and thought the film producers' past body of work made them ideal to take on the adaptation.

The development process which followed required the film producers to assemble a complex COT on unusual underlying material:

1. Factual publications (magazine articles);
2. A documentary film;
3. The real-life story of a living person.

The easiest rights to secure were those held by the documentary film company. They had approached the filmmakers and were therefore entirely disposed to transfer the rights, which eventually went to the film producers for a very small sum of money.

Before this could take place however, the film producers had to contact the publishing company behind the magazine which had commissioned and run the articles. This was needed because – although the publishers had already signed away the *re-format rights* of the article to the documentary company – it was not entirely clear whether or not these rights included a cinema film version. A conversation helped to clarify that point and clear this vital link in the COT, pending necessary documentation.

Finally, since the filmmakers had decided to make her the central character in the script, the journalist herself had to be approached for her consent in proceeding with the adaptation. Not to have taken care of this would have exposed the producers to a potentially damaging legal action because the journalist might then have been within her right to sue them for *defamatory treatment*, invasion of her privacy or libel once the film was in production or on release in the cinemas. Like most other European countries (and most states in the United States), the UK has libel, anti-defamation and protection of privacy laws. These are sometimes ambiguous and difficult to interpret, especially when public figures and famous people whose entire careers depend on being in the

public eye are involved. Filmmakers anywhere in the world should always be aware of what these laws may entail before endeavoring to make a film based on someone's life story, even if the character's name is changed in the script and some of the events altered. The price of not doing so can be as high in some cases as an *injunction* on the exploitation of the finished film. In an injunction, the court would grant the plaintiff the right to stop the exploitation and/or circulation of the finished film. To avoid these, it is essential to seek the consent of the person involved through a *life rights* agreement. Perhaps the most famous case of a movie involving a real life story and running into legal trouble as a result is *Citizen Kane*, Orson Welles' timeless cinema masterpiece. The film was based on the life of press magnate William Randolph Hearst and the similarities between him and the fictional character of Charles Foster Kane were sufficiently striking for Mr. Hearst to attempt to use legal means to stop the film from being released.

On *The Farmer Wants a Wife*, the journalist on whose "life story" the film was to be based agreed to sign an agreement which gave the filmmakers exclusive rights to portray, represent or impersonate her in the film.

Although it is generally much simpler, the *life rights* deal works very much like any other form of rights' assignment or licensing in that the producer commits to making a payment against the assignment of the rights. In some cases, the person on whose life the film is to be based may also negotiate other, non-financial advantages. In this particular case, not only was the journalist offered a flat fee as a consultant but she was also guaranteed a screen credit if the film was produced.

Furthermore, she did not assign her life rights in perpetuity and chose instead to license those to the filmmakers for a limited period of time. This approach ensured that she could remain in control of those rights and re-license them to another producer in the event that this project did not go into production.



CASE STUDY 2: MEMOIRS OF A TEENAGE AMNESIAC

Making a Movie in Japan

Narrative Feature Film

Director: Hans Canosa

Writer: Gabrielle Zevin

Cast: Anton Yelchin
Emma Roberts
Maki Horikita
Kenichi Matsuyama

Budget: Approximately US\$ 3 million

Producers: Wendy Reeds
Hans Canosa
Kimio Kataoka and 12 other named producers, executive producer and associate producers

Production Company: Dot Dot Dot Films

Distributors: Toei Company, Japan
Metro-Cine, China
Golden Scene, Hong Kong

Underlying Material: Novel by Gabrielle Zevin, published in 15 countries

Copyright Aspects:

- writer agreements;
- acquiring film rights to a novel;
- transferring distribution rights;
- talent agreements; and
- music agreements.

Development and Financing:

When Gabrielle Zevin wrote this book, it was not with the intention of making it into a movie. Hans Canosa read the book and thought that it would make an interesting project for Japan, given the themes of teenage love and privacy. He approached Zevin with a proposal that he

would option the rights to the book with his partners, Wendy Reeds, and that they would pay a small option fee and a larger amount if the film were ever made. They secured the film rights to the novel and also agreed to a writing contract for the screenplay with Zevin (as a work-for-hire). At this point, they established an SPE called Dot Dot Dot Films. When a first draft of the script was ready, they brought it to potential Japanese financiers and eventually struck a deal with Toei as an investor, but also as the Japanese distributor of the film. This agreement provided sufficient funding for the production of the film but also secured the all-important first distribution deal. This distribution agreement was signed separately from the finance agreement. They also helped with local casting to ensure that the young stars were popular with Japanese audiences. The film was to be shot in Japan in the Japanese language and so the script needed to be translated into Japanese.

Other Creative Licenses:

Since Canosa is a member of the Directors Guild of America, his contract conformed to the standard conditions of those agreements – this made things easy.

The actor agreements were more complicated, as several of the actors (Yelchin and Roberts) were Screen Actors Guild (SAG) members but the Japanese actors were not. It was important to the producers that the actors were all treated equally and therefore the Japanese agreements conformed to the general terms of the SAG agreements. Compensation for the actors included both up-front payments and a percentage of profits if the film was very successful. One of the most complicated aspects of the Japanese actor agreements were the Name & Likeness terms.

Music was always going to be important to the success of this film and the producers wanted to use a combination of existing pop hits and music specially created for the film. For the pop hits, the producers contacted the music companies and the bands themselves in Japan to



secure both the synch rights and the master rights. They also concluded a deal with a composer to create the score for the film on a work-for-hire basis.

Financial Results:

The film was well-received in Japan, but failed to find distribution outside of Asia. Despite this, the film can be considered a success since most of the budget was supplied by the Japanese financier and the expectations for the rest of the world were always limited.

Some territories in Asia were licensed to other distributors and this provided some additional revenue to the producers.

CHAPTER 4

ENTERING THE GLOBAL MARKETPLACE FOR FILM AND TV

This chapter explains strategies for generating film revenue.

The development and acquisitions executives are the gatekeepers at distribution and production companies including major studios and TV outlets. Producers present projects to them in hopes of securing finance and distribution. They expect a complete and professional explanation of the rights situation for the project. Producers must know what they are expected to supply and what kind of deals they can negotiate.

Objectives:

- **Understand the roles of sales agents and producer's representatives and the associated agreements**
- **Understand the roles of local and international distributors and the associated agreements**
- **Understand other related agreements that may be necessary for distribution**
- **Understand the benefits and pitfalls of self-distribution**

4.1 Business Models for Value Creation

This is the section where it must be acknowledged that a film is a consumer product – or at least all those involved in its making hope it will be. A film fights for shelf space in the same way that breakfast cereal and instant coffee do at the local grocery store. In fact, that is one way to explain commercial distribution. Imagine that you are launching a new brand of instant coffee. You have made sure that it is produced in the best way from the best coffee and it has won prizes in international competitions. In order



to pick the right person and place to get this coffee to consumers, you would go through some very logical steps:

- You would examine where people buy coffee and specifically, a more expensive, high-quality instant coffee.
- You would examine how other brands have come to market in the past. It is important to examine the ones that failed and the ones that succeeded because lessons can be learned from each.
- You would decide which outlets provide the biggest potential revenue for the coffee – small shops, expensive grocery stores in malls or chain stores?
- You would research the value chain – do the stores you want to access buy directly from the manufacturer or from wholesalers? Who are the wholesalers and what kind of deals are common for their services?
- Etc.

Now it is time to examine how that process works for film. Keep in mind that this is not a secret process that only makes sense when looking at film. This is basic, logical business practice.

4.1.1 Single Global Distributor Model

In many cases, a film will be distributed through a single company on a global scale. Netflix has started to aggressively license global rights to films from around the world, and the major studios produce and acquire films to put through their global theatrical, VOD and TV systems. There are many advantages to global deals, as discussed below, but the option is usually not available or might not be a good fit for a specific film.

Netflix Model Considerations

Netflix (and by extension, other global SVOD distributors) have started to produce locally (in which case they will handle all worldwide rights) or acquire local productions from Nigeria, Turkey, Russia and many other

countries. There are a few special considerations related to Netflix global deals:

- Global means global and that can include the country of origin. A Nigerian friend recently received a Netflix offer and one of the writers of this book asked if it was worth more than they expected to receive from distributing the film in Nigeria. They said that it was much less and would be paid over a period of three years, whereas they would realize the Nigerian revenue within a year. They thought that Netflix was not taking Nigeria, just everything else. In the end, they were able to negotiate a “window” to release the film in cinemas, run VIP and sponsored screenings and even attempt to get some money out of DVD before the film would be made available through Netflix.
- Netflix usually pays in quarterly installments over a period of three years from delivery.
- Netflix acquisition deals can have very limited terms. Whereas some distributors might want to control your rights for 25 years (a standard major studio deal), Netflix deals can be as short as four years. After that, the film can be resold.
- A global SVOD platform means that a huge number of people will see the film, will hopefully be impressed by the director, actors, writers and others. This will help their careers. It also means that people will receive your message, get to know your country, or just be entertained by something you produced.
- Financially, this model changes constantly. There are rumors that Netflix paid millions of dollars to license the Nigerian film *Lionheart* in 2019. If that is true, it is wonderful, but it does not mean that they will pay that for other Nigerian films. They might pay more they might pay less or they might not want to buy any more Nigerian films in 2020. This has been frustrating for independent producers.



Major Studio Deals

The Majors (Universal, Disney/Fox, Warner Bros., Sony, Paramount and MGM) often acquire worldwide rights to films or produce films locally. They have incredible reach, great resources and, if they get behind a film, there is no other distribution method that can generate similar revenues. They will also usually pay the highest advances available. A studio distribution deal, if available, is usually the best financial deal for a film. The advance is paid on delivery or soon after, and their analysis and modeling will make sure that the release is (usually) tailored to the production to maximize revenues.

However, these are golden handcuffs, and it is rare that any producer sees money beyond the advance and the producer loses all control over the promotion and distribution of the film. There is no easy answer, but usually the safest course is to accept the bad aspects along with the cash and to use the success to pursue future production and distribution deals on new films.

4.1.2 Split Rights Deals

In most cases, independent films are brought to consumers through split rights deals where one entity handles distribution in the home country and another entity handles distribution outside the country or region. Since, for most films, the local market will be the most lucrative, the producer is usually very involved in the release there, but much less involved in any potential distribution outside the territory.

These deals can be divided into three categories and this will depend on local practices more than anything. In some places, there is simply no export market for films, while in others (often for specific directors' films in those territories), the export market is stronger than the local market.

Producer Local/Sales Agent International: In many places such as Nigeria, the producer is also the local distributor. This has clear

inefficiencies, not least of which is that producers should be producing films, not distributing them. As markets develop, there is an increase in specialization, with distribution companies in various media emerging or all-rights distributors handling theatrical, DVD, VOD and TV licensing deals, marketing and revenue generation.

In cases where the producer distributes a film locally, or in the local region, rights outside that area rarely have enough potential to generate revenues to interest international sales agents (see below). In those cases, nothing happens with the international rights – although the films will often appear on YouTube eventually.

Third Party Distributor Local/Sales Agent International: As noted, in developed markets, the producer licenses the film to a local distributor to generate revenues. Those deals are discussed in more detail below. Finding the right local distributor is challenging since the producer wants someone who is honest (a serious problem, although research and discussions with other producers can help) and has a proven track-record of success with similar films in the various distribution media envisaged. A producer's representative (see below) might be available to help producers make the right decision, but ultimately the producer must feel comfortable with the local distributor.

Hopefully the film will have the revenue potential to interest an international sales agent who will propose the best distribution plan including festival appearances and special promotions involving the director and cast at film markets.

Global Deals Outside Country/Region of Origin: In some cases, it is possible for a producer to make a deal with a global distributor as discussed above, but to retain all rights in their country or region. This is usually an ideal situation for the producer as monies are more secure/predictable and they are able to focus their attention on maximizing



local distribution – which is usually how the majority of global revenues are generated.

4.1.3 Self-Distribution

In some countries, the answer to the question, “Can you distribute your film by yourself?” is an emphatic “no”, but in most of the world, the answer is often, “I didn’t know there was any other way to do it.” Distribution and production require two very different skill sets and the ideal is to use someone with the distribution skill set to distribute the film. If that is not an option, or the producer has that option but wants to try to distribute the film themselves, there are some important things to keep in mind:

- The producer might still be competing against established, professional distribution companies – so they must know the business before approaching outlets. That means knowing the usual splits with cinemas, the pricing of DVDs, the impact of an SVOD release on the local market and the standard license fees paid by TV stations. Approaching these outlets in an unprofessional or naïve manner is the easiest way to get cheated or ignored.
- The producer must honestly assess the potential in the various distribution outlets. Is the film theatrical? Does it have stars that are popular on TV? Is it the type of thing the local or global VOD providers are currently licensing or offering?
- The self-distributing producer will probably have to work with third parties at some point. It is unlikely that the producer will own a TV station or SVOD platform, so the film will be licensed to a broadcaster or platform. That might require an aggregator (see below). Outside providers can include duplication facilities (for theatrical release elements or DVDs), marketing companies to produce posters and trailers and possibly accounting firms to track and distribute revenues. Engaging, supervising and coordinating

these third parties can be challenging, but some producers find that they have a talent for distribution and happily switch careers.

- While it may be overly optimistic to mention YouTube partnerships given the disappointing revenues currently available, this is where many producers have found a home for their films after failing to find a better option. Everyone has access to the YouTube Partner Program by turning on the Monetization function and opening an AdSense account (to get paid). The only requirement is that you have properly licensed the intellectual property contained in the film – in most cases that means the music licenses are in order and that no one involved in the production is going to complain about not being compensated for their participation.

The biggest advantage to a YouTube partnership is that people will see the film. By promoting the release and encouraging people to view it, there is a chance that the talent will be discovered or that the creativity will result in a big-budget remake or series deal – stranger things have happened. What the producer will not get is rich. In fact, they will be lucky to receive any significant payment ever.

4.2 Market Access

Ultimately, this is about gaining access to markets in order to make money. What are the barriers to accessing local or international markets? Can a producer do that on their own or do they require a distributor, aggregator, international sales agent or producer's rep? What control does a producer relinquish and how much is it going to cost?

The answers vary by territory, but a few conversations with successful local producers is usually all it takes to develop a plan for accessing markets. This should be done prior to the production of the film as part of the overall business plan that will be presented to investors and financiers.



The first step is understanding the role of the intermediaries.

4.3 The Sellers

4.3.1 Producer's Representatives

As previously discussed in chapter I, there are two types of representatives who offer distribution rights to potential distributors. A producer's representative (or producer's rep) is usually authorized to offer the film in its country of origin for various rights. They might seek an all-rights deal with a major theatrical distributor or they might seek a separate distribution deal for theatrical, DVD, VOD, TV, airlines and any other rights that have value. They are responsible for finding the best situation for each medium for the film and for concluding the deal, getting signed agreements, assuring payment of any amounts due, arranging the delivery of required elements and following through to make sure that the distributor fulfills their responsibilities.

In some cases, the producer's rep might be responsible for certain aspects of promoting the film, including designing marketing materials such as the poster and trailer, submitting the film for festivals and possibly even working with a publicist to promote the film. In rare cases they might even be responsible for hiring an international sales agent to represent the rights outside the country of origin.

4.3.2 International Sales Agents

As previously discussed, international sales agents represent the distribution rights outside a film's country of origin. Like the producer's rep, they seek the best possible deals with distributors in territories around the world, negotiate and follow through with deals and do their best to make sure the film receives the best possible distribution. They are often involved with the international film festivals at which the film appears and are usually very involved with the production of marketing elements that will be used at film markets and during the exploitation of the film internationally.

Of course, it is always best to make sure that the producer's rep and the international sales agent work closely together so that their efforts (and costs) are not duplicated. It is also important to coordinate festival and release efforts to assure maximum publicity value and revenues.

4.3.3 Aggregators

Aggregators were discussed in chapter II above, so it is not necessary to go into any more detail here. However, it is important to remember that access to certain markets specifically requires the assistance of an aggregator.

4.4 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 analyzing both a sales agent agreement (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 a 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 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 II, 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 favorable to themselves. This book has tried to provide neutral versions of these agreements.

Distributors and producers must 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 a bank 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.

4.4.1 Analysis of Gross Receipts

EXHIBIT A

Allocation and Distribution of Collected Gross Receipts

The Collected Gross Receipts and Collection Account Interest shall be allocated and paid in the following manner and order:

1. Collection Account Management Fee and CAM Expenses
2. Sales Agent (Commission + Expenses)
3. Residuals to Guilds/Unions
4. Lenders/Banks
5. Deferred fees/payments
6. Investors – repayment of investment plus premium (often 20%)
7. Subsidies – if they require repayment
8. Profit Participants
9. Balance Split Between Talent and Investors

Since so many aspects of the agreements below 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 rightholders and producers are between producers and distributors and arise owing to a misunderstanding of the way revenues will be shared. The order of sharing of revenues is often referred to as the “waterfall”. To the left is an example of a typical waterfall as it would appear in a contract. Please note that this is just a reflection of the explanation of the division of receipts contained in the body of the agreement.



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 recouping of production and distribution costs (sometimes called "first break-even" although 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 deceived 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 will arise, 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, sometimes 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/rightholder 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 ensure 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.

4.4.2 The Sales Agency 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 presales 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 principal elements of the sales agency agreement are:

1. The Parties – the production company (often an 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 record in the contracts that 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 COT) 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 United States, 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 rightholder, 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 ensuring 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 subagents. 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 state clearly 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 ensure 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 US dollars in sales, the fee



might be as low as 5% (\$500,000) but if they are likely to only do 250,000 US dollars in sales, a 30% fee (75,000 US dollars) 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 must 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). Firstly, 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 US dollars. 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 for the publicist who will make those arrangements. Having a film at Cannes might require the additional expenditure of between 50,000 and 500,000 US dollars (37,000-370,000 euros). 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 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 hard 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 to CMOs for blank media levies, retransmission, music use, certain public performances and other reasons. Organizations such as the 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 rightholders – 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.

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 United States 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 these 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 versus Paramount Classics* – Paris Commercial Court, September 8, 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 e-mails, 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 rightholder and have 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 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 recommended model contract clauses and submission agreements in Annex IV). These clauses should indicate in particular the relevant authority and jurisdiction, including the applicable law that governs 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 V below. Disputes arising from sales agent agreements are among the most common and the most difficult for producers 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 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.

4.5 Distributors

4.5.1 Domestic Distribution in Various Media

This is an area that varies greatly from one territory to another. The best thing to do is research local markets for theatrical, DVD, VOD and TV distribution and ask local producers and distributors what their strategies have been. The domestic market is usually by far the most lucrative market for any production. Some of the most innovative distribution strategies emerge from the most difficult local markets. Prior to launching any

production (spending money) it is very important to understand the following:

- what distribution partners are necessary;
- potential costs and revenues from various media; and
- timeline for release of different rights and when revenues can be expected.

4.5.2 International Distribution

Export markets are often elusive when a film is:

- not in English;
- made for a low budget; and
- made to specifically appeal to the tastes of a local audience.

That said, targeting international markets with a film is extremely risky, although United States, Canadian and United Kingdom films usually have more success in export markets. The sales agents are the gatekeepers and will tell you if a film is likely to find an audience. They do not want to waste their time and money on material from which they cannot generate revenues.

This is also an area that is almost impossible to “do it yourself”. Sales agents have developed relationships with distributors around the world, understand pricing, collections, contracts and delivery. Most territorial distributors will not license films from producers or anyone who does not have a functioning company devoted to those activities.

Tracking and collecting monies earned from international distribution can be very challenging. It is a specialized area that should be left to the sales agent, but if your film is receiving export revenue, it is important to understand how the money was earned (which media, what are the local deals in various media), when the monies are due and how to confirm the accuracy of the payments. All of these details should be contained in the



International Distribution Agreement and obligatory revenue reports. Producers should demand access to these documents and learn to understand and review them.

4.5.3 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. Annex II is a sample Territorial Distribution Agreement.

Below are the principal 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 and 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 also contain the French-speaking African countries. 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 releasing 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 sales 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, subtitling, dubbing, striking release prints or creating digital cinematic release elements, advertising costs, taxes (most taxes cannot be considered expenses – these must 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 COT, the credit obligations (since they will be creating marketing materials, they must know what rules they must 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.

4.5.4 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%). Many a time, 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 ensure that rights are properly transferred/retained/exploited. Please see the discussion of issues related to the licensing of these rights in chapter I 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.

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.

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.

4.6 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 websites 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.



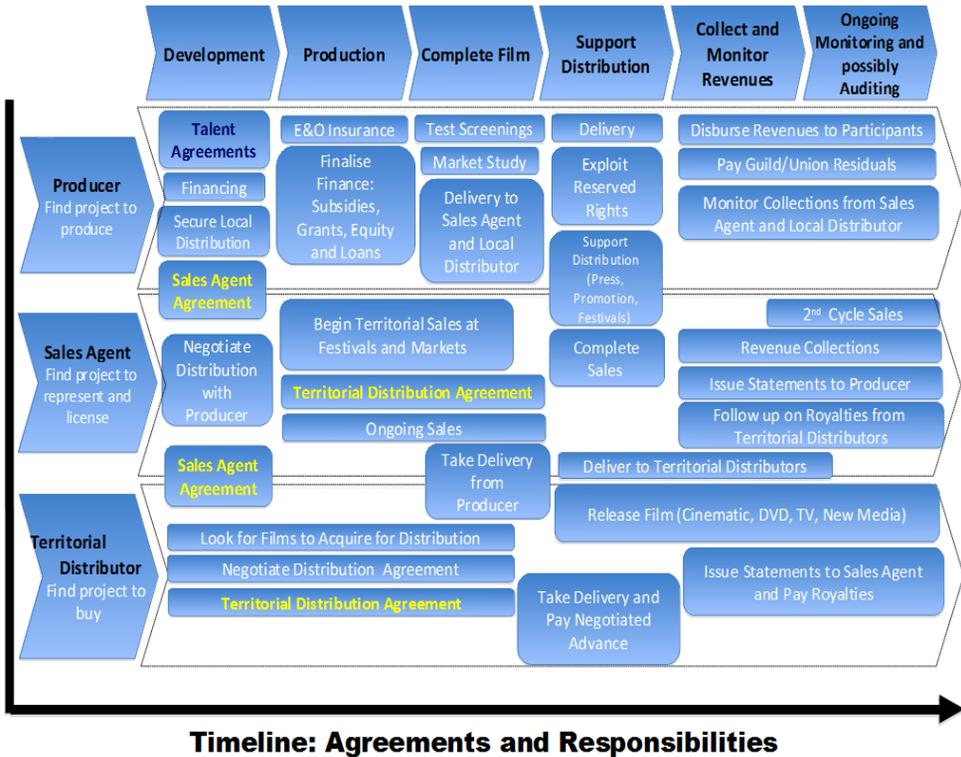
Many countries offer financial help to encourage producers to attend festivals and markets. Whether or not they have distribution, producers should find out if there is local funding and try to attend as many festivals and markets as they can. Producers will learn more from attending one of these events 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 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.



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.



CASE STUDY: CONTRACORRIENTE - UNDERTOW (2009)

Entering the Global Market for Film

(Courtesy of Film Independent – www.filmindependent.org – full case available on their site)

Narrative Feature Film

Director: Javier Fuentes-Léon

Peruvian Producer: Javier Fuentes-Léon

Colombian Producers: Michel Ruben, Andrés Calderon, Rodrigo Guerrero- Dynamo Productions

Budget: Under \$1 million

Financing: Foreign co-production funds; Grants; Small private equity

World Premiere: 2009 San Sebastian International Film Festival

Awards: Miami Film Festival – Audience Award, Ibero-American

Competition;

San Sebastian International Film Festival 2009 – Sebastian Award;

Sundance Film Festival 2010 – Audience Award, World Cinema Dramatic.

The official submission of Peru to the Academy Awards;

Nominated for the Goya Award for Best Latin American Film.

Producer's Rep: Mr. Steven Beer (Attorney)

International Sales Agent: Shoreline Entertainment

Festival Consultants: The Film Cooperative

United States distributor: Wolfe Releasing

Copyright Aspects:

- creation of intellectual property
- transfer of intellectual property
- engagement of an agent for management of IP
- festival and marketing strategy
- revenue generation from copyright
- distribution contracts

Initial Choices – Festival Strategy in the Distribution Process:

During post-production, *Undertow* was selected to participate in the Latin American Film Festival in Toulouse, France in March 2009. *Undertow* played in the festival's "Films in Construction" (works in progress) section, which grants completion funds to films in post-production. It is important to note that the Toulouse screening would not be considered the world premiere, as the film was incomplete.

At the end of March, after the screening of *Undertow* in Toulouse, Javier was invited to premiere the film at the San Sebastian International Film Festival in Spain in September 2009, one of the most prestigious festivals in Europe behind the big three of Cannes, Berlin and Venice. Shortly thereafter, Sundance accepted the film for its 2010 festival. Sundance programmers usually prefer to screen world premieres, but they were not bothered by the San Sebastian premiere. However, they did request that Javier not screen the film publicly after its debut, so the filmmakers had to turn several festivals down that wanted to screen the film after San Sebastian and before Sundance.

In the run-up to Sundance, the producers of the film received calls from prospective producer's reps and sales agents. At the end of 2009, Javier and Dynamo hired Steven Beer, a well-respected entertainment lawyer in the United States, to advise them during the whole process of finding a sales agent in time for Sundance. Although it had partly financed *Undertow*, Memento Films did not want to handle foreign sales. In the first week of January, Javier and Dynamo chose to go with Shoreline Entertainment for world sales (for a 15% commission). Rights to Colombia, Peru, France and Germany were already being handled by the respective producers from those territories. Dynamo reserved the right to handle sales in several Latin American territories.

In addition, Jeffrey Winter and Orly Ravid of The Film Collaborative were hired to handle the festival applications. By the end of 2010, *Undertow* had played in over 100 festivals worldwide. The Film Collaborative usually secured screening fees, which averaged \$500 (sometimes as



high as \$1,000), for which they took a 50% commission for their services. Based on Shoreline's recommendation, the filmmakers hired Jessica Edwards from Murphy PR to handle publicity at Sundance. Edwards got great coverage for the film in the Spanish-language press and television outlets and made sure the film was covered by the film industry trade magazines.

Sale and Release – Revenue Generation

During Sundance, Ms. Maria Lynn from Wolfe Releasing saw *Undertow* and loved it. Wolfe paid more than US\$100,000 for all North American rights, except theatrical. *Undertow* proved to be an extremely popular festival title. Encouraged by more than 53 festival awards worldwide, the filmmakers decided to release the film theatrically in the United States themselves, in conjunction with The Film Collaborative. The producers of the film re-invested the revenues from festivals into the initial theatrical release. Wolfe Releasing also contributed a small amount for the release, with the expectation that the theatrical release would increase revenues in other release mediums.

Undertow opened in San Francisco on September 17 to great reviews—The Film Collaborative spent very little on advertising but spread the word via grass roots marketing, reaching out to gay and Latino audiences around the city. In September 2010, Peru selected *Undertow* as its official entry to the Academy Awards® for Best Foreign Language Film. The film received a great review in *The New York Times*. Owing to the success of the film on the festival circuit and a promising theatrical run during the 2010/11 awards season, Wolfe delayed the DVD release until June 2011.

Thanks to the festival success and the Oscar submission, Shoreline successfully licensed the film to art house distributors around the world.

Undertow has already opened to great reviews in the Netherlands, Spain, the United Kingdom, Ireland, Brazil, the Dominican Republic, Puerto Rico, Ecuador, Bolivia, Colombia and Peru. In terms of box-office, it did

particularly well in Spain and the United Kingdom, and has done less well than the producers expected in Colombia and Peru.



CHAPTER 5

FINANCE AND DEAL-MAKING

This chapter addresses the sources of finance for production and the ways those are accessed. The documentation requirements and players involved in assembling these deals is also discussed. Particular attention is paid to co-production requirements and opportunities.

Objectives:

- **Understand basic production finance structures, including co-productions**
- **Understand the variety of finance sources**
- **Understand finance documentation**
- **Understand other finance-related issues including banking and insurance**

5.1 Production Finance

Once a producer has developed the creative aspects of their project, the next question anyone seeking to finance the film needs to ask is, “how much do I need to make the film?” The second question is, “how much is the film going to earn?” The third and fourth questions should be, “where do I get the money?” and “where will the revenue come from?” This chapter will help you examine some of those issues.

5.1.1 Film Budgeting

This book does not specifically address all the physical production aspects that are necessary to determine the budget of a film, but simply offering a few tips on the topic. Usually, the producer, in cooperation with a line producer or production manager (also called a Unit Production Manager or UPM), will develop a budget based on existing information (cast, writer,

director salaries, producer fees, necessary number of shooting days) and in consultation with specialists such as stunt coordinators, set designers and others with knowledge of specific costs.

There are specialized software programs (such as MovieMagic) that are widely used to develop budgets. Of course, it is very valuable to examine budgets for similar films shot in the same place (costs can vary greatly from one country, or even one city, to another). The Internet has many examples of budgets that might be relevant to your project, or simply give you an idea of the many different categories of costs to consider.

One of the most common questions is what appropriate producer fees should be. Often the answer is, “as much as the producer can get.” If a producer is getting funds from sophisticated sources, those sources will limit producer fees as much as possible. Producers and talent will usually split net revenues with the investors in a project. It is easy to say that if a producer believes in a film, they should take very little up-front and expect payment from the success of their film. This is not really relevant as the producers have very little control over potential success of a film in distribution and they should expect that most of their compensation will come from their budgeted fees.

A rule of thumb is that the producers as a group, including the executive producers, producers and associate producers, should get between 5% and 10% of the total budget. Other factors that can influence this amount are:

- How desirable is the project and how successful is the producer? Top producers with a track-record of success can demand higher fees. Projects that are considered desirable will obviously rate higher fees for the people deciding who gets to benefit from the investment or distribution.



- Are the sources of finance private or public? Often, public sources allow generous allotments for producer fees. Private sources, including banks, will usually try to limit these fees to the lowest amount that can be negotiated. Obviously, this is because the more producers are paid from the budget, the longer it will take investors to recoup their investment or for loans to be repaid.
- Have any of the producers done anything extraordinary to raise the funding? In some cases an executive producer will bring in a large portion of the funding from a specific source based on the understanding that they will receive a specific percentage of the funds raised (usually 5-10%).

Film budgets can also include specific line items that must be calculated by experts such as finance costs, insurance (including completion bond) and a contingency amount, usually calculated at 10% of the budget before finance costs and insurance. The contingency is meant to cover any over-budget items and if all goes well it should not be spent at all.

The meaning of terms such as “mid-range”, “low-budget”, “microbudget”, “tent-pole” and “mega-budget” vary widely depending on where the production is taking place (a mega-budget Indian film’s budget might be the same as a mid-range budget in the United Kingdom) and who is using the phrase (a major studio production executive might consider a film costing 10 million US dollars to be “low-budget” and in their world it probably is).

In most cases, it is important that the budget bear some relation to the potential revenues a film will generate. This depends on where the funding originates and whether or not it needs to be repaid from revenues. For instance, many Canadian films receive 30-50% of their budgets from sources that do not require repayment. Therefore, the film only needs to cover the balance of the budget from revenues in order to be in profit.

Control of the budget is in the hands of the production accountant and is often supervised by an outside agency, such as a completion bond

company or production auditor. Often, payroll is the responsibility of a payroll service which also deals with income tax and guild payment issues. Of course, the payment of amounts due to the principal talent and producers is usually dealt with separately in their agreements.

5.1.2 Production Insurance

Managing the Risk of Production

Filmmaking is a highly hazardous undertaking. Once filming has started, the production may be vulnerable to anything from adverse weather conditions, the death, illness or incapacitation of a lead actor (or the director), some of the financing failing to materialize because investor X has just filed for bankruptcy, or a thousand other problems.

Most financing contracts provide for financiers to accept a measure of risk such as “acts of God” (e.g., catastrophic storms or unexpected political violence, coups d’état, etc.), which fall under standard insurance terms. However, films can fall apart at the production stage for reasons that have nothing to do with the standard risks covered by standard policies. The production team may be exceeding the budget and/or schedule with the eventual result that the film’s completion cannot be covered out of the budget initially agreed by all investors and rights purchasers.

Self-Insuring

In the Hollywood major studio system, completion and delivery risk may be assumed entirely by the studio, which has complete ownership of the project and can supervise its production in minute detail. The studio’s physical production expertise, combined with its extensive supervisory rights, means it may be able to anticipate budget overruns and impose drastic re-scheduling or agree to an extension of the budget against a re-negotiation of certain terms governing the sharing of profits with the producer.



In India, the risk is also assumed directly by the larger production companies, while the producers of lower-budget films tend to attract investors who will accept the risk as inherent in the filmmaking process and charge interest rates or premiums commensurate with the perceived risk. In West and East Africa, no established mechanisms exist to manage the risk: most films are in the microbudget bracket and made using deferred services and small-scale individual investments which are a more intuitive way of making films happen, even in the absence of a risk management structure. Of course, when there is a major problem, the production can collapse and the investors can lose all their money.

Completion Bonding

In the international independent film industry, however, few entities have the capacity to buy out all rights against 100 % financing, monitor the production process for an ongoing assessment of the delivery risk and cover this risk by themselves. The overwhelming majority of independent films are made according to a “patchwork financing” model in which the pre-selling of certain domestic and foreign rights, combined with local incentives, television license fees, equity investment, gap financing and other contributions, eventually meets the budget necessary to make the film to the agreed standard, with the approved cast and principal artistic and technical contributors. In this situation, no single financier is in a position to guarantee the completion of the film in the event of the production going over-budget or going long. Additionally, producers will very often require bank financing in the shape of discounting of the rights’ licensing contracts in order to open up the cash-flow that will allow the production to start. Banks will not give loans unless the completion (on time and on budget) is guaranteed.

It is at this point that the *completion guarantee (completion bond)* generally comes in. The completion guarantee is simply a form of specialized insurance which covers banks and investors in the film against the risk of the production failing to be completed and delivered in accordance with the

distribution contracts. The completion bond company that provides the insurance will carefully review the budget and all of the personnel responsible for the film being made (from the director and stars down to department heads). Many people who have had successful careers in physical production will later work at bond companies where their expertise is put to use supervising projects.

This supervision starts before principal photography and continues through delivery, mostly without any problems. The bond company will review the progress of the film through production and post-production and, if everyone has done their job properly and there are no unforeseen problems, their work is finished. In some cases, though, the completion guarantor must intervene during the production or post-production process by either advising the producer on how to get the budget and schedules back on track in order to complete the film according to plan. They might replace key personnel, and even the director, if necessary. In extreme cases they will take over the production entirely and attempt to complete the film. There is, however, a third scenario, one which happens relatively seldom because its consequences are negative for all involved: the completion guarantor takes over the production and finds they are unable to complete the film to the delivery criteria expected. In this case, the guarantee will be called and the completion company will reimburse investors for the losses incurred. The completion guarantor will charge a premium for their services, generally equivalent to between 3% and 6 % of the production budget.

In order to perform its role satisfactorily the completion bond company will need to have a number of tools at its disposal. These include the following:

- The power to make its own independent assessment of the producer's budget, the production schedule and all the documentation relating to the pre-production of the film. If they find these wanting, they may advise the financiers, who will make



- demands for specific changes based on the guarantor's assessment and recommendations, prior to giving the production the go-ahead.
- The power to make its own independent assessment of the personal competence (and emotional stability) of key technicians, production management personnel, artistic contributors and lead actors. Again, if the completion bond company has reason to doubt the competence or reliability of any of these leading contributors, they may require changes before agreeing to a Letter of Intent signaling their intention to bond the film.
 - Considerable in-house knowledge of the film production process in all its intricate technical and managerial details. All bond companies employ seasoned *line producers* or production managers with years of experience working across a whole range of productions.
 - Extensive supervision powers: The guarantor often has a representative in the production office throughout the process. They have full access to call sheets, production account records, daily cost reports and any other document relevant to the day-to-day management of the production.
 - Re-insurance structure: All guarantors cover their own risk through a re-insurer in order to reduce their own exposure.
 - Power to take over: This is an essential aspect of the completion guarantee contract. The completion company must be allowed to take over the production if, in its judgement, the film is in clear danger of failing to complete within the parameters agreed with the financiers.

From all the above, it may be tempting to conclude that the completion bond company, while providing an essential guarantee without which no financier or bank finance may be forthcoming, creates an atmosphere of tension and suspicion on a film set. In most cases however, the producer's experience is more complex and mitigated: completion guarantors are invariably people with considerable knowledge of the details of film production and their experience can be a boon to the producer by helping

him anticipate problems and manage the production to obtain an optimum result.

Completion bonding is most generally used in the Anglo-Saxon film industries where the overwhelming majority of films above the microbudget level require a bond in order to secure a commitment from banks, distributors and other financing parties.

Although completion bonding has been increasing steadily over the years as international co-productions have increased in volume, European countries where *droit d'auteur* prevails have traditionally been more reluctant to adopt it as a means of oiling the mechanism of multiparty film financing. Initially, this was because the takeover and completion powers granted to the completion guarantor were perceived as necessarily adversarial to the exercise of the authors' moral rights. This specifically affects the right of the director to assert his or her paternity over the work by making the decision on the final shape, form and structure of the film. In practice, the *droit d'auteur* system has yet again demonstrated its adaptability and flexibility by accommodating the exercise of those rights alongside the completion powers of the guarantor and, although it is still far from being the norm in some countries, an increasing number of films are resorting to the guarantee in order to close their financing.

It is impossible for most film producers with international ambitions to embark on the adventure of co-production and foreign presales without at least a passing acquaintance with the requirements of completion bonding in the mainstream independent film industry. Without a completion bond in place, most films cannot proceed to production, and the rights' edifice painstakingly assembled by the producer over months or years, may crumble and scatter.



Liability Insurance

Films are complex business ventures, with many employees often working in dangerous circumstances. Like all such businesses, productions need insurance against accidents and damage to property. A number of specialized companies provide general liability policies to the film industry and their experts can help make sure that your production is safe and covered in case of unexpected problems.

Managing the Risk of IP Rights Issues

General IP Issues

As discussed in Chapters II and VII, there are many things that can go wrong in the transfer of IP rights. As a quick reminder, these can include:

- making sure that people own or control the rights they are offering to license;
- getting all contracts signed and make sure payments are made per the terms of the agreements;
- understanding what rights you need and what rights you can get (usually, producers want all rights now known or hereafter invented, in perpetuity, in the entire universe); and
- understanding what legal recourse you might have if there are problems.

Errors & Omissions Insurance

Errors & Omissions (E&O) insurance can cover the parties against chain-of-title paperwork problems. These can include conflicting copyright claims and claims of misuse of other IP, including performances that were not properly contracted, music that was not properly licensed or cleared and claims of improper use of trademarks and artwork. Issuers of these insurance policies require a significant amount of detailed information regarding the rights transfers underlying the film, as well as access to the

pertinent agreements. An E&O Checklist (an example is attached as Appendix III) can be a great aid to producers in confirming that they have done what is needed to acquire the necessary rights. Banks and smart financiers will not finance a film without an E&O policy in place.

5.2 Basic Finance Issues

Securing the complex presales, 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.

5.2.1 Basic Finance Structures

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. Those links will be discussed later, but first comes an examination of general financing issues. Three major financing structures can be identified:

- the Subsidy Finance Model – where direct public finance is the principal 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 Presale 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; and
- the Pure Equity Model – where investors provide the funds (often as part of a tax-advantaged program such as the *Sociétés de Financement de l'Industrie Cinématographique et de l'Audiovisuel* (SOFICA) in France, or the German film funds that provided a portion of the finance for many films during the 1990s including Peter Jackson's *Lord of the Rings* trilogy (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 financing 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 other than 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.

	CAD \$	%
Total Budget	\$200,000	100%
CIFVF	40,000	20%
Canada Council	16,000	8%
Nova Scotia Film Development Corp.	10,000	5%
Nova Scotia Arts Council	12,000	6%
CBC Atlantic	5,000	2.5%
Vision TV	33,000	16.5%
SCN	2,000	1%
Canadian Learning TV	2,000	1%
Rogers Doc & Cable. Fund	39,500	19.75%
Provincial Tax Credit	28,500	14.25%
Producer	12,000	6%
Total	\$200,000	100%

The Presale 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 presales of the territorial distribution rights that can then function as collateral to secure a production loan from a bank. Under a territorial presale 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. Of course, it is hoped that these unsold rights will be sold at some point in the production process or shortly after the film is completed.

Pre-selling the rights to a film has become difficult unless the film is made by a “name” director, has a significant internationally recognized star 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 who have had success overseas such as Jackie Chan, Tony Jaa, Shakira or Maggie Cheung or popular international directors such as Kim Ki-duk of South Korea or Michael Haneke of Germany. 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 US dollars or 1 million euros cannot be pre-sold as the expense of using this method to finance the film is prohibitive. A lack of presales 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.

PRESALE MODEL FINANCE PLAN

Budget: \$2.7 million

Financing Sources

Presale Loan

Gross Presales		\$	2,000,000	
less 20% deposits	20%	\$	(400,000)	
less sales commission	5%	\$	(20,000)	
less CAM fees	0.75%	\$	(3,000)	
Net Presales		\$	1,577,000	
Less Interest and Bank Fees	15%	\$	(236,550)	
Total Presale Loan		\$	1,340,450	Budget

Tax Credit Loan

Republic of Georgia		\$	500,000	
Post credit/deal		\$	75,000	
Total Tax Credits		\$	575,000	
Tax Credit Loan	80%	\$	460,000	Budget

Presales Deposits	20%	\$	400,000	Budget
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Equity Investment		\$	500,000	Budget
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Total Loans and Equity		\$	2,700,450	
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The Equity Model

Although 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 owing to local regulations. In France and some other European Union countries, television stations must contribute a share of their net turnover to the production of European films. Since November 2010, SVOD platforms have had the same kind of investment obligation in France.

In addition to the above, equity can take many forms, including direct investment of cash to the production or in-kind investment by a services provider and even crowdsourcing. Direct cash investment is extremely high-risk and it is very common for investors to lack the level of sophistication necessary to analyze the potential risk of a film investment. Smart investors will surround themselves with knowledgeable experts with specific experience in the film industry, including finance and legal professionals.

In-Kind Finance – Service/equipment providers such as camera/lighting providers, post-production facilities, visual effects and sound labs and even caterers might provide their services free of charge in exchange for a share of the film's potential revenues.

Crowdsourcing – Crowdsourcing used to mean asking friends and family for money to assemble the production budget. These days producers reach out to potential funders (usually “affinity groups” – people with similar interests or an interest specifically in the film topic). 10% of the films selected for the 2014 Sundance Film Festival were partially financed



through Kickstarter and many others benefitted from crowdsourcing (also called crowd-funding). In this model, funds are directly solicited from people through Internet platforms such as Kickstarter or IndieGoGo (which take about 5% of monies raised).

Some major films have been funded in this way, famously including Rob Thomas's *Veronica Mars* (2014) film and Zach Braff's 2014 *Wish I Was Here* (he raised 3.1 million US dollars from Kickstarter and the film sold at Sundance to Focus Features for a distribution advance of 2.75 million US dollars). Even director Spike Lee went to the "crowd" to raise funds for his recent film, "*The Sweet Blood of Jesus*". The most important thing to remember is that this is not an investment source. These monies are essentially a gift from the funders and will not be repaid. There will definitely be no profit participation going to funders. This is an evolving area and there are plans for crowdsourced investments in films. Clearly, filmmakers and the owners of crowdsourcing sites have benefitted from the arrangement and there seems to be no end to the number of people willing to support these projects.

Product Placement and Sponsorship

As discussed in chapter III, product placement deals and sponsorship arrangements have become common sources of revenue and production funds. They are not investments as they are not repaid – they are compensation for tying the advertising of a product or service to a film. This can be in the form of a product being used in a movie (the James Bond franchise is the most blatant example, with Omega watches and either BMW or Aston Martin cars prominently featured). In some cases, the products are featured in exchange for the product being used (and saving the production money) or in exchange for cash payment. Sponsorship directly ties the production itself to a service such as mobile phones or banking and requires that the "sponsor" be named, and their logo featured in advertising and on-screen. The payment might be cash, or the film being promoted in the company's advertising.

5.2.2 Asset Value of Film Copyright

We have been discussing the financing and revenue generation of individual titles from the narrow perspective of that project. The goal of most companies is growth and creating overall value for their investors/owners. To that end, film producers and distributors who have managed to defy the odds and achieve success over many years have created a solid asset value tied to the intellectual property they control.

This asset value is tied to two main factors:

- Existing revenue streams from distribution activities – what revenues are currently being generated from the film? This includes licensing revenues from VOD and TV, ongoing DVD sales, collective management revenues.
- Revenue streams from the exploitation of related rights – what revenues can be legitimately expected from sequels, remakes, character licensing, novelizations, secondary rights collection and even stage productions?

Keep in mind that copyright ownership is not the same thing as the right to derive revenue from a film. To assess the asset value of any property, tangible or intangible, it is crucial to know how that value can be realized and by whom. If a copyright holder has licensed the distribution rights to a third party under a contract that provides a large advance but no future revenue percentage, then no asset value from future distribution can be assigned.

However, if that copyright holder has retained all the related rights, then asset value can be assigned to those rights even though they will see no future revenue from the distribution of the film.

In addition to the potential revenue streams from distribution and related rights, asset value can also be assigned to the reputation of the company



or a chief executive (if they remain with the company). Director/Producer Kunle Afolayan's Golden Effects Pictures in Nigeria is an example of this. There is a reasonable expectation that Mr. Afolayan will produce successful films in the future based on his previous efforts and an assumption that he will remain with the company. Publicly traded companies will often include these amounts on their balance sheets as goodwill. Time Warner, Inc., the parent company of Warner Bros. studio, recorded a goodwill value as of 27.8 billion US dollars (Time Warner, Inc. form 10-Q, March 31, 2018). This is the latest (and last) information on Time Warner – at that point they merged with AT&T.

Asset Valuation of Film Company Holdings for Borrowing and Capital Investment

A reliable asset valuation can be used to secure funding either from lenders or from investors. This is an extremely common practice in the United States, Canada, Europe and Asia. Specialized divisions within banks can provide credit facilities based on the asset value of a company. A prospectus for fundraising from investors will certainly include a value of existing assets as well as a valuation of the long-term value of assets created using the additional capital being sought. In these cases, the asset valuation is subject to a very high degree of scrutiny and not a little skepticism. It is important to provide a sober and realistic appraisal of this value to maintain credibility with potential lenders and investors.

5.3 Co-Production

There are two kinds of co-productions – treaty and non-treaty. The non-treaty co-productions are easy – they are just cooperation between producers from two different countries not based on any government-level agreement. Sometimes they can provide specific benefits granted by one of the countries (if the film meets qualifying criteria). An example would be China, where a co-production might result in favorable distribution terms or

other benefits, whereas no mutual benefits are provided by the co-producing country.

Treaty co-productions are more complicated. 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 maintain no co-production treaties with any other country. The October 2, 1992 European Co-Production Convention outlines the major features of multinational cooperation between European Union countries, but each country has specific laws and regulations governing film financing 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, 2002, many films have been co-produced with the financial support of the French *Centre National du Cinéma et de l'Image Animée* (CNC) 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.

In its purest form, a co-production ("co-pro") is when two (or more) production companies in two (or more) different countries agree to join forces to make the film together. The approach typically entails each company sharing in the artistic, technical and financial resources necessary to make the film and sharing the resulting IP rights *pro rata* of their respective contributions. Whether you are working on a treaty co-pro or a non-treaty (sometimes called a financial co-pro), the important thing is to understand the requirements and legal issues that vary based on treaty considerations, national law and differences in the way the players in different countries do business.



5.3.1 Deciding to Co-Produce

The strategic rationale behind co-production may vary: the principal motivation may be that the story requires it: a script developed in say, Great Britain by a British producer is set in the days of the Indian Raj, with a mix of characters and narrative developments requiring shooting the film in both countries with a mixed cast of British and Indian actors. In this instance, a co-production structure should in theory enable the producer developing the script to find a partner able to (a) access a key Indian cast, (b) raise joint finance in India for the project and (c) hire elements of a local shooting crew which offers the advantage of high-level skills and competitive wages, thereby helping to reduce costs.

The rationale may also, in some cases, be either financial or technical only: in the case of a purely financial co-production, the foreign co-producer has no direct involvement in the development of the script or the management of the production. They confine themselves to arranging financing from their own country and, in most cases, very little of the film is shot in their country. The co-producer may raise public sector subsidies or other benefits available to film production locally. When a co-production is technical only, the foreign co-producer may be unable to contribute a significant amount to the financing of the picture but is working in a country where the technical labor pool and film industry services are competitive, which may induce the lead producer to locate the majority of the production there in order to keep the budget down. In this case, the co-producer plays an important part in hiring a local crew and services and organizing production locally.

Of course, financial considerations often override creative considerations and the producer and director as well as the other creative members of the team must try to work within these restrictions. It is not easy to tell an English-speaking director that their crew will not speak a word of English and that three of their actors must memorize their lines phonetically (and take direction through a translator). It is equally challenging to tell the cast

that they will be flying to Romania. These are not hypothetical situations – they are the way films get made on limited budgets. All is not lost, though, and all parties should understand that these issues result in cost savings to the budget and there might be benefits that can be derived. If you have to shoot in Romania, maybe you can secure an extra week of production, or that crane shot or that VFX shot. If you research the new location, maybe you can find something that can be done cheaply that will really enhance the production (the perfect building, a great local orchestra for music or even an amazing local actor that would be perfect for one of the roles).

5.3.2 Co-Production in Europe

Europe is the region of the world where treaty co-production is currently practiced the most. Many of the smaller European countries have insufficiently-sized domestic markets to sustain film production over and above the low-budget category in all but the most exceptional cases. Consequently, their producers look to other potential partners in neighboring countries to help them finance more ambitious projects. The larger film production countries, such as France, Germany or the United Kingdom, approach co-production with a variety of motivations: the French State actively encourages producers to co-produce films in the French language as part of a consistent policy to support French culture and the French language in Europe. Outside Germany, German is spoken in some Eastern European countries as well as in Austria and Switzerland, which are natural partners for co-productions in that language. United Kingdom producers, on the other hand, bank on European audiences being well-accustomed to watching films in the English language in the cinema and the worldwide popularity of some British stars.

5.3.3 Co-Production Treaties

Whatever the various producers' respective strategies in relation to treaty co-production, they always have the same objective: to obtain national



production status for the film in each of the co-production countries, so that valuable film industry subsidies in those countries may be legitimately accessed and used to finance the film. In most cases, the best way for the film to obtain the nationality of the co-producing state is to go through an official *co-production treaty*.

Co-production treaties are bilateral agreements between two states: many of these link European countries, but many other countries maintain important co-production treaties, with perhaps the most important of those being Canada. Bilateral treaties cover co-production relationships between a European country and an extra-European country – e.g. France has bilateral treaties with approximately 23 non-European countries, including Canada and India. Although these treaties vary in their expectations and demands, they all broadly operate along the same principles.

States want the co-production treaty to enable, over time, the use of labor and services (and the payment of related taxes) in their own country; they do not look too favorably on financial-only co-productions because these tend not to bring a broader benefit in the shape of increased economic activity. Treaties therefore encourage co-producing partners to ensure that a balance is struck as far as possible between their respective financial contributions.

Treaties also require that co-producing partners strive to make their artistic and technical contribution to the film proportional to their financial contribution.

Each co-production treaty specifies the minimum financial contribution required from each of the partners. These typically vary between 30% and 40 %. However, when a co-producer in a third country is involved, through the interplay of other bilateral treaties or under the Council of Europe Co-production Convention, this minimum percentage may be as low as 10% or 20 %.

If these conditions are fulfilled, the production may be given the go-ahead to qualify for national status in both (or more) countries, opening the door to production incentives which may help cover a significant proportion of the budget or provide favorable distribution terms for theatrical or TV distribution.

5.3.4 Elements of the Co-Production Agreement

The co-production agreement between the parties involved is generally a complex and detailed document. It will deal with many of the usual terms in a production agreement, including sources and uses of funds, financial waterfall (sharing of revenues), representations and warranties, responsibilities of each party for distribution and reporting as well as the usual dispute resolution clauses. In each case, the language of the agreement will be governed by local co-production requirements in order to secure whatever benefits are sought. There are a number of specific points to be made within the scope of this course, regarding the main issues surrounding the transactions related to IP rights in the film and how these are normally resolved:

Chain of title – the co-producers must obtain warranties from the lead producer who generated the project that all underlying rights (books, theatrical plays, scripts, etc.) have been cleared and that they have the necessary consents and assignments or licenses to make the film unimpeded.

Cost of Underlying rights – the most basic agreement will make the producer (or producers) responsible for the initial purchase of the underlying rights agree on the means to recover those costs *pro rata* from other co-producers (either in advance or via an agreement for them to recover those costs from the budget or income from the film in first position before their colleagues). Thereafter, the rights to the underlying materials may be assigned to the SPE established especially to manage the co-



production, or they may be licensed to each co-producer for exploitation in their respective territory.

Copyright – The general approach is for the co-producers to share in the rights of the underlying material *pro rata* to their contribution to the budget of the film. Copyright in these materials may be held by the principal producer with the consent of the co-producers: this is more expedient in securing bank financing of the distribution and sales agreements, because all banks will require a lien on the copyright as security against their loans.

As far as copyright in the film itself is concerned, the co-producers will normally share its ownership, to the effect that copyright and all related economic rights belong in perpetuity to co-producer A in country A, and the same for co-producer B in country B. For the rest of the world, copyright will be shared, with all net profit split between the co-production partners *pro rata* to their financial contribution to the budget of the film.

Another possibility is that the copyright in the entire film may need to be the object of a temporary assignment to one or other co-producer who may require it in order to successfully apply for approval of tax incentive funding in their territory.

Soundtrack – all music used in the film must be provided to each co-producer after clearance and cue sheets supplied for use by the local distributor in the co-production country (or countries).

Completion guarantor rights – Although the completion bond company's rights are not IP rights in the strictest sense, their full exercise (meaning that the film has had major problems and the guarantor must step in to complete the film) amounts to a takeover of the film from the co-producers, which in turn will affect their ability to remain in charge of the exploitation rights on the finished film (if the guarantor manages to finish it). The co-producers will include in their agreement an undertaking that the completion guarantor may take over the production and take any measure

necessary thereafter, regarding completion, cost recovery and assignment of rights for security.

5.3.5 Mixed Finance Strategies

The subsidy, equity and presale models are often combined, as will be discussed later. In Europe, films strongly depend on presales 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 euros. The subsidy portion (from the CNC in France and tax credits) was about 600,000 euros and the presales, including the sale of the distribution rights to the French and Belgian co-production partners (which could be considered an equity investment) and other presales concluded by the sales agent contributed the balance of 2.9 million euros.

SUNNY DAYS IN AFRICA

The following hypothetical film case is based on an actual film. It describes the steps of the presale process and negotiation.

A Presale Model

Sunny Days In Africa is a United Kingdom 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, although this is less a factor than in the past.

Funding for the film could be raised through a combination of presales, 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 US dollars (about 7.5 million euros) on the potential success of the



film. Presales 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 United Kingdom novel and will be directed by a United Kingdom producer based on a United Kingdom 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. Those savings will allow them to make the film at a lower budget. They still need about 7.5 million US dollars to finance the film. They have secured 2.5 million US dollars from investors who have previously been well rewarded for investing in other films from this producer. The need for presales and a bank loan have been reduced but not eliminated. The producers must 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 United Kingdom 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 US dollars, but more likely around 150,000 US dollars) 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) and 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 how 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 3 million US dollars’ worth of contracts. The United Kingdom distributor (which will be considered the home distributor, as the producer is based in London) has agreed to pay 1 million US dollars for the United Kingdom rights. That still leaves 1 million US dollars 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.

The No International Presales Model

In some cases, films made outside the larger territories will probably not be able to rely on international presales 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.

Consider two scenarios. In the first, the film is very hot and likely to spark a bidding war among 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 much 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 specified in the agreements. Of course, the producer also needs to watch closely and will try to influence the distribution in ways that will not result just in the best

financial results for that film: a good producer is also always trying to leverage current success to launch the next project.

The financiers of a hot film must 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 United Kingdom 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 US dollars. 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 to 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 website. We should 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 US dollars in interest later in the year). They weigh the options: Sundance is often better for United States 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 ensure 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 himself or 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 their own. Perhaps most importantly, they go into the process with a goal: securing distribution. They get as much advice as possible from trade organizations, the British Film Institute and Film London, sales agents and anyone who can offer good counsel on how to deal with the situation.

Sunny Days arrives at the festival and people are interested in the film. The producer manages to secure a great offer for distribution of all rights worldwide. They will be getting paid an advance and the distribution company wants them to sign a contract. The distributor must require as part of that contract that the producer shows he or she has licensed all copyrights necessary to exploit the film and that he or she has secured or can secure the proper E&O 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 their next film made.

CASE STUDY: *TSOTSI* Finance and Distribution

Narrative Feature Film

Writer and Director: Gavin Hood (South African)

Cast: Presley Chweneyagae, Mofusi Magano, Israel Makoe

Budget: Approximately US\$3.5 million

Producers: Peter Fudakowski, Robert Little and others

Sales Agent: The Little Film Company

South African distributor: Ster-Kinekor

Financing

50% from South African Industrial Development Bank (in exchange for 50% of revenues);

\$100,000 "soft loan" from National Film & Video Foundation

Balance of funding provided by the UK producer from tax-advantaged investment funds.

Market/Festival Premiere

Edinburgh International Film Festival 2005, followed by the Toronto International Film Festival (TIFF)

Awards

Audience Award at TIFF 2005

Oscar, Best Foreign Language Film 2005

Copyright Aspects

- Screenplay based on original novel published in 1980 (Athol Fugard) and optioned multiple times
- Distribution rights licensed to sales agent and then to local distributors
- Copyright ownership assigned to UK investors to qualify for tax break

Development and Financing

Book rights had been optioned by various producers since 1980, with several screenplays written. For various reasons, none of these were produced. At the point our story starts, the right to make a movie based on the book was in the hands of a United States producer who planned to make the film for \$1 million but was never satisfied with the scripts that had been produced. Given that the cast would be unknown young South Africans, it was clear that the screenplay had to carry the film.

UK producer Peter Fudakowski discussed the project with South African writer/director Gavin Hood and found out that Hood had been wanting to adapt the book into a screenplay for many years. Confident that he could secure the rights if he had a strong business plan to move the film forward to production, Fudakowski took a chance and commissioned Hood to write a new screenplay.

The quality of Hood's screenplay so impressed Fudakowski that he negotiated a deal (option agreement) with the United States producer to secure the right to turn the novel into a film. He saw this as a high-quality production that would be interesting for international audiences and set out to secure a sales agent to handle the rights outside of South Africa.

Distribution Preparation and Strategy

The producers decided to bring establish sales agent Robbie Little and his company, The Little Film Company into the process. Little believed that the project had strong international potential, but only if the film received critical acclaim. That meant that no rights would be pre-sold and that the first indication of whether the film would be financially successful would be after all the production money was spent.

Long before that point, though, Little was discussing the film with potential distributors and letting them read the script. There was excitement about the film long before the premiere.

The most important choice was how to introduce the film to international audiences and buyers. The choice was made to premiere the film at the



audience-friendly Edinburgh Film Festival, where the reviews were excellent. Very few buyers attend the Edinburgh Film Festival and it is not considered a “selling festival”. However, Miramax, a major United States independent distribution company and international sales agent, saw the film and made an offer of \$300,000 for the United States rights and another \$1 million for international rights outside of South Africa. This offer was rejected, as the producers were confident that they could do better when a broader audience saw the film at TIFF.

Very soon after being greeted by great reviews in Edinburgh, the film played in Toronto, where buyers and sellers from around the world gather to license rights to some of the most commercial independent films. The film was an official selection of the Festival and the audience response was overwhelmingly positive. Miramax increased their offer for United States rights to half a million dollars and when it won the Audience Award the producers were able to close a deal with them for \$1.5 million, with a commitment to push the film for an Oscar (something Miramax was very good at).

The producers were confident that they could get South Africa to submit the film as their choice for the Oscars.

Financial Results

The TIFF Award also helped The Little Film Company close lucrative licensing deals with strong advances and favorable royalty terms in major territories:

- UK - \$240,000
- France – \$400,000
- Germany – \$300,000
- Italy - \$200,000

In the United States, Miramax worked with the producers to promote the film for Oscar consideration and it ended up winning for Best Foreign Language Film (and paying an “Oscar bump” to the producers of \$100,000). This strategy paid off, with box-office in North America nearing \$3 million.

In South Africa, the producers chose to forego an advance from major distributor Ster-Kinekor in favor of a higher royalty rate. This paid off for them, as the Oscar announcement came while the film was still in cinemas there and drove the producer's share of revenues there to more than \$1 million.



CHAPTER 6

TRACKING AND DISTRIBUTING THE MONEY

This chapter explains revenue distribution and the financial waterfall, revenue tracking and finally accounting and auditing. The role of collective management in the process is also addressed.

Objectives:

- **Understand the main issues related to distributing film revenues to lenders, authors, investors and others**
- **Understand how to avoid problems by verifying business partners and understanding agreements**
- **Understand how to review and verify distribution statements and deciding when to audit**
- **Understand how to gather and utilize available statistical information**

6.1 Film Finance and Accounting

Chapter V discussed various loan structures and finance models. Some of those models require repayment of monies to lenders or investors from distribution revenues. This is a very complex area of the business and usually requires the assistance of specialized practitioners familiar with the film industry. These include entertainment attorneys, accountants, auditors and, of course, the lenders and investors themselves.

Of course, film revenues depend entirely on a film being distributed. That sounds like an obvious concept, but it is surprising how many producers take it for granted that their film will receive distribution. Competition is tough for the limited number of release slots in the marketplace and new technologies have made it possible to produce more films chasing those slots. A total of 3,901 feature films were submitted for the 2018 Sundance

Film Festival in Park City, Utah. Sundance is one of the major acquisition festivals – meaning that acquisitions executives from distributors in the United States and around the world attend to try to find films to release in the coming year. Of the 3,901 submissions, about 110 were selected for screening. A few of those already had theatrical distribution deals in place or were produced by companies such as Lionsgate, which distribute the films themselves. Most came to Sundance hoping for distribution. At least half left Sundance disappointed. Some of those might get picked up later for direct-to-VOD distribution, but many will never receive any commercial distribution – and those were the films lucky enough to be selected. Imagine the odds against the other 3,791 films. Unless a film secures distribution prior to being made, there is no distribution guarantee no matter how much time, energy or money goes into making it.

6.1.1 Loan Repayment

Usually, loans are repaid prior to investors receiving their share of revenues. In other words, the lender is in “first position” in the “waterfall”. The waterfall is the flow of funds from all sources back to lenders, investors, other funders and profit participants – usually in that order. As discussed in chapter V, much of this money might pass through a dedicated collection account at a bank or other financial institution. However, it is more common for funds to be controlled by the financiers or producers. In the case of a loan, the lender will usually want to ensure that funds that should go towards repayment are not misdirected to other uses.

Producers should be very committed to assuring loan repayment if they hope to receive future loans. Loans are not usually based on the performance of a film – that would make them investments. Loans are based on collateral – presales or future subsidy payments and, in some cases, a minimum estimated value of uncommitted distribution rights (the “gap”). It is rare for loan repayment to depend on whether or not a film is released successfully. Also, the faster a loan is repaid, the more funds will



be available from interest reserves that are released by the lender upon full repayment. The producer should keep track of these reserves and be able to track when they will run out – which might require additional investment or could potentially trigger default.

A loan usually matures 12-18 months from the start of photography. If unpaid at that point, it is common for the loan to be extended, provided that it is likely to be repaid and provided there is sufficient interest in reserve. At some point, though, if unpaid, the loan will be in default and the lender will probably have the right to foreclose and take ownership of the movie. In that case, the investors are usually left unpaid, deferred fees and salaries are no longer relevant, and the producer is unlikely to receive another loan.

6.1.2 Deferred Payments

It is quite common for “ATL” participants (producers, writer, director, actors) and some of the sellers, including the international sales agent and the producer’s representative handling the domestic rights, to defer some or all of their compensation. An international sales agent will often defer 50% of their fee and some of their expenses until the bank is repaid. Many of the other deferrals are paid from net revenues after the bank and investors are repaid.

Deferred payments are one of the biggest areas of contention and spawn a large number of often acrimonious disputes. Deferred parties will often see a film perform extremely well and therefore expect deferred amounts long before they are due. Producers are often pressured by investors to limit deferred payments for various reasons. Mostly, though, this is just an extremely complicated area and many of the people involved do not have the appropriate level of accounting or industry expertise to properly administer the payments. Use of a collection account with clear collection account management instructions is one way to avoid these problems.

6.1.3 Investor Payments

Investments usually depend on successful distribution to be repaid. They are most often repaid after lenders and receive a premium either in the form of interest or a fixed percentage of their investment (20% is standard) prior to other people in the waterfall being paid. Investor deals can vary greatly, but a general guideline is that the “money” gets 50% of net profits (after they are repaid their investment plus premium) and the “talent” receives the other 50%. Producers, writers, directors and cast are considered talent in this case and the investors are the money.

6.1.4 Ongoing Author/Performer Remuneration

Actors, writers, directors and composers might receive ongoing compensation in the form of residuals if they are covered by a union/guild agreement, or if such payments are indicated in their agreements. The Beijing Treaty on Performers Rights addresses the concept of equitable remuneration for performers and, as signatory countries adopt local laws in line with the treaty, it is likely that performers will be able to seek a fairer share of ongoing film revenues.

6.1.5 Profit Distribution

As previously mentioned, some of the net profits that are paid to the producer might be directed to the “talent”. Distribution of these monies is controlled by the producer and subject to the contractual terms of the actor, writer and director agreements they have negotiated. It is common for producers to share at least half of their share of revenues with the director, writer and principal cast.

6.2 Avoiding Problems

As expected, a large number of the legal problems that arise are based on the distribution of revenues. There are ways to avoid many of them –



assuming, of course, that the players intend to act responsibly and honestly. Entertainment lawyer Schuyler Moore begins his book *The Biz: The Basic Business, Legal and Financial Aspects of the Film Industry* (Sillman-James Press, 5th edition, 2018) 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 eight 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 eight 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 becomes clear. 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 the film 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 owing 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 can be disastrous.

6.2.1 Transparency

These systems only work when all the players trust the numbers being presented. Even then, it is inevitable that misunderstandings will arise. The more successful the film, the more likely it is to create problems between the profit participants, producers and investors. Transparency is key to

avoiding problems and producers should prudently share as much financial information as possible with interested parties.

6.2.2 Know the Players

The best way to achieve the best results and avoid problems on the business side of the industry (film finance, distribution and revenue tracking) is to make sure you know the people you are doing business with. 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 he or 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 a person claims to hold certain copyrights when in fact they do 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 as true for lawyers at various stages of the process as it is for 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 they are reliable.

6.2.3 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.

6.2.4 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 obtain an updated report about what monies have come in and to collect 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, they 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 spends 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.

By the time the first contractual distribution statement is received by the producer – usually within three months of the initial release, but possibly sooner – it is probably too late to make major changes or force compliance with contractual obligations. Supervision of all of the steps leading up to that first release and subsequent statement are therefore crucial.

6.3 Distribution Statements

Assuming all has gone well leading up to the receipt of the first distribution statement (and hopefully payment), the producer should generally understand what that statement will contain without even looking at it. If there are surprises in the statement, they are likely to be bad (but often involve misunderstandings rather than outright distributor fraud).



In order to illustrate the type of information that would be contained on a distribution statement, here is an example from the release of a film in the United Kingdom:

Revenue breakdown – United Kingdom theatrical (cinema) release of a low-budget British film	Revenues (£)
Total gross box-office receipts over the cinema release period	£4,000,000
Cinema exhibitor's share	(-) £2,840 000
Recovery of distributor's prints and advertising expenses	(-) £1,400,000
Distributor's commission (30%)	(-) £348,000
Net from the cinema exhibition of the film	(-)£588,000

It is quite common in the United Kingdom for a film to lose money in cinemas only to go into profit from VOD, DVD and TV revenues. In this scenario, there was no advance paid for the rights. If an advance had been paid, the distributor would first recoup that amount plus interest from the day it was paid.

In a perfect world with transparent box-office data, the producer can easily verify the gross box-office figure. In the United Kingdom, it is common for the exhibitor (the cinema owner) to take the majority of box-office. In this case, they are taking £2.84 million of the £4 million box-office, or 71%, which is higher than average, and the producer should inquire about the reason for that. The distributor's print and ad expenses were subject to various approvals and caps under the distribution agreement and can also be audited if the producer believes the figures are incorrect (with a small release, of course, it is easy to determine the number of cinemas and therefore the number of prints or digital copies necessary, for instance).

The distributor's commission is usually based on the theatrical "rentals" – the box-office less the exhibitor's share. In this example that comes to £1.16 million. 30% of that is £348,000. Of course, they are not able to receive this money until additional revenues are received, as the entire amount of the rentals was used to pay the cost of the theatrical release. The distributor is allowed to charge interest on unrecouped expenditures, but usually not on unpaid commissions.

Clearly, the theatrical release of the film produced a loss of £588,000. However, that release might have been necessary to generate millions of pounds in ancillary revenues which will more than cover the deficit and return significant revenues to the producers.

That example is limited to theatrical release and very simplistic, but it gives a general idea of the types of concerns a producer should have. Again, it is important that the producer confirm the reliability of the distributor and remain involved in financial decisions such as release size and advertising budgets. They should also understand potential future revenues which may affect those decisions. Distributors will be very sensitive to potential interference (meddling, in their mind) from the producer and that relationship should be handled delicately to avoid conflict.

6.3.1 Reviewing Revenues and Expenses

As mentioned, a producer should already have a good idea of what the expenses will be before they get the first statement. Those expenses should be compared either to the pre-approved budget or to explanations or promises regarding those expenses made by the distributor, whether contractual or not. Any discrepancies should immediately be addressed in writing and through conversations where possible. There are usually clear and reasonable explanations if the distributor is a reliable company. Even the major studios will make mistakes sometimes (strangely, this is almost always in their favor) and therefore it is important to be vigilant.



The revenue picture can be murkier. If the producer is lucky enough to live in a country with reliable box-office information, that can be a good starting-point. However, finding any useful third-party confirmation of ancillary (VOD, DVD, TV) revenues is nearly impossible. Per-unit or transactional information can be studied to determine if it is reasonable. For example, are they claiming their per-unit revenues from DVD copies is less than 50% of what the producer saw it sell for at the local store? It is also possible to discuss these issues with other producers and compare figures. The producer might not like that and there could be reasons for discrepancies, but it could produce some very interesting information.

6.3.2 Compliance

Distribution agreements contain many requirements including release commitments, minimum advertising spends and, perhaps most importantly, advances and royalty reporting/payment. These requirements are often divided into “material” and “incidental”. Breaches of material requirements can result in the termination of an agreement (the practicality of which will be reviewed later), while there might be no consequence for the breach of an incidental requirement such as credit obligations in advertising materials (not that these are not important – they are).

Examples of material terms include almost anything financial (advances, issuance of statements, payment of royalties) or related to the rights granted (violating limits on the rights such as which media are included, territoriality or the term of the agreement). In the case of the breach of a material contractual term, the breaching party is usually granted a “cure period” of between 15 and 45 days to correct the situation before the other party can opt to cancel the agreement (and reclaim the rights previously granted – possibly along with any advances paid).

In the case of the incidental contract terms, the distributor is expected to behave in accordance with the terms of the agreement, but there is little a producer can do to force compliance. For instance, a Japanese distributor

believed that a film in which Sharon Stone appeared for five minutes would sell better if her face were on the poster. According to the contract (Ms. Stone's contract and the distribution agreement), this was not allowed since she was not the star of the film and did not want to make her fans feel cheated. In that case, the distributor was informed that they were out of compliance and agreed to change the marketing material in the future, but there was nothing they could do about the thousands of posters and DVD jackets already in the marketplace. The producer was forced to accept this situation as the breach was not serious enough to be considered material and prompt cancellation of the agreement.

6.3.3 Auditing and Enforcement

Of course, trying to enforce an agreement is more a matter of the personal relationship between the parties than it is a matter for lawyers and courts, and the best way to ensure compliance is to negotiate a fair agreement and to maintain a good relationship and open communication between the parties.

Contracts should include a provision for verifying the accuracy of distribution statements and making sure they are in compliance with the provisions of the agreement. The statement should include a clear accounting of expenses, fees and royalties payable. Usually it is a simple matter to ask a distributor to explain anything that is difficult to understand in a statement. In some cases, though, there may be deeper concerns that are not adequately addressed. In that case, an audit might be in order.

Usually, an audit must be conducted by a certified (chartered) accountant familiar with the industry. The cost of the audit is borne by the producer unless the result indicates an underpayment of at least 5%. An audit is often an aggressive measure and might upset a delicate relationship with a distributor. Enforcement of the audit determination might not be automatic and might even require arbitration or litigation – which can be costly and



might not result in the desired outcome. Dispute resolution is explained in more detail in chapter VII.

6.4 Using Available Statistics

One of the challenges in any business is finding reliable statistics on which to base financial decisions. Investment, budgeting, marketing spends, release media and timing are all affected by available industry data. In many countries, film industry data is so common that it has entered the mainstream. In the United States and Europe, the top ten box office earners are published in mainstream papers and announced on the news along with financial speculation on issues such as budgets, release spends and profitability. In France, the CNC maintains statistics on nearly every film transaction involving production or distribution in France.

6.4.1 Types of Available Statistics

At times, it can seem as if there is too much information available in some countries but in most of the world, even securing reliable box-office information is challenging. A producer needs to secure the kinds of data that will allow them to present an honest assessment of repayment to investors and lenders, make budgeting decisions and properly supervise the revenue generation activities of their film. This information might be difficult to obtain, but an enterprising producer should be able to ascertain the following:

- average box-office for a film similar to the one they are producing;
- average cost of theatrical release;
- standard split of box-office between the cinema and the distributor;
- standard distribution fee charged by distributors;
- DVD costs and revenue potential (if there is still a DVD market);
- amounts paid by various TV outlets (including ad rates if the stations trade ad time for rights);
- VOD revenues realized by similar films; and

- potential revenues from the sale of international rights, including fees and costs.

It would also be helpful to understand statistics related to production budgets and finance sources, such as what an average local budget is and what percentage of similar budgets are funded through grants, TV presales and other sources. One of the biggest mistakes producers make is over- or under-budgeting a film made for a certain release plan.

6.4.2 Statistics as a Basis for Budgeting

In most of the world, budgets are determined by the potential revenues. In other places, the system is affected by subsidies and other support systems, but still has some basis in the potential revenues.

In Nigeria, for example, a film with theatrical potential needs a budget in excess of 150,000 US dollars but is highly unlikely to be able to recoup an investment of more than 400,000 dollars. If a producer decides to make a film where theatrical release is part of the plan for recouping the investment, it would be prudent to remain within that range. However, if the film is going straight to VOD release, the budget should not exceed 75,000 US dollars. Clearly, statistical analysis of the market would indicate that making a film between the 75,000 and 150,000 dollar budget range would be unwise.

This is often the basis for presentations to potential investors and lenders. They want to know the potential revenues versus the costs. Unfortunately, in many cases, the producers pick their statistics carefully in order to encourage investors or lenders to make imprudent choices. Often, the funder will find their own statistics and determine that the producer might not be as reliable as they would like if the numbers are too far off.



6.4.3 Statistics as Basis for Release Plans

Industry statistics are used to determine the size of a theatrical release, the amount that will be spent on advertising, the number of DVDs to manufacture and the schedule for release windows. In some cases, a film is test-marketed a number of times prior to release and the statistical results of those tests can determine whether a film is released theatrically or straight-to-VOD or TV.

Since release costs can often exceed production budgets, proper analysis of release statistics can determine whether a film is profitable or loses money. Producers should understand how statistics are used to determine the release budgets, how demographics are used to determine target audiences and the impact this has on costs.

A distributor might decide, after analyzing all available data, that the cost of a theatrical release will never be justified by the increased revenues and that the film should therefore go directly to VOD or TV. This is understandably difficult for a producer to accept, but unless they have an independent source of funding for the release, they are usually at the mercy of the distributor's determination. It is always better if the producer is able to understand how the statistics were used so they can either gracefully accept the decision or fight it.

6.4.4 Using Statistics to Analyze Distribution Statements

As previously discussed, the producer should be able to use statistics to analyze their distributor's statement. For example, if a distributor claims that 1,000 US dollars was spent duplicating DVDs and the producer knows that the average cost of duplication is 10 cents per unit, then it can be assumed that they made 10,000 copies. If the distributor claims to have only sold 7,000 copies, they should be able to explain either (1) why they overpaid for duplication or (2) what they did with the other 3,000 copies. It is not uncommon for distributors to "pay" full-price for duplication only to receive a

“rebate” or discount at the end of the year from the manufacturer. Of course, they should account for that discount to the producer, but the producer will not even know what happened unless they analyze the data and have good underlying information. It is nearly impossible for the producer to know how many DVD units are sold outside of knowing how many were made. Most distributors are honest, but it is good for producers to do their homework and help keep them honest.

6.4.5 Guild Payments and Collective Management

Perhaps the biggest users of statistics and sometimes the best sources are talent guilds and CMOs. We discuss CMOs in detail in chapter VIII, but for the purposes of this chapter, it should be noted that guilds and CMOs use staggeringly complex statistical analysis to determine what amounts should be paid to authors and rightholders.

If properly registered with a CMO, a producer will receive statements that indicate amounts of money derived from certain types of exploitation. Writers, directors, composers and actors might receive residual payments based on release of the film in various media. These data points, combined with an understanding of how the amounts were determined, can let people know if a film was aired on TV in Europe or released in a medium that was never licensed to a distributor.

CASE STUDY 1: FOOL EL SEEN EL AZEEM (2004)

Presale Finance

Narrative Feature Film

Director: Sherif Arafa

Writer: Ahmad Abdullah

Cast: Mohamed Henedi, Hajjaj Abdul Azim, Soleiman Eid

Producer: Mohammed Ramzy

Budget: US\$1.8 million

Copyright Aspects:



- Using the presale of distribution rights for finance purposes
- Distribution windows

The example which follows illustrates vividly the role of international presales in the making of a higher-budget film and exemplifies the sometimes complex arrangements required to ensure that each buyer can secure an adequate “window” of exclusive exploitation.

The film, *Fool el seen el azeem*, is an adventure comedy-genre film released in 2004 to critical acclaim and with excellent commercial results. The film charts the comical mishaps suffered by a hapless Egyptian chancer who runs into trouble with a gang of local hoodlums. Having fled to China, he is recruited against his will into a cooking competition, despite never having cooked in his life. In the process of trying to save both his life and the remnants of his dignity, he finds the time to fall madly in love with a local girl.

This type of family comedy with a romantic twist can be extremely popular both in Egypt and the rest of the Arab-speaking world. The main producer, Mohammed Ramzy, budgeted the film at US \$1.8 million, with an additional \$200,000 in marketing and prints costs to support the release of the film in Egyptian cinemas. By the standards of most of the world’s film industries outside the US and Europe, this was a big budget film. Most movies in the Middle East are made for half – or much less than half the cost.

Table 4: Presale Revenues - *Fool el seen el azeem**

	US \$	Budget%
Producers’ advance against Egyptian cinema release rights (theatrical)	1,045,000	51%
Gulf area theatrical and DVD/video rights	400,000	19%
Theatrical and video/DVD Jordan/Lebanon/Syria	10,000	0.5%
Egyptian DVD/video rights	30,000	1.5%

Rest-of-the-world DVD/video rights	20,000	1%
Total theatrical and DVD/video	1,505,000	75%
Free-satellite rights Arab region	150,000	7%
Pay-satellite Arab region (3 runs – 3 different satellite channels)	250,000	12%
Total satellite TV rights	400,000	19%
Free TV Egypt	35,000	2%
Other Arab free TV (10 channels)	35,000	2%
Total free TV rights	70,000	4%
Grand total pre-financing	1,975,000	99%

*Used with permission from Mr. Mohamed Ramzy, Chair, United Artistic Group, Egypt.

The above table shows in detail how the film was financed using a combination of local rights and international presales. Only about 55% of the film's budget came from Egypt, with the balance coming from presales to other territories and pan-Arab satellite TV operators. Looking more closely at the detail, other issues emerge:

- The total amount raised, \$1.975 million, did not cover the budgeted total of \$2.09 million. However, the latter figure included \$200,000 in Egyptian cinema release costs (prints and advertising) of which the producers were required to cover only 10% in advance. The balance would be earned back by the local distributor from first local cinema revenues.
- A massive 52% of the budget came in the form of an equity investment against returns on Egyptian cinema release revenue only. The producers put up some of their own capital and assembled a portfolio of investors across the Arab region. Investors were to recover their funds in first position on Egyptian theatrical, with an additional profit share between 5% and 30%.
- Egyptian video rights represented only 1% of the total raised by the producers. This is mainly owing to piracy in that market.



- Egyptian free television rights were also sold for a very small sum (1% of budget), owing to budgetary limitations of much public television in Egypt and the rest of the Arab world.
- In contrast, cinema and DVD rights for the Gulf region were quite valuable, contributing 19% to the budget. Piracy was not as big a problem in that region and the cinema market was strong for Arabic films.
- Pan-Arab satellite operators typically cover the entire region. They are financed out of a mix of subscription and advertising, depending on whether they are freely available over the air or encrypted.
- The producers negotiated rights for two free-satellite windows: Melody, an Egypt-based operator licensed the first window, while Rotana in Saudi Arabia licensed the second run. These two sales combined brought in 7% of the budget.
- Encrypted satellite rights were licensed to three different operators combined with a multiparty deal on exclusive windows: ART, a Jordan-based pay-channel, had the first window with a year's holdback; Showtime was allocated the second window while the third window went to ORBIT, which broadcasts out of Italy into the Arab region.
- Free television in the rest of the Arab region had little value, with presales to ten different channels bringing in only 2% of the film's budget.
- Sales of rights for the rest of the world were predictably limited.

The *Fool el seen el azeem* story illustrates the considerable value of regional rights in a producer's strategy. The appeal of *Fool el seen el azeem* in this respect was due in part to the popularity of Egyptian screen stars across the Arab world, but also to the fact that the movie was designed to be a broad popular comedy appealing to a common denominator of taste among Arab audiences as a whole. The majority of films are in fact extremely difficult to pre-sell outside their country of

origin, because their cast may be unknown beyond their national borders, and/or the subject matter may be deemed too narrowly local for international buyers. However, regional film communities (usually united by both language and shared culture) can provide lucrative export opportunities.



CASE STUDY 2: CRUCIFIXION IN SPAIN

Revenue Accounting and Distribution

Narrative Feature Film

Director: Russell Mulcahy

Cast: Christopher Lambert

Licensor: Interlight Pictures, Inc.

Spanish distributor: Aurum Pictures, SA

Theatrical Release Date: June 8, 1999

Statement Date: June 30, 2013

Copyright Aspects

- Transfer of distribution rights
- Contractual payment for copyright use

Distribution Contract Financial Terms

The Advance Minimum Guarantee will be recouped by the Distributor from Licensor's share of revenues.

Theatrical

From theatrical revenues (rentals) – 35% fee to distributor until recoupment of Recoupable Distribution Costs (P&A). P&A recouped from 65%. After recoupment of P&A rentals split 50/50. If any P&A is not recouped from theatrical revenues then it is recouped from Licensor's share of future revenues.

Home Video/DVD

Rental Units Sold: Net billings (with no expenses deducted) shared 25% to Licensor and 75% to distributor.

Sell-Thru Units Sold: Net billings (with no expenses deducted) shared 12.5% to Licensor and 87.5% to distributor.

TV (including Pay-Per-View, Pay TV and Free TV)

30% fee to distributor with the balance 70% to Licensor with no deductions.

CHAPTER 7

DISPUTE RESOLUTION

This chapter addresses the unfortunate need to resolve disputes between various stakeholders, including the authors/performers, the financiers, distributors and others. Various methods of dispute resolution are discussed, along with the pros and cons of each. Finally, enforceability of these decisions is addressed in practical terms. Of course, lawyers are the principal players in dispute resolution but there are many experts who are involved to determine the facts of the dispute (which are not always as clear as they should be). These include auditors, accountants, experts in standard custom and practice and contract professionals, including agents and managers. Some of these experts might offer expert testimony during the dispute resolution process.

7.0 The Nature of Disputes in the Film Industry

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 owing 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 section.



Generally, film disputes fall into just a few categories, with the most common being disputes over the allocation of monies earned or the non-payment of monies due (including alleged fraudulent investment opportunities). It is also common for there to be disputes related to adherence to non-financial aspects of contracts (most commonly, violation of release or other exploitation obligations), misuse of copyrighted material (including plagiarism) and violation of contractual terms related to name and likeness restriction or other credit obligations.

7.1 Court Litigation

7.1.1 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 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 resolved 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.

7.1.2 Applicable Law and Jurisdiction

Parties must agree on the law applicable to the distribution agreement. Such choice is normally recorded in the distribution agreement. For example, if a Russian producer licenses distribution rights to a United States distributor, the parties may agree that United States (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 its 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 judgements. 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 rightholder of a film, they must be willing to discuss conditions of theatrical release and the possibility of allowing a global distribution deal with a third party (*Ucore versus Europictures Distribution* – French Supreme Court, May 27, 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 subdistributors (*Procidis versus AAA* – French Supreme Court, February 13, 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's *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 euros 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 euros (*Terre Sud Films versus Pierre Grise Distribution* - French Supreme Court, February 6, 2007).

Keep in mind that decisions in one jurisdiction have little or no impact on decisions in another jurisdiction. It is always important to understand under which set of laws or precedents contractual terms will be interpreted.

7.1.3 Disadvantages of Court Litigation

Unlike in 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 judgements, unlike in arbitration, where such instruments exist.

7.2 ADR

7.2.1 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 recommended WIPO clauses in Annex IV).

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. 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 hold 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 on preserving their professional relationships.

7.2.2 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.

Mediation can be combined with arbitration or other ADR procedures and is often attempted during or after court litigation.

7.2.3 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 Annex IV.

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 judgements. The New York Convention has 159 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 of it. This is one of the reasons why the enforcement of arbitration decisions tends to be relatively efficient.

7.2.4 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.



7.3 WIPO ADR Options for Film and Media and CMOs

7.3.1 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 more than 600 mediation, arbitration and expert determination cases. Most of these cases were filed in recent 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 CMOs, as further explained below.

7.3.2 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 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. A total of 70% of WIPO mediations have resulted in settlements. Also, 40% of cases submitted to WIPO arbitration were settled, while the rest ended in final, enforceable awards.

The WIPO Film and Media Rules are available at the WIPO Center's website in different languages at <http://www.wipo.int/amc/en/film/rules/>. A general explanation is provided at <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 <http://www.wipo.int/amc/en/publications/>.

WIPO Film and Media Panel of Neutrals

For disputes under the WIPO Film and Media Rules, a special international WIPO Film and Media Panel of neutrals has been established, including mediators and arbitrators 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 of Neutrals. 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 of Neutrals that have the relevant expertise for the particular dispute. The parties can 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.

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.

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 IV and are also available in different languages online at www.wipo.int/amc/en/clauses.

WIPO ADR Procedures for Certain CMOs

The WIPO Center provides specialized procedures for certain CMOs involving film producers and distributors, which may be of interest to

stakeholders in film production and distribution as they regulate disputes between rightholders 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 rightholders that could not resolve their disputes in a first mandatory phase of an AGICOA recommendation process (www.wipo.int/amc/en/center/specific-sectors/agicoa/expedited-arbitration). The WIPO Expedited Arbitration Rules for EGEDA (*Entidad de Gestión de Derechos de los Productores Audiovisuales*), the Spanish CMO representing audiovisual producers, work in a similar way (see www.wipo.int/amc/en/arbitration/egeda/). Both procedures are particularly efficient, as the arbitral awards are immediately enforced by the CMO which releases the blocked royalties in accordance with the award.

7.4 Other Options

Many other institutions provide general arbitration services, such as the International Court of Arbitration within the International Chamber of Commerce, the London Court of International Arbitration and the American Arbitration Association (AAA). However, only a few institutions, such as the WIPO Arbitration and Mediation Center and the 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 500 million US dollars 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 versus Audiovisual Enterprises SA – IFTA Final Award*, February 2010). In addition to compensatory and punitive damages, the IFTA arbitrator can forbid the losing party from participating in the AFM if the 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 <http://www.ifta-online.org/recent-awards>.

**CASE STUDY: SPIKE LEE'S *MIRACLE AT ST. ANNA* (2008) –
FINANCE/DISTRIBUTION LAW SUIT**

(Quoted with permission from an analysis written on certain aspects of the case by Mr. Ezra Doner, Attorney, New York City, USA)

Narrative Feature Film

Director: Spike Lee

Writer: James McBride based on his novel

Cast: Derek Luke, Michael Ealy, Laz Alonso

Budget: Approximately US\$45 million

Distributors: TF1 International – Worldwide outside of North America and Italy

RAI Cinema – Italy

Touchstone Pictures/Disney – North America

Production Companies: 40 Acres & A Mule Filmworks

On My Own

Rai Cinema

Touchstone Pictures

Copyright Aspects:

- dispute resolution clauses in finance/distribution contracts;
- choice of venue/law clauses in contracts;
- contractual delivery issues;
- moral rights; and
- enforceability of court judgements.

On June 21, 2011, a French court awarded Spike Lee and associated plaintiffs a judgement against French media giant TF1 in the amount of €32 million (approximately US\$43 million at currency rates prevailing at the time). The Court ruled that TF1 had wrongfully rejected delivery of Lee's film *Miracle At St. Anna* (hereafter, *Miracle*), failed to pay Lee the minimum guarantee in the amount of US \$11 million, and refused to distribute the picture in TF1's territory, which was worldwide outside of North America and Italy. Shortly after the decision, the parties reportedly settled.

Underlying Facts:

Pursuant to a 2007 deal memo, Lee pre-sold to TF1, a major French media company, worldwide distribution and sales agency rights to *Miracle*, excluding the United States, Canada and Italy. The US\$11 million minimum guarantee was to be payable 5% on signing and 95% on completion of delivery, in accordance with picture specifications. Key specifications for *Miracle* included that it would be 95 to 120 minutes in length and based on an approved screenplay.

In late March 2008, Lee screened a three hour cut for the financiers. Shortly thereafter, having made requested changes, Lee screened a new version for the financiers, which ran two hours 35 minutes. (Hereafter, picture lengths will be designated in the form 2h 35m.)

In late September 2008, the Walt Disney Company theatrically released a 2h 40m version of *Miracle* in North America, to extremely disappointing box office results. In early December 2008, Spike Lee's company formally demanded that TF1 pay the minimum guarantee for the TF1



territory. The following day, TF1 formally rejected delivery of the picture and refused to pay the minimum guarantee, on the grounds that the 2h 35m version that Lee delivered exceeded the contractual maximum, and that an alternate, 1h 56m version that Lee also delivered, while below the contractually stipulated maximum of 120 minutes, did not sufficiently conform to the approved screenplay.

Judgement of the French Court:

In its decision, the French court held that Lee's 1h 56m version did conform and that, in any event, TF1, by its conduct, had waived its right to object to the 2h 35m version. The conduct cited by the Court was that, between March and mid-July, 2008, TF1 did not object to the length of the picture; TF1 cooperated in the screening of the long version at the Deauville and Toronto Film Festivals as well as the Paris Cinematheque; and that TF1 had commenced dubbing and subtitling the long version of the picture for exhibition in its territories.

Moreover, the Court took issue with a statement in a mid-July letter TF1 sent to Lee, that the company was "surprised to discover that the film, which was supposed to run no more than 120 minutes, instead ran 145 minutes." The Court noted that since March of that year, TF1 had been aware of the film's length. Finally, the Court rejected TF1's position that the company could elect to use either the short or long version of the picture, depending on the reaction of international distributors.

Curiously, however, the Court did not address how Lee came to produce and deliver a 2h 35m version – 35 minutes longer than the contractual maximum, and a full one hour longer than the contractual minimum.

Producing and delivering a 2h 35m picture is, in significant ways, different than producing a 95 to 120 minute picture.

CHAPTER 8

USING AND BEING PART OF COLLECTIVE MANAGEMENT AND TRADE ORGANIZATIONS

This chapter discusses the various organizations that exist to support individual authors, performers, distribution companies and other entities most effectively participate in the global film economy. More detailed information on the topic can be found in WIPO Educational Material on Collective Management of Copyright and Related Rights in the Film Field.

Objectives

- **How collective management works**
- **How they can benefit from CMOs**
- **How to apply for and receive monies from CMOs**
- **Which organizations are part of the CMO world**

8.0 Role and Importance of CMOs

It is because publishers and theaters did not rightfully appreciate the authors (and by extension the value of their copyright), that some proactive authors decided to step up and to rally on their own to challenge the way their rights were dealt with. One of the very first to stand up for the “cause of copyright” was French playwright, Beaumarchais, author of the acclaimed “The Barber of Seville.” On July 3, 1777 he organized a small group of writers to form a “Society of Dramatic Authors.” This society went on to become what is now the SACD, which collects secondary payments for secondary uses on behalf of their 40,000 author members.

Today, more than 500 CMOs from more than 120 countries represent millions of creators in all creative fields. These CMOs function in a global network and are members of international associations such as AGICOA,



the International Confederation of Societies of Authors and Composers (CISAC), the International Federation of the Phonographic Industry, the International Federation of Reproduction Rights Organisations and the Societies' Council for the Collective Management of Performers' Rights (SCAPR). These groups promote the rights of creators worldwide by advocating strong legal protection for copyright and related rights and support a network of CMOs, also known as authors' societies, copyright/royalty CMOs, collecting societies or performing rights organizations. According to the 2018 CISAC annual report, these entities collected about 10 billion euros in royalties in 2017 (about 87% from music use) in their respective national territories. Of that, more than 600 million euros was collected for audiovisual works, an increase of about 30% from 2013. A full 91.5% of audiovisual collections originated in Europe. Transparency is crucial to the proper functioning of CMOs, and therefore in-depth analysis of this data can be found on the websites for the above entities.

8.1 The Principle of Copyright Royalty Collection

Owing to the variety of distribution channels available in the digital age, individual management of copyright is usually not appropriate or possible for copyright holders. Therefore, it is usually necessary for authors and performers to transfer the right to take action against infringement and to collect secondary rights money to CMOs.

The underlying idea of collective rights management is widely shared and CMOs play a key role in all developed and developing countries. Because of historical, legal, economic and cultural similarities and differences among countries, as well as differences in market conditions, regulation of CMOs varies broadly from country to country. In Europe, CMOs usually require their members to transfer exclusive administration rights to all of their works. The United States and Canada have less restrictive rules, as members maintain their rights simultaneously with CMOs, which are also

called performing rights organizations. The authors/performers involved in feature film creation will find some advantage in collective management, because they are rarely in a position to effectively control the way their IP assets (the film as a collective work and all its components) are used by third parties and end users and secure remuneration.

8.2 Different Approaches to Managing Film Rights: Individual Contracts, Guilds and CMOs

The two main approaches are a system based on contracts and a system based on collective management. Contracts can be individually negotiated or collectively bargained between representatives or creators/performers and producers.

8.2.1 Individual Contracts

Contracts between an individual creator and a producer govern, among others payments, working conditions, transfer of rights and any subsequent remuneration that the producer pays to the creator. It is customary for the creator to receive an up-front payment for their work and rights specified in the contract. The contract can further specify what kind of subsequent payments are due and on what basis.

It is then the responsibility of each producer to track the exploitation of the film and report and pay subsequent remuneration that may arise from specified areas where extra remuneration is due. In some countries, unions representing creators have negotiated model agreements to be used as a guideline in individual negotiations.

8.2.2 Collective Bargaining Via Guilds

In countries such as the United States, where the producers are deemed to be the author of a film work, the payment and working conditions of creative collaborators are determined by collective agreements negotiated between



professional guilds and producers' associations. Guilds act on behalf of creators in a similar way as do labor unions; they negotiate, enforce and administer collective contracts that establish the minimum terms and conditions for all work being made by their members. Based on the size of their entertainment industry, the guilds are powerful in the United States.

Union requirements establish the salaries and general employment terms for creative collaborators, the transfer of usage rights and royalty payments that are due to creators following the initial release of a work, called "residuals". The guilds handle any disputes and use their collective negotiation power, including strikes, if they are not in agreement with a proposal set put forward by producer's organizations such as the Alliance of Motion Picture Producers and Distributors (the AMPTP). The WGA, the DGA and the SAG are examples of guilds negotiating with producers' organizations.

The negotiating power of guilds depends on various factors including the level of organization of groups within the industry as well as the financial strength of the local production and distribution sectors. In many countries, rival guilds and producer organizations deprive the participants of the power that only solidarity can bring. In other places, the financial incentives to work as a professional in the film industry (because of low potential revenues from distribution or production activities) make collective bargaining and organization efforts challenging.

8.2.3 CMOs

In countries where the copyright law provides certain exclusive and remuneration rights, film creators can transfer the management of their rights to a CMO that collects and distributes royalties on their behalf for mandated uses of their works. The CMOs negotiate licensing contracts for such uses and also establish tariff rates with users such as broadcasters and cable companies. The range of rights managed collectively varies from

country to country and it is subject to the country's financing, production and distribution infrastructure.

Even in countries that provide a collective management framework for authors' rights, working conditions, including any up-front payments and transfer of rights, are set out in a contract signed with the producer. Not all creators have equal negotiating power, and this is addressed through statutory protection, CMOs and/or unions. CMOs usually offer legal support to their members to ensure that the terms of their contracts are in line with minimum standards set by the CMO for its members.

Even in countries where CMOs are more prevalent, film unions also remain active on behalf of their members. For example, in the Nordic countries, unions negotiate collective agreements, including terms of collectively managed rights and remuneration.

8.3 Basic Rules of CMOs

A CMO is a body, created by rightholders and based on copyright law, usually (but not always) by private agreement, that establishes the organizing rules for the membership of authors/performers or other copyright holders willing to bring their IP assets to the structure.

CMOs then have full authority to license copyrighted works and to collect royalties, depending on the respective jurisdiction, as part of compulsory/mandatory/statutory licenses or individual/contractual/voluntary licenses negotiated on behalf of its members.

CMOs administer all rights management tasks for the collectivity of the authors/performers who are members: selling non-exclusive licenses to end users such as TV or radio networks, shopping malls or Internet platforms; distributing collected royalties to their members; negotiating license fees for public performance and reproduction; and enforcing the rights transferred by the members. The blanket licenses sold by the CMO will grant the right



to perform their catalogue for a period of time. Such a license might, for example, provide a broadcaster with a single annual authorization encompassing thousands of songs. For example, Apple must submit the download reports for the iTunes Store, which are used to determine their royalty payments to the CMOs managing specific catalogues.

In order to be more effective on a worldwide market, each CMO will also enter into reciprocal arrangements with other CMOs in other countries so that its own members' assets are administered abroad. CMOs will also be closely involved in public affairs, acting as powerful lobbies to protect their members' rights and interests.

8.4 CMOs and Blanket Licensing of Internet Exploitation

In the digital era, fighting unlawful behavior is one way for CMOs to force some online distributors to enter into large agreements that are, for the authors, new sources of revenue stemming from the exploitation of content. For example, the general agreement between the French CMO for music, SACEM, and YouTube on April 3, 2013, has reinforced the idea of copyright while providing for the required "equitable remuneration". The YouTube agreement makes a large catalogue of protected works available for distribution by YouTube on their platform in 127 countries in Europe, the Middle East, Africa and Asia. This agreement has led to greater transparency, coordination and data-sharing between the organizations while ensuring equitable compensation for rightholders, who are entitled to a share of the platform's revenues.

Audiovisual authors have been requesting a mandatory right to remuneration for the exploitation of their works by VOD services, collectively managed. Switzerland and a few Latin American countries like Chile have recently granted this right. Platforms which are offering VOD services in Switzerland will now have to get a license from the audiovisual authors' CMOs.

It should be noted that Netflix applies a flat-fee model when producing outside the United States unless local legislation prevents it from doing so.

8.5 Various Types of Licenses for Collectively Managed Primary and Secondary Rights

Irrespective of the copyright system, there are certain exploitation areas where collective management is a feasible solution, and, in some cases it is the only option, owing to the concept of obligatory (mandatory/statutory, depending on the jurisdiction) collective management.

In a few countries, CMOs manage primary exploitations on behalf of their members independently of direct licensing by the producer. For example, CMOs can be entitled to collect remuneration for television broadcasting. In some countries including Spain, Italy and Poland, the broadcaster as the final distributor is considered by law to be responsible for payments to the authors and performers. These are paid through CMOs.

Collectively managed rights, however, refer in most cases to revenue paid to rightholders for subsequent uses after the primary exploitation. These can include private copying remuneration, rental or retransmission of broadcasts via cable and/or Internet usages (e.g., video on-demand, streaming, webcast and simulcast). These rights can be subject to collective management, and in some countries they are subject to obligatory collective management.

In the film field, CMOs have been established to help rightholders to manage their rights collectively. The role of CMOs varies greatly in different jurisdictions and countries. Their scope in terms of representation of rights and rightholders is diverse, for example:

- CMOs for creators, mainly directors and screenwriters;
- CMOs for performers, such as actors and dancers;



- CMOs for film producers; and
- CMOs representing all rightholders or a mix of them.

Whereas film CMOs are relatively old phenomena in some developed countries, many developing countries are currently considering how collective management could contribute to the economic development of their film industries. Local infrastructure, social, economic and cultural and legal parameters are decisive when a country is considering the most appropriate solution. There is a wealth of experiences to draw on from and countries should examine the positive and negative results of the CMO systems in a variety of countries to develop the system that is best for them. In all cases, it is important to ensure that the producer is in a position to finance, produce and distribute the film work. There are various ways of organizing additional or subsequent payments to key contributors.

8.6 Film Rightholders and Management of Film Rights

Films were added to international copyright conventions as independent artistic works only in 1948. The determination of who is a rightholder in a film is a matter for national legislation. International protection of film performers dates back to 1961. The Beijing Treaty on Audiovisual Performances updated the international protection of performers in 2012.

The main groups of rightholders in filmmaking are creators, performers and film producers. In international copyright conventions the term “cinematographic work” is used instead of film. In this chapter, however, the term film is used throughout.

The author of a film work has never been specifically defined in international copyright conventions. Authorship is therefore determined by national and regional legislation, which in turn depends on a number of cultural and economic factors.

The term “rightholders” in films customarily includes creators, performers and film producers. Creators can include authors of preexisting works, such as the writer of a book a script is based on and a composer of a preexisting song. Directors and screenwriters as well as composers of music composed especially for the film can be authors or co-authors of the film work, subject to national legislation. Some countries’ laws include special provisions concerning authorship and/or transfer of rights to film producers. A contract between a creator/performer and a film producer specifies working conditions, transfer of rights to the producer and payments due to the creators/performers.

Creators receive different types of payments for their work. Many creators receive an up-front payment from the producer for their contribution to a project, whether it is a script, a score or the work involved in directing. They can also receive payments for subsequent uses of their works, depending on the terms of their contract with the producer. These contracts can be individual or collectively bargained by authors’ and performers’ unions.

In common-law countries, a system where the producer holds all rights to the film production prevails. This is the case in the United States pursuant to the work-made-for-hire doctrine. In the United Kingdom and Ireland, the producer and the principal director are “authors”. This is substantially the same in most countries in the Asia-Pacific region. In Latin America, there is a system of co-authorship for audiovisual works whereby directors, screenwriters and music composers are deemed to be co-authors. The rationale behind the common-law approach is that the production company makes a substantial financial investment and there is a need to have flexibility in marketing the work. Producers maintain all copyright-based rights and are entitled to the profits of the production, subject to their contractual obligations. For example, according to United States law, the producer is deemed to be the sole “author”. Individual contracts and collective bargaining agreements between creators and performers on one hand and producers on the other determine what remuneration is paid to



the creative personnel. It might be in the form of up-front payments and a subsequent percentage share of revenues. These additional payments are called “residuals” in the United States. In Africa, most countries abide by the system of law instituted by previous colonial regimes. In French-speaking countries such as Burkina Faso and Senegal, there are specific authorship rules for audiovisual works reflecting the civil-law system – listing co-authors of the work, whereas English-speaking countries such as Kenya, Nigeria and South Africa utilize the common-law system cited above.

In other countries, the actual creators are the authors or co-authors of a film, meaning that they have separate copyright rights. This system is prevalent in civil-law countries, including much of continental Europe and parts of Latin America such as Argentina, Brazil, Mexico and Peru. The actual creators are determined by national legislation and usually include a combination of director, screenwriter and music composer, but can include other contributors such as directors of photography, editors and costume designers. In these countries, some rights are managed by CMOs which are mandated to administer certain remuneration rights. In some respects, this system of remuneration rights could be considered analogous to the remuneration allocation (residuals) system in the United States.

Where national legislation provides exclusive rights to authors and performers, these exploitation rights are almost always transferred to the producer. National legislation may include a presumption of transfer of rights if a film contract is concluded. In some cases, national legislation provides a right to equitable remuneration where the right itself has been transferred to the producer. Remuneration rights may be managed by CMOs. Presumptions of transfer tend not to apply to remuneration rights and moral rights which are usually inalienable and unwaivable. Some countries, such as France and Spain, have a statutory presumption of transfer in favor of an audiovisual producer, which is rebuttable.

There are still many countries where the copyright framework does not adequately protect creators and producers. Capacity-building and development activities of WIPO and non-governmental organizations, like CISAC, aim to improve the situation. As previously noted, the 2018 CISAC report states that in 2017, 91.5% of A/V collections came from Europe, 7.4% from Argentina, and the remaining 1.1% from the rest of the world (including only 0.1% from the United States and Canada).

Authors

Films may include preexisting works. For instance, it has become popular to base a film script on an existing novel. Music can be especially composed for the film; alternatively, the film can include a number of existing musical works that support the storyline. A permission to use preexisting works is a prerequisite for filmmaking. The clearance of music rights in films can take many different forms, depending on the country.

“Authors who have brought contributions to the making of the work” is the guidance given in the Berne Convention for countries to decide the concept of an author of a film work. In some regions, such as in the European Union, directives have established that at least the following are regarded as authors or co-authors of a film:

- the principal director;
- the author of the screenplay;
- the author of the dialogue; and
- the composer of music specifically created for use in the film.

Performers

Performers in films include actors, dancers, singers and musicians. The main international convention in the field of related rights, generally called the Rome Convention, establishes international protection for performers,



phonogram producers and broadcasters. However, the protection in the film field is considered by some to be insufficient. Consequently, discussions at WIPO led to the adoption of the Beijing Treaty on Audiovisual Performances (Beijing Treaty) in 2012 and its entry into force in 2020. The concept of performers' right is discussed in more detail below.

Film Producers

The position of film producers is twofold. In some jurisdictions, film producers are considered as “authors” of films. For example, in the United States, the producer holds the copyright in the work and is deemed therefore to be “the sole author”. In other jurisdictions film producers base their rights on transferred rights from creators and performers. National law may include presumptions concerning transfer of rights when a film contract is concluded or provisions on transfer of rights for employed authors. Moreover, producers hold related rights in many jurisdictions.

In all instances, producers have a central position in the film sector because contracts between them and creators and performers play a central role in the production of the film. Main exploitation rights are customarily transferred by law and/or contracts to producers (usually to an SPE, as discussed in section 3.1 of the Introduction), who in turn can market the works effectively to various uses and markets throughout the world. In these contracts, it is important to make a distinction between transfer of exploitation rights and remuneration that will be paid to creators and performers.

Rights are customarily exploited by the producer, who concludes contracts with distributors and others who market films domestically and abroad. It has been considered important that film producers have major exploitation rights in order to attract financing for the film from distributors and broadcasters as well as from possible financiers.

Management of Remuneration for Creative Personnel

In many common-law countries, producers pay remuneration to the creative personnel based on contracts that are either individual or collectively bargained. Remuneration for various subsequent uses (after the “primary exploitation window” – often the theatrical release) is called “residuals” in the United States. The role of guilds representing scriptwriters, directors and performers is important in this system, as the guilds negotiate the basic terms of employment and remuneration – salaries above guild minimums are obviously negotiated individually.

In many civil-law countries, such rights are managed by CMOs for all or some of the uses. Unions exist also in civil-law countries, and in some countries there is a combination of collective bargaining agreements, including residuals and remuneration rights managed by CMOs.

In some cases, the concept of an unwaivable (and therefore non-transferable) right to remuneration is introduced to guarantee equitable payment to film creators and performers in cases where their relevant exploitation rights are transferred to film producers. This is the case, for example, with rental right in the European Union. The fact that the right is constructed as unwaivable ensures that creators/performers actually receive payments whether through direct contracts or collective management.

8.7 Legislative Framework

A film is the product of the collaboration, investment and creative input of a number of individuals and enterprises. Based on the originality of their work, some individuals can be recognized as being authors under national legislation, with intellectual property rights in either the completed work or their contribution to it.



In all 28 (soon to be 27) countries of the European Union, the director must be included in a list of authors or co-authors of a film based on the Rental and Lending Directive of 1992. The Directive caused a unique situation in countries like the United Kingdom where the director had not been recognized as an author.

Screenwriters are sometimes considered as authors of a preexisting work, like in Germany or co-authors of the completed film work, like in France and Italy. A similar arrangement is also applied to composers of music used in the film. In yet other countries, like Mexico and Austria, other creative personnel, such as the director of cinematography, are included in the list of co-authors.

International protection concerning related rights dates back to 1961 when the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was negotiated. The adoption of the Beijing Treaty in 2012 updated and improved the international protection of audiovisual performers.

Under international, European and national legislations, performers are granted protection for their performances in the fields of music, film, dance or any other category of performing arts. Those rights are generally called “performers’ rights”. Like authors’ rights, performers’ rights can be divided into two categories: moral rights and economic rights. As to economic rights, performers can enjoy exclusive rights and rights to equitable remuneration for certain secondary uses. Moral rights pertain to the right to be identified as the performer and the right to object to distortion, mutilation or other modification.

Performers customarily conclude contracts with film producers covering working conditions, rights and payments. The minimum terms of these contracts, including collective bargaining agreements, can be negotiated by unions representing performers, such as an actor’s union.

In practice, the rights of performers are, to a large extent, transferred to producers either on the basis of contracts and/or legislation. Many countries' laws include presumptions of transfer of rights when a film contract is concluded.

For some secondary uses, performers may be entitled to receive an equitable remuneration. Equitable remuneration rights do not give performers a possibility to authorize or prohibit the exploitation of their performances, but do assure them of an income (though this is often very small). CMOs customarily manage such remuneration rights when they are based on copyright legislation. Private copying remuneration and rental right are examples of such remuneration. The other alternative is performer residuals based on collective bargaining agreements (which is common in the United States and United Kingdom).

8.7.1 The Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961)

The Rome Convention establishes minimum protection for performers, producers of phonograms and broadcasting organizations. Each country joining the Rome Convention (which is most countries) must have incorporated this minimum protection in domestic law.

According to the Convention, "Performers" means actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works.

The minimum protection for performers is constructed in the form of "possibility of preventing" the doing of certain acts without the consent of the performer, including broadcast, performance, fixation and reproduction.

However, from the moment the performer consents to the inclusion of their performance in a film, they cannot prevent any use which is made of their fixed performance in any medium.



8.7.2 The WCT

The WCT is a special agreement under the Berne Convention which deals with the protection of works and the rights of their authors in the digital environment. It provides a framework for the online exploitation of audiovisual works. In addition to the rights recognized by the Berne Convention, authors are granted certain economic rights including (i) the right of distribution; (ii) the right of rental; and (iii) a broader right of communication to the public.

- The right of distribution is the right to authorize the making available to the public of the original and copies of a work through sale or other transfer of ownership.
- The right of rental is the right to authorize commercial rental to the public of the original and copies of three kinds of works: (i) computer programs (except where the computer program itself is not the essential object of the rental); (ii) cinematographic works (but only in cases where commercial rental has led to widespread copying of such works, materially impairing the exclusive right of reproduction); and (iii) works embodied in phonograms as determined in the national law of Contracting Parties (except for countries which, since April 15, 1994, have had a system in force for equitable remuneration of such rental).
- The right of communication to the public is the right to authorize any communication to the public, by wire or wireless means, including “the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them”. The quoted expression covers, in particular, on-demand interactive communication through the Internet (VOD).

8.7.3 The WPPT

The WPPT offers performers exclusive rights for the first time. However, the exclusion of the audiovisual sector did not remedy the lack of international protection of audiovisual performers.

8.7.4 The Beijing Treaty on Audiovisual Performances

One of the most recent international treaties for the protection audiovisual performers was adopted on June 24, 2012 in Beijing and entered into force on April 28, 2020. The Beijing Treaty (BTAP) strengthens the position of performers in the audiovisual industry by providing a clearer legal basis for the international use of audiovisual products, both in traditional media and in digital networks. The instrument also contributes to safeguarding the rights of performers against the unauthorized use of the performances in audiovisual media, such as television, film and video.

BTAP deals with a set of exclusive rights granting performers the right to participate in the economic exploitation of their audiovisual performances fixed in an audiovisual format, however with the possibility by a Contracting Party to the treaty to make specific reservations.

The economic rights in the treaty are as follows:

- economic rights of performers in their unfixed performances (Article 5);
- right of reproduction (Article 7);
- right of distribution (Article 8);
- right of rental (Article 9);
- right of making available to the public (Article 10); and
- right of broadcasting and communication to the public (Article 11)



Article 12 of BTAP deals with transfer of rights and this is one of the central questions. The article reads as follows:

- (1) A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual medium, the exclusive rights of authorization provided for in Article 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.
- (2) A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their authorized representative.
- (3) Independent of the transfer of exclusive rights described above, national law or individual, collective or other agreements may provide the performer with the rights to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

The wording of Article 12(3) thus incorporates different ways of remunerating performers for subsequent uses of their performances, such as individual contracts, collectively bargained agreements and management through CMOs of an equitable remuneration

8.7.5 Regional Example from Latin America and the Caribbean: Mexico

Article 97 of the Mexican copyright law specifies who is considered to be an author of a film. The term “photographer” means director of photography, also called cameraman or main photographer in some instances.

The following are the authors of a film:

- I. the director or maker;
- II. the authors of the plot, adaptation, screenplay or dialogue;
- III. the authors of the musical compositions;
- IV. the photographer, the authors of cartoons and animated pictures.

Unless otherwise agreed, the producers are considered the owner of the economic rights in the whole work.

8.7.6 Regional Example from Europe

Two European Union directives have harmonized the concept of authorship in a film to a certain extent. As stated above, the principal director was recognized as being an author in the 1992 Directive on rental and lending rights. Article 2.2 of the directive states:

For the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

A further directive from 1993 harmonizes the term of protection and establishes the minimum list of persons to be considered as authors or co-authors. Article 2.2 of the directive states:

The term of protection of cinematographic or audiovisual rights shall expire 70 years after the death of the last of the following persons to survive whether or not these persons are designated as co-authors: the principal director, the authors of the screenplay, the authors of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.



8.8 Musical Works in Films

Most films include music, be it preexisting songs or music specifically written for the film. A prerequisite for inclusion of music is permission from the composer and other rightholders in the musical work. The inclusion of music in a film is a category of the right of reproduction, commonly called the synchronization right.

In countries where rightholders to musical works are members of a CMO, the CMO can also manage synchronization rights for their members. Alternatively, a music publisher may grant synchronization rights based on a contract with the composer. If the music is specifically written for the film, the film producer and the composer may agree on the terms and conditions in a direct contract. For instance, in the United States, music composed especially for the film will be acquired directly based on the work-made-for-hire doctrine. Preexisting music will be cleared at source.

In both cases – existing and specifically composed music – CMOs in many countries manage performing rights related to music in films. Films are shown in cinemas, on television and in other public places. A common tariff basis for film music in cinemas is a percentage of the ticket price.

When films are distributed as DVDs, the making of multiple copies entails mechanical rights, also a subset of the right of reproduction. In cases where mechanical rights are managed by a CMO, the film producers get permission for the making of copies and their distribution from the CMO. In some jurisdictions such rights are cleared at source, i.e., acquired directly from the authors of music.

Internet delivery customarily entails both rights of reproduction and communication to the public, including making available to the public. The CMOs in some countries negotiate a deal directly with a content provider who is responsible for putting together the service and delivery to consumers; be it by streaming or downloading. In some other countries,

these rights are cleared at source. In such cases, the CMO may need to differentiate between local and foreign productions, as rights have to be cleared differently.

Musical works and their licensing are described in more detail in chapter II.

8.9 Collectively Managed Rights

The range of rights that are managed collectively on behalf of film authors, as well as for other rightholders, varies greatly from country to country and respond generally to market needs. Rights can be grouped into the following categories based on how they are managed:

- rights that are managed individually;
- rights that can be managed collectively; and
- rights that are most practicably managed collectively or are subject to obligatory/mandatory/statutory collective management.

The following is a partial list of rights that are managed collectively in most countries of the European Union. Management can be based on law, but it has generally been a voluntary matter. In other countries, the same rights can be licensed individually. For instance, in the United States, general licensing solutions (also called blanket licenses) are available from commercial operators such as the Motion Picture Licensing Corporation.

Theatrical Exhibition and Performances in Other Public Places

Theatrical exhibition is managed collectively only in a few countries, for example in Spain and Poland. Other instances of public performances include hotels, bars, buses and the like. In many countries, films are shown also by hairdressers, beauty salons, etc. In most cases of non-theatrical public performance, those rights are managed collectively by CMOs.



TV Broadcasting Including by Satellite and Pay TV

TV broadcasting rights are collectively managed by a majority of members of the Society of Film Authors (SAA). As a primary exploitation form, TV broadcasting royalties are generally an important source of income for film authors.

Rental

In Europe, the rental right is subject to an unwaivable right to equitable remuneration. Member States may stipulate in national law that this remuneration right is subject to obligatory collective management.

Cable Retransmission

Cable retransmission rights and remuneration therefore are customarily managed collectively in Europe owing to requirements of obligatory collective management included in what is known as the Satellite and Cable Directive. This does not apply to the rights of broadcasters or rights acquired by broadcasters.

Educational Copying

Private Copying Levies

Exceptions to the right of reproduction in case of private copying are recognized in the majority of countries of the European Union and in a number of other countries. Private copying remuneration is often paid in the form of fees or levies on recording equipment and blank media.

Remuneration covers music, film, and also literary and visual works in many countries (see

https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf).

On-demand and Online Exploitation

This may include online video sales and rentals, as well as revenues collected by online platforms from consumers as a subscription (SVOD) or on a pay-per-view basis (TVOD).

Compensation for Some Limitations Such as Educational Uses and Public Lending

Broadcast programs are also used in educational establishments and clearance of rights for all rightholders, including the broadcasters, can take place through the services of CMOs.

8.10 Operational Aspects of Collective Management of Film Rights

8.10.1 Collection of All Collectively Managed Payments

Collective Management payments are customarily collected by a CMO that concludes an agreement with importers and local manufacturers or their representatives. One CMO collects the remuneration, but it can be distributed to rightholders through their sector-specific CMOs.

Collection

The collecting CMO may be one of the existing organizations or a new body established for collection purposes. In a few countries, two bodies have been established to collect remuneration, one for audio equipment/carriers and another for film equipment/carriers. In today's media landscape, this kind of distinction is largely outdated, as most carriers and equipment are used for multiple purposes, to record audio, video, text, photographs, etc.

In most cases, the collecting body does not distribute the money to authors, performers and producers. To take the example of Hungary, the CMO



representing musical works, ARTISJUS, collects the levy. It is distributed among others by FILMJUS, representing directors, directors of photography, writers of films and film producers.

Liability to Pay

The liability to pay the levy is customarily with the importer or local manufacturer. Some countries' legislation includes a secondary liability for retailers in order to ensure that they trade with carriers and equipment for which the levy is paid.

There are three ways to set the tariff:

- national law or regulation;
- administrative commissions representing interested parties; and
- negotiation between parties.

Arbitration or court action can follow in cases where negotiations fail.

Tariffs

The tariff structure is either a flat fee per recording capacity or a percentage of the price of the equipment/carrier. In earlier days, the flat fee used to be a tariff per minute of recording time, reflecting that the more consumers could record on a blank VHS-cassette, the higher the remuneration should be. In the digital world, with recordable CDs and DVDs (CD-Rs and DVD-Rs), the flat fee is customarily per gigabyte.

The other alternative, a percentage-based remuneration, is calculated on the import price or retail price, subject to the provisions of the law. The percentage-based remuneration varies in most countries between 2% and 8%. It is lower in cases where carriers and equipment are used also for other purposes than recording copyright-protected material for private use. Such is the case, for instance, with personal computers.

Private copying levies are applied to devices such as blank CDs or DVDs, external hard discs, set-top-boxes, MP3/MP4 players or memory cards and mobile phones with MP3 functionality, just to mention some examples.

8.10.2 Distribution of Remuneration

Private copying remuneration in the film field is paid to the main groups of rightholders: authors, performers and producers of films.

Decision on the respective shares of each main group can be included in legislation or regulation, or the decision can be left for rightholders to negotiate among them.

Legislation defines the main shares among others in Denmark and Poland, with the following results in the film field:

Denmark: video scheme:

- authors 33.33%
- performers 33.33%
- producers of films 33.33%

Poland: video scheme:

- authors 35%
- performers 25%
- producers of films 40%

Internal distribution in each group is decided by the relevant CMO. Many CMOs use a distribution method called “objective availability”. In this method, remuneration in the film field can be allocated to television programs and video/DVD titles on the market, as people have a possibility to copy these materials. CMOs can find out through surveys which types of materials are copied frequently and thus allocate a heavier weight to those



materials in their distribution rules. The rationale of this method is that existing material in the marketplace can be copied by private persons. Surveys also indicate the share of foreign material, which is usually significant.

Legislation in some countries provides that part of the collected revenue is used for cultural and/or social purposes within the activities of CMOs. The share varies with the countries, but it is generally about 20-30%, as the following examples show:

- Japan and Spain 20%
- France 25%
- Croatia 30%

Some countries have lower shares and in many countries there are no provisions on the use of funds for cultural and/or social purposes. Cultural purposes can include promotion of production and dissemination of films and the training of professionals in the field

8.10.3 Market Control

Cooperation with Customs authorities can be an important element in the collection of private copying remuneration, based on provisions in legislation.

As most equipment and media are imported goods, it is important that the legislation includes clear provisions concerning the CMO's ability to get information from Customs authorities. As this kind of information is not customarily passed on to private parties, there may be a need to specify the possibility to deliver information in Customs legislation, irrespective of general secrecy provisions.

Another market control mechanism is to introduce a secondary liability for retailers of blank media and recording equipment. This ensures that

retailers have an interest in checking the payment of the levies when purchasing goods, because they would be liable in case of non-payment.

Many CMOs have controllers who visit retailers during their field activities.

There are wide variations in the representation of rightholders in the film field. For all film CMOs, accountability, transparency and good governance are important when they collect and distribute royalties for rightholders.

In some countries, screenwriters and directors have joint CMOs; in others, there are two separate organizations for the two constituencies. Authors from all repertoires are grouped together in some multipurpose CMOs, including music and film rightholders.

Authors and performers are grouped together in some countries; film authors and producers in others. There are also some new CMOs in the film field where all rightholders are grouped together. Ghana offers an example for this type of CMO with the Audiovisual Rights Owners Society of Ghana (ARSOG), established in 2011.

Acquisition of rights is one of the first tasks of any CMO. The type of rights administered plays a role. Whereas direct mandates are needed from owners of exclusive rights (they must become members of the CMO), CMOs often manage remuneration rights for all rightholders, members and non-members alike. If this is the case, the CMO needs to acquire all necessary information from all rightholders to effectively distribute royalties to them.

Accountability, transparency and good governance rules are needed but often lacking in the CMO world. The money collected by CMOs is not the money of the organization, but remuneration that they hold in trust for rightholders. However, owing to the monopolistic nature of many CMOs and a general lack of effective supervision, they are often plagued by fraud



and mismanagement. It is important that rightholders demand the highest standards from these trustees.

In order to be capable of distributing remuneration to rightholders, films must be properly reported by users and identified by CMOs. Different industry standards have been developed to facilitate identification and royalty distribution. One international body, the International Organization for Standardization (ISO) reviews and approves various standards and has approved one standard in the film field – the ISAN as a reference for identifying films throughout the industry. Other identifier tools in the film sector include the EIDR (Entertainment Identifier Registry).

8.10.4 Different Types of CMOs

The main types of CMOs in the film industry are authors', performers' and film producers' organizations. These groups have organized their collective licensing and collection of remuneration in a number of different ways, reflecting historical, operational and economic realities in each country. The variations are almost limitless and extensive cooperation is needed among different CMOs representing film rightholders as revenue often needs to be shared among different CMOs.

Film Authors' Organizations

A few existing types of CMOs are presented below, both in Europe and on other continents.

Screenwriters and directors together:

Screenwriters and directors are grouped together among others in the following countries: SACD and the *Société Civile des Auteurs Multimedia* (SCAM) in France, DAMA in Spain and the *Société Suisse des Auteurs* (SSA) in Switzerland. The underlying idea is to unite the two main groups of authors of films.

Screenwriters and directors separately:

Separate CMOs for screenwriters and directors exist in the following countries: ALCS for United Kingdom Writers and Directors United Kingdom for United Kingdom directors and LIRA for writers and VEVAM for directors in the Netherlands. Where all kinds of literary authors have their own CMOs, like in the United Kingdom and The Netherlands, directors have established their own CMOs.

In Argentina, ARGENTORES represents writers, including screenwriters and DAC represents film directors. In Japan, WGJ represents screenwriters and grants the license to any secondary uses of their scripts.

Multipurpose CMOs for authors' rights:

Some CMOs are called multipurpose organization, as they represent different repertoires, including both film and music. This is the case for instance with the Italian Society of Authors and Publishers (SIAE) in Italy and SPAutores in Portugal. Management of all authors' rights jointly has economies of scale and can be more accessible.

In Senegal, BSDA is a multipurpose CMO that also manages film rights. ONDA does the same in Algeria.

Umbrella organizations:

Umbrella organizations for several rightholders' organizations and repertoires exist in the Nordic countries, for example KOPIOSTO in Finland and COPYSWEDE in Sweden. The underlying rationale is to unite all CMOs and associations of rightholders in cases where licensing involves different repertoires and genres of works and performances. For instance, KOPIOSTO in Finland manages reprography and digital copying, cable retransmission and other forms of secondary uses of films.



Audiovisual Performers' Organizations

Like with authors' CMOs, there is no single model for the management of performers' rights. In general, performers' organizations were established later than those for authors. In many countries, related rights' protection has been added much later than authors' rights.

Below are some examples of film performers' CMOs in different countries.

Related rightholders together:

All related rightholders in the field of music and film are grouped together in one CMO in a number of countries, such as INTERGRAM in the Czech Republic. In the field of music, the rightholders are performers and producers of phonogram and in the film field, actors and dancers.

Separate CMOs for related rights' holders in audio and film fields:

Related rightholders are grouped in separate organizations in the field of music and film. An example is Denmark: GRAMEX represents performing performers and producers of phonograms, and FILMEX represents performers in the film area. FILMEX was established in 1995 by the actors' union for management of film performers' rights. The underlying rationale is specialization, as there are differences in both rights and types of uses in the two fields.

In Chile, ChileActores represents actors and collects remuneration for communication to the public in all forms including television, cable, cinema, Internet, transportation vehicles and hotels.

Joint CMOs for audio and film performers:

In some countries, performers in the audio and film field have grouped together and work in partnership with phonogram and film producers. This is the case with SWISSPERFORM in Switzerland. This type of CMO has a strong performer representation and can partner with producers and share revenue collected for related rights.

Film directors and actors together:

Another variation is a joint film CMO for directors and actors, like VDFS in Austria. As literary authors have their own CMO, Literar-Mechana, the other main rightholders have founded their CMO.

Film Producers' Organizations

Producers have a joint international management body for cable retransmission rights: AGICOA, based in Switzerland, which collects royalties in 38 countries. It has close to 10,000 individual and institutional members; the latter are customarily the producers' association or CMO of a country.

Producers' Organizations:

Film producers have established their own CMOs in a number of countries. They customarily cooperate with AGICOA for retransmission rights. This is the case with TUOTOS in Finland. There are also other rights uses where film producers can collect their share. One such example is educational recording of television programs.

In Spain, EGEDA represents and defends the interests of film producers. EGEDA has the authority of the Ministry of Culture for its activity. It also cooperates with AGICOA on retransmission revenues.

Film authors and producers together:

Some film CMOs represent both authors and producers. This is the case with SUISSIMAGE in Switzerland and ZAPA in Poland. In many countries,



film rights are largely transferred to producers, but certain remuneration rights are shared among authors and producers.

Joint Film Organizations

Discussions are under way in some developing countries to establish a joint CMO representing all rightholders in the audiovisual field. Ghana and Nigeria are examples of those initiatives.

ARSOG in Ghana received its approval to function as a joint audiovisual CMO in 2011. It represents producers, writers, actors and music in film productions. ARSOG started as an initiative of film producers but grouping together all rightholders in the audiovisual field was considered the most appropriate solution for the local infrastructure. In Ghana, private copying remuneration has been collected for a number of years.

8.10.5 Rights Acquisition

Collective management of exclusive rights takes place on the basis of a mandate from rightholders unless prescribed by law. In case of remuneration rights, it is important to identify all rightholders for distribution of royalties.

National mandates are acquired either directly from rightholders or through their associations. Foreign mandates are acquired through representation agreements with CMOs in other countries.

Rightholders generally give to the CMO a proxy or authority to manage their rights for a given period of time on an exclusive or non-exclusive basis. In certain cases of collective management where the law does not provide for exclusive rights, but only a right to equitable remuneration, users customarily pay remuneration for all protected material. In those cases, the CMO may not need a mandate from rightholders, but rather all necessary data to pay out remuneration to rightholders who have been identified.

As many film CMOs deal both with exclusive rights and rights to equitable remuneration, a mandate structure forms the basis for operation in most cases.

Representation of foreign rightholders or payments to them takes place through agreements with CMOs in other countries. As the collection mandate of film CMOs varies by country, the collecting and paying CMO must sometimes conclude agreements with several CMOs in the receiving country. The CMO also needs to consider different ways of paying secondary royalties, for instance through the guild system, where this is the case.

8.10.6 Governance Issues

CMOs must be run in a professional manner, fulfilling the requirements of accountability, transparency and good governance. Some non-governmental organizations (NGOs) have defined standards of service that rightholders and users can expect.

The good governance principles of CISAC are used here as an example to describe standards that NGOs have established. Some standards are mandatory for members, some others are voluntary.

The Professional Rules of CISAC is a set of principles laid down by CISAC to ensure that all members operate according to the best governance, administrative, financial and technical practices. Compliance with the rules is mandatory for each CISAC member. Professional Rules for Dramatic, Literary and Film Arts (DLV) Societies specify the rules that are applicable for film authors' societies.

The Professional Rules cover the following principles that all CISAC's members must apply and respect:



- Governance and membership: Establishes who can be members of a CMO, members' rights, Board of Directors composition and the organization's inherent compliance with laws and regulations.
- Transparency and confidentiality: Deals with the information that authors' societies are required to share with their members, sister societies and CISAC (annual report, licensing income, distribution rules, etc.) and policy concerning disclosure of confidential information to third parties.
- Licensing and collection: Details the different criteria for authors' societies related to the granting of licenses, the collection of royalties and the monitoring of uses of their repertoires.
- Documentation and distribution: States that authors' societies must carry out all documentation of works in their repertoire and distribution of royalties in accordance with the Binding Resolutions.
- Compliance and conflicts: Describes the various principles related to compliance with the rules and the various procedures for dealing with litigation and dispute settlement.

In 2014, the European Union adopted a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. It introduced new standards for governance and transparency for all kinds of CMOs (<https://ec.europa.eu/digital-single-market/en/collective-rights-management-directive>).

The (non-normative) *WIPO Good Practice Toolkit for CMOs* also discusses good governance and transparency on the basis of examples from legislation, regulation and codes of conduct in the area of collective management from around the world (see also section VIII.17.i below): <https://www.wipo.int/publications/en/details.jsp?id=4358>.

8.10.7 Documentation of Works and Performances; Standards and Technical Tools

Films and performances must be identified for royalty distribution purposes. CMOs need tools which meet international standards and are interoperable.

Major players in the film industry have developed a set of international standards for proper identification of films. The ISAN is a key numbering system and metadata schema enabling the unique and persistent identification of any film work. ISAN is recommended or required as the identification and metadata system of choice for studios, producers, broadcasters, authors, rightholders, film archives and service providers who need to encode, track and distribute any kind of film content in all possible platforms in a variety of formats and embodiments, such as film prints, optical discs, digital files and digital streams. The ISAN has been integrated into several digital watermarking and fingerprinting technologies.

Authors' Identification Tools

The International Documentation on Films Database (IDA) is a worldwide film authors' management system that serves as a common information database for CISAC's members. They can consult it online to get accurate information on films. IDA is fully compatible with ISAN and with the International Party Identifier (IPI).

The purpose of the IPI system is the global unique identification of an author or other rightholder acting across multiple creation classes (musical work, literary work, work of art, etc.), assuming different roles (musical creator, film director, author of fine art, etc.) and owning different rights (performing right, reproduction right, broadcasting right, etc.). Around 2.2 million rightholders (IPs) are today included in the IPI system. The IPI system is the backbone administration tool for all CMOs dealing with authors' rights.



CISAC's Common Information System consists of two series of tools that provide the building blocks to global DRM:

- The first component features the integration of unique, ISO-certified, standardized international identifiers of works and parties (IPs) relevant to the creative process.
- The second pertains to a network of global databases, or subsystems relying on various centralized and increasingly decentralized technologies that will serve as the repository of authoritative information on the creative process for all participating CISAC societies.

These tools make it possible for CMOs to carry out their functions efficiently and transparently, in particular in the digital world. They are keys to automating the data exchange processes across the distribution chain and help CMOs in their royalty payments around the world.

In the audiovisual industry, a unique identifier for movie and television assets, called EIDR, is also an important identifier and the Registry provides unique identifiers for a range of audiovisual items.

Performers' Identification Tools

Performers enjoy rights in their performances in the same way as authors enjoy rights in their works. Apart from exclusive rights, they have some remuneration rights that are collectively managed. CMOs in this field must identify the performers whose recorded performances have been used in order to be able to distribute the remuneration collected by them for the entitled performers in their own countries and abroad.

In 1997, 18 CMOs representing performers' rights established the International Performers Database Association (IPDA) with the goal of establishing an International Performers Database (IPD). In 2011, 37 performers' rights CMOs adhered to the IPDA and more than 500,000 performers registered in the IPD.

The main objective of the IPD is to identify individual performers in audio recordings and films and the legal mandates they have assigned their CMOs in a unique way. Performers are assigned an International Performer Number. This number can be later used in the data exchange between CMOs, simplifying and improving the matching algorithms and the proper identification of rightholders, as well as in other databases and information systems, linked to IPD.

8.11 Collective Management of Rental Rights

The film rental business includes DVD, but that format is quickly being replaced by VOD models.

Rental rights were added to international copyright conventions at a relatively late stage. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994 introduces rental rights in respect of computer programs and film works. The Beijing Treaty of 2012 introduces the rental right for performers.

Rental refers to physical copies and thus leaves VOD outside the scope of rental rights. In terms of copyright, the latter is covered by communication to the public, including the right to make something available.

Rental has been a major form of exploitation, but it is already clearly diminishing in developed countries. It still has a major role in developing countries and many of the titles produced in Nigeria every year are delivered directly to the home video market.

Rental rights are customarily dealt with in direct contracts between creators/performers and producers, and rights are transferred to producers. Many countries have legislation that includes presumptions on the basis of which rental rights are transferred to producers in the event of a film contract unless otherwise agreed between parties. Sometimes these



presumptions are “rebuttable”, meaning that there is a possibility of a different agreement.

To counterbalance such provisions and to ensure rightholders have the possibility to enjoy some revenue from rental, national legislation may include a provision on a right to equitable remuneration. In Europe, rightholders, authors and performers all have a right to equitable remuneration for rental that cannot be waived. Member States may stipulate in national law that this remuneration right is subject to collective management, but this is left to the discretion of each country.

Users, Tariffs and Other Conditions

For the collective management of rental rights to be efficient, it is important to specify in national legislation which entity is liable for the payment of remuneration.

In cases where the liable entity is defined as “those who operate the rental” or “the user”, CMOs can exercise collective management and conclude agreements with the rental stores. In countries where the liable party is defined as “the producer”, collective management is not applied. In countries where there is a system of collective bargaining agreements, like in the United States, residuals are paid for home entertainment.

In some European countries, it is obligatory for the remuneration right to be managed by CMOs; this is the case for instance in Germany and Spain for both authors’ and performers’ rights. As the rental market is declining, remuneration has been decreasing in these countries in recent years.

In countries where remuneration for rental is collected by CMOs, this remuneration is determined by mutual agreement between the CMO and the users. As with any collective licensing, the importance of finding a representative negotiating partner is crucial. The tariff can be a percentage of rental income or be based on some other criteria.

For instance, in Spain, AISGE, a performers' CMO, concluded an agreement with the relevant association of video stores in 2005 and collection was greatly enhanced as a result. The tariff structure of AISGE is based on the area (square meters) of the video store, as it is considered that this correlates to the number of movies available. Special conditions apply to video clubs. In both cases, there is a minimum payment which is 1.5 per cent of the rental revenue in 2012.

8.12 Collective Management of Retransmission Rights

Television channels are sent to satellites (up-link), relayed to other countries (down-link) and distributed to households through cable or satellite networks. In copyright terms, this involves a new use, a separate communication to the public right, and therefore clearance of copyright is required.

When national broadcasters clear rights they normally acquire licenses for the domestic market, which is their primary area. They conclude agreements with national rightholders and buy the broadcasting rights of foreign material in order to show it in their country. One broadcast channel can have more than 10,000 individual programs a year.

The very same broadcasts are often sent up to satellites (the up-link phase) from where they can be relayed to other countries (the down-link phase) and the signals are picked up by cable or satellite operators. When cable or satellite operators choose to include a particular channel in its channel selection, the operator needs to clear rights for all programs on the channel. The cable operator cannot choose which programs to send or in which order. There is no way that rights could be managed individually, program by program.

CMOs can facilitate the clearing of multiple copyright licenses of thousands of individual programs transmitted via satellite and cable. The rights cover



those of original creators, performers, film producers and broadcasters, all of whom benefit from cable revenues.

Through the network of CMOs in various countries, rights relating to the retransmission of broadcasts can be organized. For example: if a Swedish broadcast program is transmitted in a cable network in Denmark, the cable operators in Denmark need permission from a Danish CMO. The Danish CMO collects the revenue and sends the part due to Swedish rightholders to its Swedish counterpart for distribution to entitled holders of copyright and related rights in Sweden.

8.13 Collective Management of Educational Copying

Educational establishments use audiovisual material in their activities including broadcast programs. Rights clearance for the recording of radio and television broadcasts for non-commercial educational purposes is an area where collective management can offer a viable solution.

Recordings are often made from broadcast programs – what are known as off-air recordings. In today's media landscape, previously broadcast programs are also available online using on-demand services. Broadcasts and on-demand services provide an opportunity to choose and access valuable teaching and learning resources. Examples of educational areas where they provide important added value are drama, the arts and current affairs.

As in the case of the retransmission of broadcasts, copyright clearance entails many different groups of rightholders and a large number of individual rightholders. Some countries have therefore included special stipulations to facilitate the permissions process.

In copyright terms, off-air recording is an act of reproduction for which permission from rightholders is required. Rightholders may include creators, performers, procurers and the broadcaster. Without the services of collective management, the number of rightholders that would need to be

considered and approached would be complex to administer for both rightholders and users.

Remuneration is collected jointly for all rightholders. Consequently, the collected remuneration will be distributed to all copied titles, and within each title to the relevant rightholders. The scheme of allocation indicates the shares of various shareholders in an audiovisual work.

For instance, the allocations for Australian educational copying according to the Screenrights rules are as follows:

- To the copyright in the film: 68.5%
- To the copyright in literary and dramatic work: 22.1%
- To the copyright in the sound recording of musical works: 2.0%
- To the copyright in the musical works: 7.4%.

The CMO needs to identify all persons entitled to remuneration using its databases and other sources. This may seem a laborious undertaking, but it is one way of making copyright function in practice.

As Screenrights puts it: Bringing filmmakers and educators together is their task.

8.14 Private Copying Remuneration

In many countries, defined forms of private copying can take place without the consent of rightholders on the basis of the so-called private copying exception. The amount of private copying of music and films is, however, huge, and without any compensation it can have a negative effect on the livelihoods of creators and performers and on cultural diversity more generally.

Many countries have introduced special remuneration mechanisms to compensate rightholders for large amounts of private copying. The WIPO-



de ThuisKopie international survey on private copying (2016 edition) contains useful information by country at:

https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2017.pdf

Customarily a small payment, also called a levy, is added to the price of recordable equipment and/or media used for private copying. Importers and local manufacturers of media and equipment are liable to pay the levy.

Even though the liability to pay the levy is placed with importers and local manufacturers, the levy is in many cases passed on to the price of media and equipment. By so doing, the consumer, who is the beneficiary of the private copying exception, ends up paying the levy, albeit indirectly.

A CMO is customarily in charge of collecting the levy; in countries with several CMOs, one of them is nominated to function as the collecting body. In some countries, a governmental authority may be charged with the collection. In both cases, the revenue is distributed through relevant CMOs in both audio and film fields.

This system has functioned since 1965, when a remuneration right was introduced in Germany; a levy on recording equipment. In 1985, it was broadened to cover also recording media. New recording equipment and media are introduced to the market continuously. For that reason, legislation does not customarily include a finite list, but rather the principle; i.e. remuneration is to be paid for all equipment and media that enable the copies to be made for private purposes.

8.15 Local Organizations and Their Tasks

Each country, no matter the state of its film industry, has organizations that can help to facilitate the creation, management and supervision of CMOs.

Film commissions and other government agencies - These groups will often be tasked with working with the private sector to establish a CMO and should have some supervisory role thereafter. However, it has been noted

that these groups do not necessarily have the required experience in the business community to achieve these goals on their own.

Distributor organizations – If the distribution community is organized effectively, it can be a crucial element in establishing transparency and ensuring that the CMO receives adequate information on both domestic and international distribution.

Producer organizations - Producer organizations should be involved in the creation and supervision of CMOs, offering advice about private organizations and to staff running the office, as well as making sure that CMOs behave in accordance with best practices.

Actor/writer/director unions - Anyone in a position to receive monies from CMOs should familiarize themselves with the process and work through their established trade organizations to enhance the activities of state actors and producer organizations.

8.16 International Organizations and Their Tasks

The role of NGOs is crucial in all areas of collective management. In the film industry, there are NGOs representing different groups of rightholders and other NGOs representing their CMOs.

The main groups of rightholders are film authors, performers and producers. Each of these groups has one or a number of international and/or regional organizations that speak on behalf of their constituents.

The CMOs of authors are internationally represented by the International CISAC, alongside authors from all disciplines. CISAC has a specialized body to deal with dramatic and audiovisual authors. At the European level, the Society of Audiovisual Authors (SAA) represents CMOs of screenwriters and directors.



Film performers are organized in the International Federation of Actors (FIA), which, among its many tasks, focuses on the IP rights of its constituents. The international representative of CMOs for performers' rights is SCAPR (Societies' Council for the Collective Management of Performers' Rights). AEPO-ARTIS works at the European level with the CMOs of performers. The two organizations work closely together. In Latin America, FILAIE (Ibero-Latin-American Federation of Performers) speaks on behalf of performers.

Film producers are represented by the International Federation of Film Producers Associations (FIAPF), whose membership includes a large spectrum of national film producer communities including the Motion Picture Association (MPA) and the IFTA. When collective licensing of cable retransmission rights became a challenge in Europe, AGICOA as the international licensor of producers' retransmission rights was established.

The following is not an exhaustive list.

CISAC – www.cisac.org - is the world's leading network of authors' societies, bringing together creators from the world of theater, literature and film

SAA – www.saa-authors.eu - The Society of Audiovisual Authors was established in 2010 by European CMOs to represent the interests of their author members and, in particular, screenwriters and directors.

FERA – www.filmdirectors.eu - The Federation of European Film Directors has been representing European film directors since 1980.

FIA – www.fia-actors.com - The International Federation of Actors is an international NGO representing performers' trade unions, guilds and associations around the world.

SCAPR – www.scapr.org - The Societies' Council for the Collective Management of Performers' Rights started to work by developing bilateral agreements between performers' rights organizations. SCAPR aims to

ensure that performers worldwide receive due remuneration in accordance with their economic rights.

AEPO-ARTIS – www.aepo-artis.org – The Association of European Performers' Organisations) represents CMOs of performers from 23 countries. They have some 350,000 members.

FIAPF – www.fiapf.org - The International Federation of Film Producers Associations represents film and television producers from 27 countries on five continents.

MPAA- www.mpa.org - The Motion Picture Association represents the interests of the major studios in the global marketplace.

IFTA and IFTA Collections – www.ifta-online.org - The IFTA is the global trade association of the independent motion picture and television industry and the voice and advocate of independents filmmakers worldwide.

IFTA is a non-profit organization that represents more than 150 members from 27 countries consisting of independent production and distribution companies, sales agents, television companies and institutions involved in film financing.

IFTA Collections organizes the collection of international audiovisual royalties and levies for more than 140 participating companies worldwide. IFTA Collections is a service offered to IFTA member companies and, under limited circumstances, to non-members.

AGICOA – www.agicoa.org – AGICOA was established in 1981 to track and distribute royalties upon the retransmission of broadcasts of the works of independent producers.

AGICOA represents clients worldwide and operates under the terms of copyright law established by the Berne Convention and the provisions of the Satellite and Cable Directive.



Since 2000, AGICOA has collected and distributed more than half a billion euros in royalty payments from a portfolio of more than one million audiovisual titles. Their members include the world's major producer organizations and CMOs.

8.17 CMO Challenges and Opportunities

The growth of CMOs over the past 20 years has been phenomenal and has provided new revenue streams to authors and copyright holders alike. During this time, some concerns related to certain CMOs have emerged that should be addressed here:

8.17.1 Transparent, Effective And Efficient Transactions And Data Management

In collective rights management, the collection and distribution of mostly large sums of money require absolute transparency as regards financial transactions and data management. Without the greatest possible degree of transparency CMOs are vulnerable to criticism. It is important not only for the good governance of CMOs to be required by law, but for those laws to be strictly enforced for there to be faith in the system and full participation.

The WIPO Good Practice Toolkit for CMOs, a non-normative document and the result of a consultation process with WIPO Member States and other stakeholders in 2017-18, brings together examples of legislation, regulations and codes of conduct in the area of collective management from around the world. The Toolkit is a working document that will continue to be improved and can be accessed at:

<https://www.wipo.int/publications/en/details.jsp?id=4358&plang=EN>.

8.17.2 Allocation of Funds to Non-local Recipients

By law and international agreement, CMOs should treat all authors and copyright holders equally whether they are local producers or major Hollywood studios, global stars or local actors. In places where Hollywood

material dominates this can mean that most funds collected by CMOs are sent out of the local economy to the benefit of major media conglomerates and rich authors overseas.

This, combined with the fact that there is no reciprocal flow of capital from overseas owing to the lack of international markets for most films, can create significant resentment among local practitioners.

Some jurisdictions have created systems that allow for a percentage of monies generated through CMOs to remain in the local film industry in the form of subsidies or other support mechanisms.

8.17.3 Prohibitive Cost of Challenging the System

Although in local legislation and in the contracts signed by those having their rights collectively managed there are provisions for challenging decisions made by the CMO, in practice this can be either impossible or prohibitively expensive. Such challenges may relate to the allocation of monies collected, the attribution of rights, the misuse of funds collected, delays in payment and even the way in which orphan funds are treated.

Rightholders who wish to challenge the practices or specific decisions of their CMOs are encouraged to research the costs and possibility of success prior to pursuing such actions. If they prove prohibitive, the system needs to be reformed and time might be better spent on general efforts to improve the system. CMOs exist for the benefit of rightholders and should be held accountable.

CASE STUDY - TWO TRANSFERS OF OWNERSHIP: WHO OWNS THE RIGHTS IN FILM MUSIC?

Summary



Two composers of Bollywood film music joined the PRS in the UK in 2004 and entered into a deed of assignment of the performing right of their musical works with PRS. In 2008, the two composers entered into an employment contract with an Indian film company. In 2010, they composed a piece of music for one of the film company's films. Who became the owner of the performing right for the film music?

History of the case

The two composers of Bollywood film music joined the PRS in the UK in 2004 and entered into a deed of assignment with PRS agreeing to transfer:

"Absolutely for all parts of the world the rights which belong to you on the date of this Agreement or which you may acquire or own while you remain our member"

In 2008, the two composers were commissioned by an Indian film company to compose the music for a film. They were employed under a contract of service in which they were called the Music Directors. The contract stated:

"The Music Directors hereby confirm and agree that the entire copyright (if any) or any performer's rights, if any, or any other rights arising from the Services or the product of the Services of the Music Directors, including without limitation the Music shall vest with the Producer as the first owner of the same pursuant to this contract of service executed. ..."

Developments

A satellite television broadcaster, B4U Network (Europe) Ltd ("B4U"), broadcast a song from the film in 2010. PRS sued B4U for infringement of copyright as B4U had no license from PRS. PRS obtained a summary judgement on the basis that B4U had no prospect of success in the action.

B4U appealed on the basis that the Indian film company was the owner of the copyright in the song. The song had not been written at the time of the assignment with PRS and, because of the contract for services with

the film company, the two composers had never owned the copyright for it and could therefore not assign it to PRS.

B4U lost their appeal. The two assignments (to PRS and to the film company) both took effect as equitable assignments of future copyright. Under the English rules of priority for equitable assignments, the assignment to PRS was the first and PRS therefore became the owner of the copyright as soon as the song came into existence.

Significance of the subject matter

The rationale behind the decision of the English Court of Appeal will apply in most countries whose legal system is based on the English one. Even in those countries that have a different system of law, the case emphasizes the need for scrutiny and clarity regarding transfers of (future) rights through contracts.

PRS won the case because the two composers had joined PRS before they signed a contract with the film company. That gave PRS the benefit of their assignment to it and enabled the composers to benefit from PRS by establishing their right to receive royalties for the broadcasting of their work.



CHAPTER 9

SPECIAL SITUATIONS RELATED TO DOCUMENTARIES

This chapter discusses specific copyright situations that arise for documentary filmmakers. Documentaries have gained in popularity recently and there have never been so many distribution platforms available on which to watch documentaries.

9.1 Fiction Features and Documentaries Obey the Same Copyright Rules – Unless They Do Not

The School of Communication at American University in Washington, D.C., has extensively reviewed and analyzed this issue. Their Documentary Filmmakers' Statement of Best Practices in Fair Use (below) is the gold standard for the topic: <http://cmsimpact.org/code/documentary-filmmakers-statement-of-best-practices-in-fair-use/>. It cannot contain easy answers to all questions because the law and the interpretation of it continue to change and can vary from country to country. However, it is an excellent place to start. Michael Donaldson's excellent publication, CLEARANCE AND COPYRIGHT, is another resource.

Just because a film is a documentary does not mean that any of its material can be used without licensing the copyright.

We discussed the concept of fair use previously but there are several issues specifically related to documentaries to keep in mind. Fair use or educational use are not blanket exceptions to the rules that documentary filmmakers can abuse.

- The purpose of the documentary might make a difference – does it serve an educational purpose or not? Not all documentaries are considered educational.

- Life rights, libel issues and privacy rights still play a role. This can also depend on whether or not the subject is a public or private person and can vary by jurisdiction. The United Kingdom, for instance, is notoriously tough on slander and libel issues.
- All music must still be licensed unless it does not have to be. This is another gray area where filmmakers can get into trouble. There might be some ambient music playing in the background of a news clip of a crucial event and the person licensing the clip did not license the music because it was for a news broadcast. Does a documentary filmmaker have to secure the rights to that music? The answer is an emphatic “maybe”.

If there are questions like this that cannot be resolved easily (remove the potential violation from the work or license the rights), you will have to consult an outside expert, usually a copyright attorney. This applies not only to clips, music and life rights, but includes still photos, artwork and any other elements that are the creative work of other people who should be recognized or compensated for their work.

Documentary Filmmakers Statement of Best Practices in Fair Use

An example from the School of Communication at American University in Washington, D.C.

This statement recognizes that documentary filmmakers must choose whether or not to rely on fair use when their projects involve the use of copyrighted material. It is organized around four classes of situations that they confront regularly in practice. (These four classes do not exhaust all the likely situations where fair use might apply; they reflect the most common kinds of situations that documentarians identified at this point.) In



each case, a general principle about the applicability of fair use is asserted, followed by qualifications that may affect individual cases.

1. Employing copyrighted material as the object of social, political or cultural critique

This class of uses involves situations in which documentarians engage in media critique, whether of text, image or sound works. In these cases, documentarians hold the specific copyrighted work up for critical analysis.

Principle: Such uses are generally permissible as an exercise of documentarians' fair use rights. This is analogous to the way that (for example) a newspaper might review a new book and quote from it by way of illustration. Indeed, this activity is at the very core of the fair use doctrine as a safeguard for freedom of expression. So long as the filmmaker analyzes or comments on the work itself, the means may vary. Both direct commentary and parody, for example, function as forms of critique. Where copyrighted material is used for a critical purpose, the fact that the critique itself may do economic damage to the market for the quoted work (as a negative book review could) is irrelevant. In order to qualify as fair use, the use may be as extensive as is necessary to make the point, permitting the viewer to fully grasp the criticism or analysis.

Limitations: There is one general qualification to the principle just stated. The use should not be so extensive or pervasive that it ceases to function as critique and becomes, instead, a way of satisfying the audience's taste for the thing (or the kind of thing) critiqued. In other words, the critical use should not become a market substitute for the work (or other works like it).

2. Quoting copyrighted works of popular culture to illustrate an argument or point

Here the concern is with material (again of whatever kind) that is quoted not because it is, in itself, the object of critique but because it aptly illustrates

some argument or point that a filmmaker is developing—as clips from fiction films might be used (for example) to demonstrate changing American attitudes toward race.

Principle: Once again, this sort of quotation should generally be considered as fair use. The possibility that the quotes might entertain and engage an audience as well as illustrate a filmmaker’s argument takes nothing away from the fair use claim. Works of popular culture typically have illustrative power, and in analogous situations, writers in print media do not hesitate to use illustrative quotations (both words and images). In documentary filmmaking, such a privileged use will be both subordinate to the larger intellectual or artistic purpose of the documentary and important to its realization. The filmmaker is not presenting the quoted material for its original purpose but harnessing it for a new one. This is an attempt to add significant new value, not a form of “free riding”—the mere exploitation of existing value.

Limitations: Documentarians will be best positioned to assert fair use claims if they assure that:

- the material is properly attributed, either through an accompanying on-screen identification or a mention in the film’s final credits;
- to the extent possible and appropriate, quotations are drawn from a range of different sources;
- each quotation (however many may be employed to create an overall pattern of illustrations) is no longer than is necessary to achieve the intended effect;
- the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.



3. Capturing copyrighted media content in the process of filming something else

Documentarians often record copyrighted sounds and images when they are filming sequences in real-life settings. Common examples are the text of a poster on a wall, music playing on a radio, and television programming heard (perhaps seen) in the background. In the context of the documentary, the incidentally captured material is an integral part of the ordinary reality being documented. Only by altering and thus falsifying the reality they film—such as telling subjects to turn off the radio, take down a poster or turn off the TV—could documentarians avoid this.

Principle: Fair use should protect documentary filmmakers from being forced to falsify reality. Where a sound or image has been captured incidentally and without prevision, as part of an unstaged scene, it should be permissible to use it, to a reasonable extent, as part of the final version of the film. Any other rule would be inconsistent with the documentary practice itself and with the values of the disciplines (such as criticism, historical analysis, and journalism) that inform reality-based filmmaking.

Limitations: Consistent with the rationale for treating such captured media uses as fair ones, documentarians should take care that:

- particular media content played or displayed in a scene being filmed was not requested or directed;
- incidentally captured media content included in the final version of the film is integral to the scene/action;
- the content is properly attributed;
- the scene has not been included primarily to exploit the incidentally captured content in its own right, and the captured content does not constitute the scene's primary focus of interest;
- in the case of music, the content does not function as a substitute for a synch track (as it might, for example, if the sequence

containing the captured music were cut on its beat, or if the music were used after the filmmaker has cut away to another sequence).

4. Using copyrighted material in a historical sequence

In many cases the best (or even the only) effective way to tell a particular historical story or make a historical point is to make selective use of words that were spoken during the events in question, music that was associated with the events, or photographs and films that were taken at that time. In many cases, such material is available, on reasonable terms, under license. On occasion, however, the licensing system breaks down.

Principle: Given the social and educational importance of the documentary medium, fair use should apply in some instances of this kind. To conclude otherwise would be to deny the potential of filmmaking to represent history to new generations of citizens. Properly conditioned, this variety of fair use is critical to fulfilling the mission of copyright. But unless limited, the principle also can defeat the legitimate interests of copyright owner—including documentary filmmakers themselves.

Limitations: To support a claim that a use of this kind is fair, the documentarian should be able to show that:

- the film project was not specifically designed around the material in question;
- the material serves a critical illustrative function, and no suitable substitute exists (that is, a substitute with the same general characteristics);
- the material cannot be licensed, or the material can be licensed only on terms that are excessive relative to a reasonable budget for the film in question;
- the use is no more extensive than is necessary to make the point for which the material has been selected;



- the film project does not rely predominantly or disproportionately on any single source for illustrative clips;
- the copyright owner of the material used is properly identified

Fair Use in Other Situations Faced by Documentarians

The four principles just stated do not exhaust the scope of fair use for documentary filmmakers. Inevitably, actual filmmaking practice will give rise to situations that are hybrids of those described above or that simply have not been anticipated. In considering such situations, however, filmmakers should be guided by the same basic values of fairness, proportionality, and reasonableness that inform this statement. Where they are confident that a contemplated quotation of copyrighted material falls within fair use, they should claim fair use.

9.2 Production of New Copyrighted Material

When producing new material for a documentary, it is important to license the appropriate rights. That could include music, interview releases, performances, photography, script-writing, letters or other writings that might be shown, background material used and so on.

One of the reasons to do this is that it creates value, not just in the sense of creating a documentary for commercial distribution, but in also creating material that could be licensed in the future for other purposes. Without the proper documentation for the rights, it is possible to lose out on lucrative opportunities. For this reason, it is also important to produce the best quality material possible and to properly archive and organize the documentation.

9.3 Market considerations

The financing and distribution of documentaries is quite different from fiction features.

9.3.1 Finance and Distribution Partners

Most documentaries are labors of love and financed by the filmmakers themselves. The budgets can be very low and the films can take many years to produce. Those two facts can deter many investors even more than the potentially low returns. A low budget almost inevitably means that fees (of both producer and financier) are low or non-existent, and the long time frame means that the investment can be impossible to analyze. There is not even a guarantee that a documentary will be finished or that it will be interesting.

Leaving aside the self-financed model, which is clearly understood, the next section will examine two finance models: public funding and commercial production.

9.3.1.a Public sources, grants and government-mandated sources

One of my favorite stories about documentaries concerns Jean-Xavier de Lestrade's *Murder on a Sunday Morning* (2001) which won the Academy Award for Best Documentary Feature. The film originated as a study of the justice system in Florida but was financed through French sources at a low budget (the CNC, France 2 TV and Pathé). The filmmakers spent many weeks filming the experiences of young, African-American men facing the inequities and racism often present in the justice system. One of their subjects, Brenton Butler, is accused of a brutal murder he did not commit. It is a shocking story that ends with Mr. Butler being acquitted and released. That dramatic story which seemed to have been written by a top screenwriter made the film a gripping, true tale of injustice with a Hollywood ending. Of course, the skill and diligence of the filmmakers played a role, but it is rare that a documentary discovers such an amazing story.

In that case, the filmmakers relied on government and government-mandated spending by TV stations (France requires TV outlets to invest a certain portion of their revenues in new productions) to finance an important



film. It is almost certain that the film took much longer than expected and therefore cost more than expected, but the financiers were not concerned about making a profit, which is the ideal situation for a documentary filmmaker.

They might have also benefitted from grants and other subsidy programs available locally or at the international level. The common theme for all these sources is that they do not view the finance arrangement as a for-profit investment. They might seek to be repaid if there are revenues, but their purpose is to produce for the public good. Documentary filmmakers who fund their films in this way will often tell me that it is almost impossible to make a living from their work and that securing funding requires experience, connections, time and diligence.

It is also common for documentaries produced in this way to be distributed through a TV partner to their local outlets and through any international sales operation they may have.

9.3.1.b Commercial production and distribution

The recent rise in demand for documentary content, particularly from VOD platforms, has been very good for the commercial funding of documentaries. Cable and satellite channels, including pay services, such as BSkyB, Canal+, HBO and Showtime, also finance documentary content for their commercial use. The theatrical documentary market sees a few hits every year, but these are usually from established filmmakers working with higher budgets (Werner Herzog, Michael Moore, Errol Morris and Australian Roger Donaldson, whose recent film, *McLaren*, was a brilliant commercial for the car manufacturer).

There are sales agents who specialize in documentary distribution, and many documentaries are sold by TV outlets at the major TV markets like MIP-TV and MIPCOM. The educational marketplace is often a strong area for some types of documentaries. The price points tend to be higher but the

intermediaries (aggregators and distributors) tend to take very high fees because of the specialization of that market. Of course, festivals can be a crucial launching pad for higher-quality documentaries.

The economics are often brutal for filmmakers who have to stretch their budgets just to license music, a few clips and other elements, but it is crucial to get all of the proper paperwork completed in order to receive distribution.

9.3.2 Getting Seen

As discussed, documentaries are a labor of love and filmmakers want to share that love. Disappointments in the documentary world are different – they do not involve financial loss. Instead, they result from the documentary not being seen by the public – not influencing the world or educating people about a topic the filmmaker believes is important.

For the vast number of self-financed documentaries this can often be the case. It is possible that the only available outlet for the film after appearing in a few festivals is YouTube. The film can still have an impact, but the filmmaker has to make sure people know about it and that it is seen.

Partnering with organizations that share your beliefs and enthusiasm or just building an online following during the production can pay huge dividends. Some filmmakers organize local discussion groups or special screenings for target audiences. The important thing is to carry the enthusiasm that spawned the film into the distribution process.



CHAPTER 10

THE CHANGING MEDIA LANDSCAPE

10.1 How Video on Demand Is Transforming Distribution

As consumers, producers or distributors of films all know, VOD is increasingly becoming the future of film consumption outside cinemas. Cord-cutting (no longer paying for cable or satellite TV) is reducing the number of subscribers to those services and, in most of the world, finding a DVD copy of a film is becoming increasingly difficult. Many people do not remember that Netflix started as a system where subscribers were mailed DVDs from their “queue” on the Internet and could hold them as long as they wanted. A friend of one of the writers still receives his films that way, but no one else the writer knows does.

The VHS/DVD era is essentially over, and the cable/satellite world is quickly going in the same direction. That can be good news:

- Producers have increasing control over their material.
- It is now very easy to reach a global audience.
- Since the films are not showing on a large screen, consumer quality equipment can produce acceptable distribution elements.

And bad news:

- Producers only really have control in the outlets with the lowest revenue (basically YouTube and other ad-supported platforms).
- The prices paid for DVD and TV rights were generally higher than the money that can be earned from even the best VOD platforms (such as Netflix).
- There is so much material constantly available literally at our fingertips that it is difficult to get recognized and get your film seen.

10.2 Creative Distribution Solutions for Local and International Markets

Ability to reach a wide audience - The other bit of good news, particularly for producers in countries with developing film industries is that they can make good quality films for little money and get them into the distribution pipeline. That means that friends and family can see your creativity on YouTube, a local VOD platform can license the territorial rights and make it available to a paying audience or irokovtv can purchase the rights for SVOD distribution across Africa (or even worldwide).

Ability to get discovered - Previously, if a producer/director had the resources to get into an international film festival, they might have a chance to get recognized. Now, by building an online following and being incredibly talented (that part is still important), a director in Ethiopia can make a feature film for his local market that gets him recognized by producers who bring him to Hollywood to make a film starring Elle Fanning. That director is Zeresenay Mehari and his film was *Difret*. He is currently directing *Sweetness in the Belly*.

It is also possible to secure a remake deal simply based on the creativity of a project. You might not be given the opportunity to produce or direct the big budget version of your 5,000 dollar film, but the budget on your next film is going to be much higher.

Producer ownership of digital TV channels - In countries where there is a booming digital TV market, the proliferation of channels has offered producers the opportunity to own their own channel. Digital broadcasting is much less expensive than traditional (Hertzian) broadcasting and allows for a much greater number of channels.

Digital projection allows for programing innovations – Recently there have been stories of cinemas changing the films they are presenting



several times a day to suit audience tastes rather than forcing them to choose between a narrow number of films that changes once a week. This might lower revenues for some films but will give other films an opportunity to find an audience that they never had before.

10.3 New Revenue Opportunities

Sponsorship/product placement and sponsored content – Increasingly, consumer brands are using new media to hit their target markets, are willing to sponsor films and short content, and will pay for product placement because of the potentially huge audiences that can be accessed through those new media.

VIP screenings and other ways to get the rich to finance films – People love the glamor of films and people who can afford to drive luxury cars and live in mansions enjoy impressing their friends with VIP screenings with appearances by the filmmakers. This is already particularly popular in Nigeria and parts of Asia but is spreading quickly. These screenings can account for a significant portion of a film's revenues and can even support entire production budgets.

10.4 Young People Are Leading the Way

Owing to a wide variety of factors, young people have often been excluded from the best opportunities in the film industry. The biggest factor has been financiers preferring to limit their risk by using veteran writers, directors, cinematographers and editors. With the new equipment and platforms available, young people have found ways to make and distribute films outside the conservative systems of the previous generations. This has been especially exciting to watch in Hong Kong, where it used to take 20 years working your way up the ladder before being given a chance to direct a feature. The 2016 hit, *Trivisa*, directed by a trio of young filmmakers, Frank Hui, Jevons Au and Vicky Wong, won five prizes at the Hong Kong

Film Awards including best film and best director over veterans like Stephen Chow and Johnnie To.

10.5 Tracking the Trends

In broad terms, everyone understands revenue trends because the vast majority of people are consumers of audiovisual material. How often do you buy a movie ticket? Pay a cable/satellite bill? Pay to stream a film on your phone? We can even privately discuss how often people might illegally stream a film or purchase a pirate DVD. If you and your friends are watching most films or TV shows through Netflix for instance, that might be more relevant to your local situation than a global survey of SVOD trends.

That being said, there are many sources that have the latest data on all kinds of trends, but for the most up-to-date information, most countries publish weekly data on box-office takings or TV ratings that is accessible to the average consumer. Actors are ranked by their social media presence, distributors by the percentage of the market they command, and TV and film genres by their recent popularity. This information is often found in specialized trade publications such as *Film Français* and *Variety*, but is also increasingly found in mainstream consumer publications and websites.

It is important to consider the reliability of the source and the quality of the interpretation of statistics and to honestly apply the information to your own career or projects. For instance, the trend towards high-budget superhero films does not mean that a low-budget superhero film will work. This seems simplistic, but producers have been known to support their pitches with much more outlandish comparisons. The worst usually involve hand picking only the most successful examples from a very large number of completed films, ignoring the 99% of comparable films that were not successful. We all hope our film will be *Moonlight*, but more often it is one of the thousand films that were “almost” *Moonlight*.



For general statistics, two of the best sites in Europe are Médiamétrie - www.mediametrie.fr - and the European Audiovisual Observatory – www.obs.coe.int.

EPILOGUE

The global film industry is undergoing a period of radical restructuring that is increasing opportunities for producers and distributors alike, while also presenting new challenges. One thing that is not changing 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 owing to limited internal markets that cannot support a significant film output, it is possible for these 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 that gives them a competitive advantage when it comes to 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 performers 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 that this skill, if not lost in the rush to internationalize and tap into the riches of global distribution, will be what leads to their success.



As has been repeatedly stressed throughout these chapters, regardless of a country's situation 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 South 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 finance and distribution. The value of a film and a financier's ability to recover their investment (and for a film to find an audience) depend entirely on the intellectual property created and held by the film's authors. A fair and transparent global copyright system ensures an ongoing supply of quality films to global audiences by properly compensating authors and making sure 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 for people to learn about other cultures and share their stories. The system for properly licensing the distribution rights for films is well-established and should be familiar to all stakeholders. We hope that readers have gained a greater understanding of this system and will achieve success in their sectors.

Your role in the future of making a living in the film industry

As this book attempts to make clear, there are many careers in the film industry that do not involve the creative side of the business – writing, directing, acting, composing or any of the hundred other creative activities that go into making a film. Whether you are on the creative side or have a career in law, finance, government or distribution, you are part of a global film industry and the future of the industry as a whole is in your hands.

Though it may come as a surprise to people not involved in the film industry, people in the industry work very hard. Film sets are extremely

stressful places – as are law offices when talent contracts are negotiated, rooms at the AFM where distribution rights are traded and bank offices when financing is being secured. One thing all of these situations have in common is an unusual level of professionalism and technical skill. There is an expectation on a film set that you are there because you know what your job is and you do it well. The same holds true for roles on the business side of the industry.

You can hone your skills in any of these areas by participating in trade organizations, online communities and social media and, when you feel confident that you have something to share, through teaching and mentoring. Clearly, the better you understand your part of the film community, and the more you improve it through your personal actions, the better a place it will be to work and spend time. You create opportunities by broadly improving the quality of the entire industry. Simply put, be a professional and do everything you can to professionalize your local film community.

Overcoming Challenges

Many people on the business side of the industry do not understand how filmmakers overcome the incredible odds of getting a film made. The fact that they do is much appreciated – they are why people on the business side have work. The fact is, films get made, a lot of them. A huge number of people make a living in the film industry. Whether you do so already or you plan to one day, remember that it is possible and takes hard work and perseverance. It also takes the desire to be part of a community. Painters, poets and novelists can all sit alone in a room and create; these days they can even package, market and distribute alone.

Filmmakers, marketers and financiers are, by necessity, part of a community. Sometimes that community feels more like a psychological support group, but it is a community. If you are a contributing member of



that community – what is sometimes called a “giver” rather than a “taker”, you will find that community to be extremely supportive. Even the most successful filmmakers out there will tell you that there have been times when they leaned on that community for help. They are also the ones who are more likely to teach, mentor and participate in industry organizations.

A piece of advice you often hear is that the film community might be hard to break into, but once you are in, you are in for life.

A Broader View of the Importance of the Film Industry

A lot of time has been spent in these chapters discussing the financial and legal aspects of the film industry. Never forget, though, that no matter what your role is in the process, films are a cultural product, and therefore occupy a special place in a country’s economic life. They express the hopes, dreams, self-image and self-criticism of a people. They are a mirror that shows people the best and worst of who they are. They inspire people, educate them and at the same time, if they are doing it right, they entertain them. You are part of that, so take pride in your work, work on your career and live up to the high standards expected of a cultural ambassador.

The film industry is sometimes exactly as much fun as people think it should be! The film industry constantly celebrates itself in ways that every other industry envies. It throws great parties; gives more awards than any other business on the planet; every time it creates a new product, it celebrates this with friends and co-workers at a premiere; the industry members run around the world to film festivals that tell them how much their efforts are appreciated; magazines and websites sing their praises and their friends and families will never understand how they ever got so lucky as to work in this great business.

So, prove them right – have fun, feel lucky and go out and make a living in the film industry!

GLOSSARY

Above-the-line: line items in the film's budget that refer to sums paid to key talent and rightholders who are often also profit participants.

Advance: a sum paid in cash for the rights to distribute a film in a territory and/or a particular medium.

“A” List: a director or star whose presence in the film will ensure that it will attract finance and/or distribution.

Acquisition executive: The representative of a territorial distributor who is responsible for seeking/sourcing films and programing to fill their 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 preexisting work from one genre of work to another, such as film adaptations of novels or musical works. As adaptation involves altering the composition of the work, unlike translation, which transforms only the form of expression, the 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 rightholders. 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 SPE. Unlike licenses, which involve only the granting of specified rights to use the work accordingly, an assignment transfers the copyright itself. Laws governing the assignment of rights, the rights that 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 by local lawyers to ensure that it cannot be challenged. The person who transfers copyright is called the assignor, with the first assignor of a copyright generally being the author or their heirs. The person to whom the copyright is transferred is called the assignee.

Audiovisual (A/V) work: A work that appeals to the ear and the eye simultaneously and that consists of a series of related images and accompanying sounds recorded on a suitable material (audiovisual fixation), to be made using appropriate devices. It can be seen and heard only in an identical form, unlike the performance of dramatic works that appeal to the eyes and ears in ways that depend on the actual stage production. Examples of audiovisual works are films with sound, television productions or productions for the Internet.

Author: National legislation will determine those 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 in accordance with the relevant jurisdiction and may not even be actual people. For example, in the United States, owing to “work-for-hire” issues, the production company itself is often considered the author.

Below-the-Line: line items in the film’s budget that refer to sums paid to contributors engaged on a work-for-hire basis.

Cap: usually, a limit on sales or distribution expenses that cannot be exceeded without the producer's permission.

Catch-up rights: The right to retransmit broadcast programs over the Internet on a free access basis for a limited period of time immediately after the first broadcast in a territory.

COT: the COT is the documented collection of assignments to the producer, SPE, distributor or other entity that proves the ownership or distribution rights to a film. These documents and contracts that demonstrate exactly how the rights in a project are controlled by the producer.

Charge: a legal charge over the rights of the film that ensures contractual obligations are satisfied.

CGI: Computer Generated Imagery – also called visual effects – VFX. Refers to any images created outside the camera (i.e. on a computer) to enhance a film, whether in a realistic or fantastical manner.

Collection agency: an agency set up to administer the collection of revenue from the exploitation of the film and the dispersal of that revenue to the financiers of the film. The collection agent also distributes any net profits.

Common-law rights: in the context of filmed intellectual property, the convention in countries such as the United Kingdom and the United States is that the producer is the author of the work and controls its final shape and form.

Completion bond or guarantee: specialized production insurance that guarantees the timely delivery of the film at an agreed budget.

Co-production: a film that combines creative, production and/or financial inputs from more than one territory.



Co-production treaty: a cross-national governmental agreement that sets out how a co-production must be structured to benefit from national incentives.

Cottage industry: any small, low-profit, nationally-based industry that relies on little capital and local markets to survive.

Crossover film: a modestly-budgeted film with a quirky edge that manages to attract a much wider audience than originally envisaged.

Day-and-date: simultaneous release of a film across multiple territories and, more recently, multiple distribution platforms.

Debt financing: finance lent to the production and that is recoverable in first position.

Deferrals or deferments: delayed payments or remuneration paid to a supplier or contributor as and when the producer receives revenue from the film.

Delivery: the technical delivery of the elements of the film to distributors and/or financiers in order for it to be sold and/or distributed.

Development: refers to the time and actions required to move from an idea to a completed script (or screenplay) that is ready to be filmed.

Director's cut: the early form of the film that is under the direct control of the director.

Droit d'auteur: the right of the author to assert ownership and moral rights over the works they create; prevalent in countries like France, Italy, etc.

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 a 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 mediums (public performance, education, 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, or 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).

Equity: an investment that attracts a significant share of the profits of a film but that recoups back debt.

Escalator: bonus payments made to producers or participants if performance thresholds are exceeded or awards are won.

Executive producer: usually a producer whose principal task is the financing of the film.

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 to the same work by any other person.

Copyright as a whole and all of the rights of authors comprised therein are likewise exclusive, and 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 the 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 television series or webisodes. For copyright purposes a film is actually a collection of copyrights held by a single entity. These rights include the screenplay, the underlying rights (the book the screenplay is based on for instance), music, performances and costumes, as well as logos, artwork or other intellectual property 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.

Final cut: the right of a director, producer or financier (or a combination of all three) to approve the final shape and form of the film.

First negotiation and last refusal: the right of a person or company to have the first opportunity to bid for rights and the last opportunity to match a third party's bid.

First position: the finance that comes out first as revenue is accrued.

Geo-filtering: Technological solutions that allow new media rights (usually Internet VOD or streaming rights) to be offered to a limited geographic territory only.

Gap financing: finance (usually debt) against the estimated value of unsold territorial rights.

Gross deals or adjusted gross: direct participation by a major financier or talent participant in first revenues.

Letter of credit: a banking instrument often issued by distributors that allows a producer to cash-flow a minimum guarantee via a bank.

License: The authorization given by the author, other copyright owner or appointed agent (licensor) to the user. Unlike an assignment, a license does not transfer ownership, but rather only constitutes a right to use the work under the copyright in it which remains with the licensor, although this is 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 the restrictive interpretation of the scope of the licenses, a stipulation of the equitable authors' fees, the possibility of



rescission of the contract in cases where the rights are not being used and the 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 continuing 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.

Life rights: the right to make into fiction the real-life experiences of a living person.

Line producer: non-creative, work-for-hire producer responsible for ensuring that the production is properly managed on a day-to-day basis.

Minimum guarantee (MG): finance promised against the exploitation of a film in a territory and/or medium.

Moral rights: the right of the author of the work (usually the director) to control the final shape and form of the work.

Net profits: the profits that return to the producer of the film.

Option: the instrument by which a producer controls a property for a limited amount of time before making the decision to purchase the rights.

Output deals: pre-negotiated deals usually between studios or major producers and local distributors and/or broadcasters ensuring certainty of distribution.

Package: consists of factors such as expressions of interest from one or more lead actors and the attachment of a director to the project.

Participation: the share of net profits that is owned by a creative or financial contributor to the film.

Polishes: short engagements of a writer to improve sections or themes within a script shortly before financing or production.

Pre-production: the preparation and organization of the film prior to principal photography.

Primary, secondary and ancillary rights: rights windows usually defined, in order, as theatrical, video/DVD/TV and other (airlines, publishing, merchandising, etc.).

Principal photography: the period during which the principal action and the principal actors are filmed.

Prints and advertising (P&A): investment in the release of a film in the physical prints and the costs associated with marketing the film.

Producer: For the 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 rightholder for the film. That might be a major US studio or a local producer or financier.

Producer’s representative (or rep): An entity that represents a producer or rightholder in seeking a local deal (most common in the United States) and possibly in securing a sales agent.

Production bonus: a further sum paid to a writer or rights owner on the first day of principal photography.

Production budget: the cost of making and completing the film.



Production insurances: standard film production insurances required to be in place by the completion bond that cover all risks associated with production, such as illness, fire, theft etc.

Property: the script, story or other material a producer options or purchases to make a film.

Rebutable: rights granted by moral law to a rightholder allowing him/her to retain his moral rights.

Re-format rights: the right of a producer to convert the script to format other than the one originally envisaged, e.g., TV instead of film.

Reserved rights: those rights not specifically granted by the rightholder to a third party (usually the producer or distributor).

Residuals: payments to a contributor to a film from the exploitation of the film; usually imposed and controlled by union agreements.

Rights: the underlying rights to the content of the film.

Rights holder: When referring to a film, rightholders 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 to sell the copyright to a new rightholder). The underlying rightholders 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 on the basis of 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 rightholder 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 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 act "as an agent for" the rightholder. 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.

Sell-thru: DVD distribution where the purchaser owns the unit.

Separated rights: similar to reserved rights but granted to a writer or rights owner in a work-for-hire context.

Single-Purpose Entity (SPE) or single-purpose vehicle: This is the rights holding company that holds the copyrights that together comprise the COT and therefore the ownership of the film. As stated above, these copyrights include 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 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 the payment of royalties and residuals.

Spec script: a non-commissioned script owned and controlled by the author until its purchase or option by a producer.

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.

Supplementary remuneration: similar to a royalty and used mainly in *droit d'auteur* countries to refer to a share of cinema revenue.

Syndication: licensing of films or TV to local (as opposed to national) TV broadcast channels in the United States.

Ten-percenters: a slang term for talent and literary agents.

Tent-pole: High-budget wide audience movies that are designed to generate hundreds of millions of dollars in worldwide box-office revenues. Usually the domain of the major studios but occasionally produced and distributed by major independents (i.e. *The Hunger Games* from Lionsgate).

Territorial distributor: The entity that directly derives revenue from the exploitation of a film or TV program in a specific geographic area (could be worldwide, as in the case of the major United States studios, or in individual countries or regions). A territorial distributor might be an all-rights distributor or specialize in a specific right, as in the case of a TV or online distributor. Also called a "buyer", "sub distributor" or "licensee".

Transfer of rights: The conveyance of the 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.

Treatment: a short document that outlines the shape and form of an intended feature length script.

Turnaround: a pre-negotiated process for the reversion of rights to the author at the expiry of the option or license.

Underlying work or underlying material: the material or story that forms the basis of the script.

Window: that period of time when a distributor or broadcaster is given an exclusive right to exploit a film.

Work-for-hire: Primarily a US concept whereby the film's authors transfer 100 per cent of the copyright they have created for a film to the producer as part of their employment contract.

VOD: A distribution platform that allows the consumer to choose when they watch a film or TV program. This can be in the form of Transactional VOD (TVOD), where the consumer pays specifically for the right to watch one film (streaming) or own the film for a period of time (download); or it can be in the form of Subscription VOD, where the consumer pays for the right to watch a group of movies for a subscription fee (usually a monthly payment).



FILM RESOURCES

Cones, John W., *Dictionary of Film Finance and Distribution: A Guide for Independent Filmmakers*. New York: Algora Publishing, 2013.

Donaldson, Michael C. and Callif, Lisa A., *Clearance and Copyright: Everything the Independent Filmmaker Needs to Know*. 4th ed. West Hollywood: Silman-James Press, 2014.

Donaldson, Michael C., and Callif, Lisa A., *The American Bar Association's Legal Guide to Independent Filmmaking*. Chicago: American Bar Association, 2011.

Erickson, Gunnar, Tulchin, Harris and Halloran, Mark., *The Independent Film Producer's Survival Guide: A Business and Legal Sourcebook*. 3rd ed. New York: G. Schirmer Books, 2009.

Lee Jr., John J., and Gillen, Anne Marie, *The Producer's Business Handbook: The Roadmap for the Balanced Film Producer*. 4th ed. New York: Routledge, 2017.

Litwak, Mark, *Contracts for the Film and Television Industry*. 3rd ed. West Hollywood: Silman-James Press, 2012.

Moore, Schuyler M., *The Biz: The Basic Business, Legal and Financial Aspects of the Film Industry*. 5th ed. West Hollywood: Silman-James Press, 2018.

Squire, Jason E., *The Movie Business Book*. 4th ed. New York: Routledge, 2016.

Magazines

VARIETY – The most respected daily film industry magazine. It provides in-depth coverage of many topics, and a print edition is published weekly in New York.

THE HOLLYWOOD REPORTER – Weekly film magazine with emphasis on independent and international markets. Increasingly consumer-oriented.

SCREEN INTERNATIONAL – Weekly film industry magazine with coverage of international topics; published in London.

Le Film Français – 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 – Monthly French entertainment law review.

Online Resources

World Intellectual Property Organization (WIPO). <www.wipo.int>.

WIPO Arbitration and Mediation Center. <www.wipo.int/amc>.

Association of International Collective Management of Audiovisual Works. <www.agicoa-europe.lu>.

International Federation of Film Producers. <www.fiapf.org>.

Society of Audiovisual Authors. <www.saa-authors.eu>.

International Federation of Actors. <www.fia-actors.com>.

Independent Film and Television Alliance. <www.ifta-online.org>.

The Internet Movie Database. <www.imdb.com>. Provides information about thousands of films including box-office, distribution and producers. IMDB Pro is cheap and valuable for its address database.

Le film français. <www.lefilmfrancais.com>. Site for the top film weekly of France. In French.



Michael C. Donaldson. <http://www.donaldsoncallif.com/> Compendium of legal issues related to film with a special emphasis on “fair use” considerations and copyright.

Mark Litwak entertainment law resources. <www.marklitwak.com>. Another great legal source with an emphasis on contracts. Mark Litwak is one of the top entertainment contract lawyers in the United States and has written a number of books featuring sample contracts for all areas of film and TV production.

Cinando. <www.cinando.com>. Database associated with the Cannes Film Market.

Variety Magazine. <www.variety.com>. Great archive, box-office charts and other useful information.

Screen International magazine. <www.screendaily.com>.

Netflix. <www.netflix.com>. The most successful global Subscription VOD provider.

Hulu. <www.hulu.com>. Streaming/download VOD service.

Directors Guild of America. <www.dga.org>. Contract information for the United States directors’ union and information about their activities.

SAG-AFTRA - Screen Actors Guild-American Federation of Television and Radio Artists. <www.sagaftra.com>. Information about the United States actors’ union. Information about contracts, using American actors in films, etc.

Writers Guild of America. <www.wga.org>. Site of the American writers’ guild. Has contract terms and information for writers.

MPAA. <www.mpa.org>. Has significant data on global theatrical markets.

Independent Filmmaker Project. <www.ifp.org>. Support group for independent filmmakers, based in New York.

Film Independent. <www.filmindependent.org> Los Angeles-based support group for independent filmmakers.

Télémetrie. <www.telemetry.fr>. TV and VOD statistics in French and English with a focus on France and Europe.



ANNEXES

- Annex 1 Producer Agreement
- Annex 2 Distribution Agreement
- Annex 3 Sample E&O Application Form
- Annex 4 Recommended WIPO Contract Clauses and Submission
Agreements for WIPO Mediation and Expedited Arbitration
for Film and Media

ANNEX 1

The Producer Agreement

DATED 2019

[] (1)

and

[] (2)

PRODUCER'S AGREEMENT

"[]"



- 1.
2. **PO BOX 362**
3. **SUNBURY-ON-THAMES**

THIS AGREEMENT is dated 200

BETWEEN:

- (1) [] **LIMITED Company Number** [] of [] (the “**Company**” which expression shall be deemed to include its successors, licensees and assigns); and
- (2) [] of [] (the “**Producer**”).

WHEREAS:

The Producer has agreed to make available to the Company the services as individual producer in connection with the [film][television series] provisionally entitled “[]” which the Company intends but does not undertake to produce upon the terms and subject to the conditions of this Agreement.

NOW IT IS AGREED:

1. DEFINITIONS

In this Agreement the following words and expressions shall unless the context otherwise requires have the following meanings:

the “Act” the Copyright Designs and Patents Act 1988 as amended from time to time or any enactment which replaces it;

[“Broadcaster” []];

“Business Day” a day other than Saturday or Sunday on which banks in London are open for normal business;

“Film” the [feature film][series of television programmes of [] episodes each having a screen running time of [] minutes] provisionally entitled “[]” which the Company intends but does not undertake to produce;

“Net Profits” as such term is defined in the principal production and finance agreement relating to the Film.



“Pre-Production Period” the period from the Start Date until [] 200[] and forming part of the Term;

“Policy” the Health and Safety Policy created by the Producer’s Alliance for Cinema and Television and any amendments to the same;

“Post-Production Period” the period from completion of the Production Period until final delivery to and acceptance of the Film by the [principal distributors] [the Broadcaster];

“Production Period” the period of continuous filming and production commencing on []200[];

“Regulations” The Working Time Regulations 1998;

“Start Date” the date hereof;

“Term” the period from the Start Date until completion of the production of the Film in all respects and delivery to and acceptance of the Film by the [principal distributors] [the Broadcaster];

Unless the context otherwise requires words and expressions used in this Agreement shall have the same meanings as are assigned to them by the Act.

Headings are for ease of reference only and not to be taken into account in construing this Agreement.

References to Clauses are to clauses of this Agreement unless otherwise provided.

2. ENGAGEMENT

The Company hereby engages the Producer and the Producer hereby agrees to supply to the Company his services as producer of the Film upon the terms and subject to the conditions of this Agreement.

3. EXCLUSIVITY

The Company shall be entitled to the services of the Producer:

on [an exclusive][a non-exclusive but first call] basis during the Pre-Production Period;

on an exclusive basis during the Production Period;

on [an exclusive][a non-exclusive but first call] basis during the Post-Production Period;

thereafter, on a non-exclusive but first call basis (if later) until the date of delivery to and acceptance of the Film by the [principal distributor][broadcaster];and

subject to the Producer's prior professional commitments notified to the Company, prior to and/or after the Term free of charge to the Company (except only for the payment of expenses in accordance with Clause 7) in connection publicity of the Film including but not limited to the giving of press and publicity interviews.

4. PRODUCER'S SERVICES

During the engagement of the Producer under this Agreement, the Producer undertakes that the Producer shall render services as, where and when the Company may require in a competent, conscientious and professional manner having due regard for the production of the Film within the budget and as instructed by the Company in all matters, including those involving artistic taste and judgement. The Company shall make the final decision in relation to the costumes, hair and make-up of performers; the manner in which performers perform their parts and in which scenes of the Film are photographed, edited, dubbed and cut; and generally the manner in which the Film is prepared, photographed and completed.

Without limitation to Clause 4.1, the Producer undertakes that the Producer shall:

consult with, advise and assist any person responsible for the writing of the screenplay of the Film as the Company may direct;

ensure that the Film is produced in accordance with the final shooting script and final production schedule and not to make additions to or deletions from the final shooting script or final production schedule without the prior written approval of the



Company other than minor so called "on-the-floor" revisions customarily made during principal photography;

forthwith upon the completion of the final shooting script of the Film and if so requested by the Company do all things supply all information at the Producer's disposal and co-operate with the Company to enable the Company to prepare a proper, comprehensive and detailed budget and shooting schedule for the production of the Film;

assist in the casting and all other necessary preparations for the shooting of the Film in accordance with the approved budget and shooting schedule, including (without limitation) selection or designs for the sets and costumes, scouting and selection of locations, attendances at casting conferences, selection of cast and crew, selection of materials and equipment. attendances at screen and recording tests, readings and rehearsals, consultations and discussions with studios and in relation to publicity stills interviews and all such other supervisory works required of a first class producer during the pre-production of the Film;

advise the Company and keep the Company informed of all matters material to the production, delivery and exploitation of the Film of which the Producer shall become aware and promptly and fully comply with all the Company's reasonable directions, requests, rules and regulations;

do all things that may reasonably be required by the Company to ensure that the photography and recordings of the Film shall be of the highest quality and consistent with the budget approved by the Company;

both during and after the completion of the principal photography and recording of the Film assist in and supervise the cutting, editing, post-synchronising, scoring, dubbing, special and optical effects and titling and direct any retakes, added or substituted scenes of the Film as may be required by the Company in order to complete the Film in a first class condition fit for exhibition to the public as first-class entertainment;

on a daily basis prepare for exhibition to a representative or representatives of the Company and its nominees daily rushes from the Film;

[prepare and deliver to the Company a detailed programme synopsis for the Film for broadcast compliance purposes;]

upon request and in any case on the completion or termination of the Producer's services hereunder deliver to the Company all manuscripts, documents, papers and any other property in the Producer's possession or control relating to the Film;

render services for promotional films, trailers and the like and assist the Company in the production of any so called "making of" film or documentary or DVD "extras" such services to be rendered either during or after the Term, but if after the Term subject to the Producer's prior professional commitments;

render all those services usually rendered by a first class producer of [feature films][television series] during the continuance of the Producer's engagement hereunder.

The Producer accepts that to the extent (if any) that the Regulations apply to the Producer's services under this Agreement the requirements of his engagement may involve the Producer in working an average of more than forty eight (48) hours per week and the Producer agrees that the Producer will work such hours as are necessary to fulfil the Producer's obligations under this Agreement. The Producer agrees that the maximum weekly working time specified in Regulation 4(1) of the Regulations shall not apply to this Agreement or the provision of the Producer's services under this Agreement. This Clause 0 shall constitute an agreement in writing for the purposes of Regulation 5 of the Regulations. The Producer may withdraw such agreement by three (3) months (or the Producer's period of engagement, if shorter) written notice to the Company at any time during his engagement.

The Producer acknowledges that the Producer's services are provided under this Agreement as an independent contractor and that the Producer is not an employee of the Company, that the services to be provided are short term project based for a limited period and are remunerated at a higher rate than would otherwise apply and accordingly that the Regulations shall only apply to the extent



(if any) that they are required by law to apply to the Producer's engagement under this Agreement.

5. REMUNERATION

Subject to the provisions of this Agreement and to the due compliance by the Producer with his obligations and undertakings hereunder, the Company shall as remuneration and as full consideration for all services rendered and for all rights granted to the Company under the terms of this Agreement pay or procure to be paid to the Producer the sum of [] pounds (£[]) payable as follows:

[] pounds (£[]) to be payable in advance and on account of the above sum by way of retainer for the Producer's services during the Pre-Production Period such sum to be paid on signature hereof;

[] pounds (£[]) in respect of the Producer's exclusive period of engagement during the Production Period [and Post-Production Period] commencing on [] payable by equal weekly instalments commencing with the completion of the first week of the Production Period and ending on completion of the last week of the [Production Period][the Term];

[[] pounds (£[]) deferred and payable pro rata and pari passu with the deferrals payable to producer/writer/director/rights deferrers.]

[The Company shall also pay or procure to be paid to the Producer [] per cent ([]%) of one hundred percent (100%) of the Net Profits to be computed and accounted for on a favoured nations basis with all other participators in Net Profits.]

The remuneration payable to the Producer pursuant to Clause 0 shall be deemed to be a worldwide buy-out of all rights in all media now known or hereafter invented in perpetuity and shall represent full and final consideration for the products of the Producer's services and the rights granted to the Company pursuant to this Agreement and shall include any and all residual, repeat, re-run, foreign use, exploitation or similar payments due to the Producer throughout the world in respect of the Film in all media now known or devised in the future by

virtue of any guild or trade union agreement or other similar organisation and shall be deemed to include equitable pre-payment of any remuneration due from the exercise of lending and rental rights and cable and satellite retransmission rights. Notwithstanding the foregoing nothing in this Agreement shall prevent the Producer from being able to receive income under collective and other agreements unsolicited by recognised collection societies under the laws of any jurisdiction in respect of the Film.

The Producer hereby acknowledges and agrees that the monies herein provided to be paid to the Producer shall be paid after deduction of any amount required by the laws and regulations in or applicable to any part of the world where the Producer's services are rendered under this Agreement.

All payments under this Agreement shall be exclusive of Value Added Tax payable thereon which shall be paid after submission of an appropriate Value Added Tax invoice.

6. [ACCOUNTS]

The payment to the Producer of the Producer's share of the Net Profits and any accounting with respect thereto shall be rendered when and as rendered to the Company by the financier and/or distributor of the Film and the Producer shall in all respects be bound by the provisions of the statements of account rendered to the Company by such financier and/or distributor.

The Producer shall not have any independent right of audit or objection to the statements of account rendered by such financier and/or distributor but at the Producer's expense an accountant (to be reasonably approved by the Company) may within twelve (12) months from receipt of any statement of account examine the records and accounts of the Company relating to such statement and take copies or extracts therefrom but only insofar as such records and accounts relate to the Film and to the accuracy of such statement. In the absence of such an audit, such statement shall be deemed to have been agreed and any claim relating to the statement of account or any item covered thereby shall be deemed to have been waived and the inclusion of information or items in an accounting or



statement which had appeared in a previous accounting or statement shall not render any such information or item contestable or recommence the running of the period of twelve (12) months with respect thereto.

The Company shall not be liable in any way for any losses caused by any fluctuation in the rate of exchange or because of any failure to convert or remit funds to the United Kingdom at a particular time or at a more favourable rate of exchange than actually used. If any foreign Net Profits are frozen or unremittable and such Net Profits in a foreign country shall be transferred to an account of the Company in such foreign country, the Company shall notify the Producer to that effect. If the Producer requests in writing, the Company shall deposit at the Producer's cost in a foreign depository to be designated by the Producer that portion of any Net Profits not received in the United Kingdom to which the Producer would otherwise be entitled under this Agreement if the Company may legally make such deposit and such deposit shall be in full satisfaction of the Company's liability to account for such monies.

Notwithstanding anything herein to the contrary, the Company shall not be liable to the Producer for any share of Net Profits until the Company has actually received the equivalent monies to which the Company is from time to time entitled as its share of the Net Profits.

Net Profits are the Company's sole and exclusive property and are not trust funds or otherwise held by the Company for the Producer's benefit. The Company's obligation to make payments to the Producer is that of a debtor only.]

7. EXPENSES

Whenever the Producer is required by the Company to render services under this Agreement at a place outside a radius of thirty miles from [Charing Cross, London] the Company shall pay to the Producer all reasonable travel expenses and where the Producer is required to stay overnight, the Producer's reasonable hotel expenses [excluding drinks, room service and telephone calls].

8. HEALTH AND SAFETY

The Producer will make himself aware of and will comply with the terms and provisions of and information contained in the Policy and will use all reasonable endeavours to comply with the duties and responsibilities set out in the Policy and to ensure that the Policy is properly implemented.

The Producer hereby acknowledges that he has a general responsibility to give health and safety full consideration and will consult with key production personnel and take their advice on and remain aware throughout the production of health and safety in order to ensure that there are no unacceptable risks with respect thereto for any person during the production.

9. CREDIT

Subject to the Producer supplying all of the services required of the Producer under this Agreement and to the Producer not being in default of any material terms of this Agreement, the Company shall accord the Producer single-card credit on the negative and all positive copies of the Film made by or to the order of the Company in the form “Produced by []” and an identical credit in all paid advertising issued by or under the direct control of the Company subject to the provisions of Clause 0 below. The screen credit and paid advertising credit shall be on a single card equal in size and prominence to the larger of the screen credit given to the director or the writers and shall appear on-screen for the same duration as the credit accorded to the director of the Film.

The provisions of this Clause shall not apply to:

group list or so-called “teaser” advertising;

publicity or exploitation or advertising relating to the television exhibition of the Film;

award ads or special advertising, publicity or exploitation of the Film relating to any member or members of the cast, the author, director, producer or other personnel concerned in its production or similar matters;

any exploitation, publication or fictionalisation of the story screenplay or other literary or musical material upon which the Film is based;



by-products, commercial tie-ups or merchandising of any kind (including but not limited to sheet music and gramophone records);

“trailer” or other advertising on the screen or radio or television;

institutional or other advertising or publicity not relating primarily to the Film;

advertising eight column inches in size or less;

advertising of such nature that the consent to the use of the Producer’s name in connection therewith has not been granted hereunder;

advertising or publicity material in narrative form;

any other category of paid advertising excluded by the standard terms and conditions of the major distributors of the Film.

No casual or inadvertent failure by the Company to comply with the provisions of this Clause and no failure of persons other than the Company to comply therewith or with their contracts with the Company shall constitute a breach of this Agreement by the Company. The rights and remedies of the Producer in the event of a breach of this Clause by the Company shall be limited to the Producer’s rights (if any) to recover damages in an action at law and in no event shall the Producer be entitled by reason of any such breach to enjoin or restrain the distribution, exhibition, advertising or exploitation of the Film.

In the event of a failure by any distributor to accord credit to the Producer in accordance with this clause the Company shall upon notice from the Producer use all reasonable efforts (short of incurring legal or other material expenses) to remedy such failure as soon as is reasonably practicable.

10. RIGHTS AND CONSENTS

The Producer with full title guarantee hereby irrevocably assigns to the Company (by way of present assignment of present and future copyright) all such copyright and all other rights (including but not limited to lending and rental rights, the right to communicate to the public and/or making available right, satellite broadcasting and cable retransmission rights and any similar rights whether now existing or

hereafter conferred under the laws of any jurisdiction), title and interest of whatsoever nature, whether vested or contingent, in and to all the products of the Producer's services under this Agreement, including but not limited to all literary, dramatic, musical and artistic material contributed by the Producer (including contributions to the shooting script of the Film) TO HOLD the same unto the Company absolutely throughout the universe for the full period of copyright and all renewals, revivals, reversions and extensions thereof and thereafter (insofar as the Producer is able to do so) in perpetuity.

The Producer hereby irrevocably waives, pursuant to section 87 of the Act, the benefits of all rights under sections 77 to 85 inclusive of the Act in respect of the products of the Producer's services under this Agreement and all other moral and authors rights of a similar nature whether now existing or hereafter conferred under the laws of any other jurisdiction.

The Producer hereby gives all consents and clearances (including without limitation to the exploitation of the "making available" right) required under the Act or under any similar laws now in force or in future enacted in any jurisdiction as are necessary to enable the Company to make the fullest use of the Producer's services hereunder worldwide in all media now known or hereafter invented without the need for any further payment to the Producer.

The Producer hereby grants to the Company the right at all times hereafter to use and authorize others to use the Producer's name, approved photographs and other approved reproductions of the Producer's physical likeness and approved recordings of the Producer's voice taken or made hereunder and approved biography of the Producer in whole or part in connection with the advertisement, publicity, exhibition and commercial exploitation of the Film and of any documentary, DVD "extra", film or programme relating to the Film and in association with the advertisement, publicity and exploitation of any other commodities PROVIDED ALWAYS that (except with the Producer's prior written consent) the Producer's name or photograph is not directly or indirectly used to suggest that the Producer uses or recommends any such other commodities (but so that the Producer may be shown to recommend the Film per se).



The Producer shall at the request and expense of the Company do all such acts and execute all such documents as the Company may require to vest in or further assure to the Company the said copyright and all other rights herein expressed to be granted.

11. LIABILITY EXCLUSIONS

The Company shall not be liable to the Producer or to the personal representatives of the Producer for any loss or damage to the Producer's property while in transit to or while at places where the Producer renders services hereunder except to such extent if at all as the Company may be able to enforce a claim for indemnity against a third party or under any policy of insurance effected by the Company nor for any personal injury, ailment or the death of the Producer arising out of or in the course of the Producer's engagement hereunder except to such extent if at all as the same was due to the negligence of the Company and save as such exemption from liability may be unlawful by statute.

Notwithstanding and irrespective of any advertisement or announcement which may hereafter be published the Company shall not be liable to the Producer for or in respect of loss of publicity, advertisement, reputation or the like due to the Company's abandonment of the production or exploitation of the Film or the Company's failure to use the services of the Producer and nothing in this Agreement contained shall be construed as to impose upon the Company any obligation to make use of the services of the Producer hereunder.

12. WARRANTIES

The Producer hereby warrants to and undertakes with the Company that:

the Producer has the right to enter into this Agreement and to grant the rights herein expressed to be granted;

all the products of the Producer's services hereunder (except for any part or parts thereof which shall contain the works of others included therein at the specific requirement of the Company) shall be original, shall not, to the best knowledge and belief of the Producer, be defamatory of any third party, shall not infringe or

violate any right of any person including (without limitation) any rights of copyright or rights of privacy or any common law or statutory rights of any kind;

the rights hereby granted and assigned are vested in the Producer absolutely and the Producer has not previously granted, assigned, licensed, charged or in any way dealt with or encumbered the rights hereby granted and assigned;

the Producer is and shall throughout the term of this Agreement remain a qualifying person for the purposes of the Act and for the purposes of United States copyright law the products of the Producer's services under this Agreement shall be considered "works made for hire" for the Company;

the Producer will obtain knowledge of and comply with all the rules and regulations for the time being in force at such places at which the Producer is required to render the Producer's services hereunder (including without limitation the rules and regulations prohibiting smoking in public premises and vehicles set out in the Health Act 2006 and any regulations passed in relation thereto) and observe all orders given by the Company or its representatives from time to time;

the Producer will keep the Company informed of the Producer's whereabouts and telephone number (if any) at all times throughout the term of this engagement and not absent herself without first obtaining the Company's consent;

the Producer shall not without the written consent of the Company order goods or incur any liability on the Company's behalf or in any way pledge the Company's credit or hold himself out as being entitled to do so or pay or agree to pay any bonus to any person engaged for or in connection with the production of the Film;

the Producer will ensure the preparation and delivery on completion of the Film of residual abstracts containing all residual information and shall ensure that all end of year tax returns are made to HM Revenue & Customs and shall prepare and deliver to the Company a credit abstract containing details of all credits to which the cast, crew and other third-party contributors (for which he has overall responsibility for contracting) to the Film are entitled [and shall use reasonable endeavours to ensure that these credits conform to the credit guidelines issued by the broadcaster at the time of completion of the Film];]



the Producer shall not without the prior written consent of the Company at any time hereafter either personally or by means of press or publicity or advertising agents or agencies make any statement or disclosure or supply any information or photographs to any person firm or corporate body (other than their agents and professional advisers) or to the public relating to the Film, the terms of this Agreement or to the affairs of the Company;

the Producer shall not at any time hereafter do or say anything detrimental to the Film and in the event that the Producer shall commit a breach of the provisions of this sub-Clause during the term of this Agreement the Company may without prejudice to the Company's accrued rights within seven (7) days after becoming aware of such conduct by written notice to the Producer determine the Producer's engagement hereunder or cancel its obligations to accord the Producer credit thereafter (as the case may be);

the Producer will not voluntarily engage in any hazardous pursuit, nor take any risk the taking of which would invalidate or affect any normal policy of insurance or the life or health of the Producer or might interfere with the Producer's services hereunder;

the Producer will at all reasonable times when so required attend and submit to such medical examinations and/or treatments as the Company or its medical advisors shall desire or deem necessary. Such medical examinations and/or treatments shall at the Producer's request and expense be carried out in the presence of the Producer's own independent medical adviser;

the Producer will indemnify and at all times keep the Company fully indemnified against all actions, proceedings, costs, claims and damages whatsoever incurred by and/or awarded against and/or compensation agreed by the Company in consequence of any breach or non-performance by the Producer of any of the warranties, representations, agreements or undertakings in this Agreement; and

the Producer is a British citizen.

13. SUSPENSION

The Company shall be entitled by notice in writing to the Producer to suspend the Producer's engagement hereunder in any of the following events:

if the Producer fails, refuses or neglects to comply with any of the terms or conditions hereof and fails to remedy such breach within twenty four (24) hours of notice thereof from the Company provided that where such breach is not capable of remedy or the Producer breaches this Agreement on a second or subsequent occasion no such period of grace shall apply;

if the Producer is incapacitated from rendering services hereunder by ill health, injury or other cause; and

if production of the Film is prevented, interrupted or delayed by any cause outside the control of the Company (including but not limited to fire, flood epidemic, earthquake, explosion, casualty, accident, riot or civil disturbance, war (declared or undeclared), armed conflict, act of God or public enemy, strike, lock-out, labour conditions, judicial order or enactment or incapacity or death of any leading artist, the director or a senior technician of the Film).

Suspension of the engagement shall have the following effect:

it will last as long as the event giving rise to it plus such further period not exceeding twenty one (21) days as may be reasonably required by the Company to prepare to resume using the Producer's services or it will last until this Agreement is determined, whichever is the earlier;

while it lasts payments of remuneration under Clause 0 (other than those due on or before the date of suspension) will cease to fall due but the Company's obligations under Clause 7 shall not be affected unless the suspension arises by reason of the default of the Producer hereunder;

the term of the engagement will continue after the suspension ends (unless it ends by termination of this Agreement) for the length of time unexpired when the suspension began;

the Producer shall continue during the suspension to comply with all of the Producer's obligations hereunder not thereby affected by suspension and shall not



without the prior written consent of the Company (such consent not to be unreasonably withheld or delayed) agree to render services to any other person during the continuance of such suspension. If the Producer does agree to render services to any other person during the continuance of any suspension with the Company's prior written consent, this Agreement shall either terminate at that time or else the re-commencement of the Producer's services will be subject to any prior professional commitments;

the Company will remain entitled to all rights hereby granted to it.

14. TERMINATION

The Company shall be entitled by notice in writing to the Producer to terminate this Agreement (whether or not the Company has suspended the engagement for the same or another reason) in any of the following events:

if the Producer fails, refuses or neglects to comply with any of the terms or conditions hereof and fails to remedy such breach within twenty four (24) hours of notice thereof from the Company provided that where such breach is not capable of remedy or the Producer breaches this Agreement on a second or subsequent occasion no such period of grace shall apply;

if an incapacity mentioned in Clause 0 above continues for a consecutive period of seven (7) days or an aggregate period of fourteen (14) days;

if a cause mentioned in Clause 0 continues for a consecutive force majeure period of seven (7) days or an aggregate force majeure period of fourteen (14) days;

if any act or conduct of the Producer shall prejudice the production or successful exploitation of the Film;

if the Producer fails to submit to medical examination or makes untrue or inaccurate replies or statements for the purpose of insurance or if the Company is unable to effect insurance on the Producer on normal terms.

Termination of this engagement on any of the foregoing grounds shall have the following effect:

the Company may abandon or postpone the making of the Film or may substitute another person for and in the place of the Producer and may continue the production of the Film or any revised version thereof in any manner that the Company shall in its sole and complete discretion elect;

the Company shall pay the remuneration referred to in Clause 0 to the extent such payments are due or payable hereunder as at the date of the event giving rise to termination (or the beginning of any suspension preceding termination) and except where termination arises by reason of the default of the Producer hereunder the Company's obligations under Clause 7 shall not be affected;

each party will remain entitled to enforce any claim against the other party or parties arising from any breach hereof that may have occurred before termination; and

the Company will remain entitled to all rights hereby granted to it.

The Company shall also be entitled at any time in its discretion without specifying any reason by notice in writing to the Producer to terminate the Agreement hereunder and replace the Producer with another producer [but in the event of termination under this sub-clause 0 the Company shall remain liable to pay to the Producer the remuneration specified in clause 0 of this Agreement].

15. INJUNCTIVE RELIEF AND NO RECISSION

It is understood and agreed that a breach by the Producer of any of the material provisions of this Agreement will or may cause the Company irreparable injury and damage and the Producer expressly agrees that the Company shall be entitled to injunctive or other equitable relief to prevent a breach of this Agreement by the Producer, resort to such equitable relief shall not be construed as a waiver of any other rights or remedies which the Company may have for damages or otherwise.

In the event of a breach by the Company of any of its obligations to the Producer or pursuant to statute law or common law, the Producer's rights and remedies shall be limited to his rights (if any) to recover damages in an action at law and in no event shall the Producer be entitled by reason of any such breach to enjoin or



restrain the distribution, exhibition, broadcast, advertising or exploitation of the Film or any of the allied and ancillary rights connected with the Film.

16. NO WAIVER

No waiver by either party to this Agreement of any breach of any of the terms or conditions of this Agreement in a particular instance shall be deemed or construed to be a waiver of any preceding or succeeding breach of the same or any other terms or conditions. All rights, remedies, undertakings and obligations contained in this Agreement shall be cumulative and none of them shall be in limitation of any other rights, remedy, undertaking or obligation of either party.

17. NO PARTNERSHIP

Nothing herein contained shall be construed or deemed to constitute a partnership or joint venture between the parties hereto and save as expressly herein provided no party shall hold itself out as the agent of the other.

18. PARTIAL UNENFORCEABILITY

If any clause or any part of this Agreement or the application thereof to either party shall for any reason be adjudged by any court or other legal authority of competent jurisdiction to be invalid such judgement shall not affect the remainder of this Agreement which shall continue in full force and effect.

19. NOTICES

Any notices relating to this Agreement will be validly given only if in writing and delivered personally or by courier, or sent by first class post (or air mail if overseas), recorded delivery or fax, to the intended recipient at the address or fax number set out in this Agreement or such other address or fax number as the party in question may specify by notice. A notice shall not be valid if sent by e-mail.

In the absence of evidence of earlier receipt, a notice is deemed given:

if delivered personally or by courier, when left at the relevant address;

if sent by post other than airmail, two days after posting it;

if sent by airmail, six days after posting it; and

if sent by fax, on completion of transmission, provided that the transmitting fax machine prints out a successful transmission report.

If a notice is deemed under Clause 0 to have been given on a day other than a Business Day, that notice shall instead be deemed to be given on the next Business Day.

Each party shall immediately give notice to the other of a change in its address.

The address and fax number of each party for sending notices is:

for the Company: [];

for the Producer: [].

20. AGENT

The Producer hereby authorises and requests the Company to pay all monies other than expenses pursuant to Clause 7 hereof due to the Producer hereunder to the Producer's duly authorised agent [] (Attention: []).

21. RIGHT TO ASSIGN

The Company shall have the right to assign and charge the benefit of this Agreement either in whole or in part to any third party but no such assignment shall relieve the Company of any of its obligations to the Producer hereunder.

22. ENTIRE AGREEMENT

This Agreement replaces, supersedes and cancels all previous arrangements, understandings, representations or agreements between the parties hereto either oral or written with respect to the subject matter hereof and expresses and constitutes the entire agreement between the Company and the Producer with reference to the terms and conditions of the engagement of the Producer in connection with the Film and no variation of any of the terms or conditions hereof



may be made unless such variation is agreed in writing and signed by both of the parties.

23. GOVERNING LAW

This Agreement shall be construed and performed in all respects in accordance with and governed by English Law and the parties irrevocably submit to the jurisdiction of the English Courts.

24. THIRD PARTIES

A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to rely upon or enforce any term of this Agreement.

AS WITNESS the hands of the Producer and duly authorised representative of the Company the day month and year first above written.

SIGNED by [NAME] for and Behalf Of)

[name of company])

Director

SIGNED by [PRODUCER])

ANNEX 2

The Distribution Agreement

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.

This Distribution Agreement is made as of _____, 20__ between ABC Distribution, ("**Licensor**") and _____ ("**Distributor**")

Address: _____

Phone: _____

E-mail: _____

Subject to the terms hereof and conditioned upon payment of the Minimum Guarantee, the Licensor hereby grants the 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 the Licensor's Notice of Initial Delivery Availability to the 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, the Distributor will pay all sums payable to the 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 the Licensor, the 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, the 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 the Distributor to the Licensor will be made to:

ABC Distribution

1925 Century Park East

Los Angeles, CA 90067

Phone: 310.555.8300; E-mail: sales@abcdistribution.com

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

F. **Licensed Rights:** Licensed Rights are limited to the Rights indicated below. The Distributor shall not enter into any subdistribution agreements without the Licensor's prior written approval of the terms thereof. The 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 the 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

Demand-View (VOD)



Pay TV Rights: Licensed
Licensed

Free TV Rights:

Terrestrial Yes No _____Runs

Terrestrial Yes No _____Runs

Cable Yes No _____Runs
Runs

Cable Yes No _____

Satellite Yes No _____Runs
_____Runs

Satellite Yes No _____

No Pay TV or Free TV Rights licensed hereunder may be exploited by the Distributor prior to the date which is _____ months after the commencement date of the Licensor's pan-territorial satellite window. The Licensor shall notify the 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:

The Licensor and the Distributor shall share the Gross Receipts arising from the 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:** The 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:** The Distributor shall first retain ___% as a Distribution Fee, until the 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 the Distributor. Following recoupment of the Minimum Guarantee, ___% of Cinematic Gross Receipts shall be paid to the Licensor and ___% shall be retained by the Distributor.

2. **Ancillary Rights:** The Distributor shall pay to the Licensor ___% of Gross Receipts derived from the exploitation of the Ancillary Rights, without any deductions therefrom.
3. **Video Rights:** The Distributor shall pay to the 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:** The Distributor shall pay to the Licensor ___% of Gross Receipts derived from the exploitation of the Pay-Per-View (PPV), VOD and Pay and Free Television Rights, without any deductions therefrom.
5. **New Media Rights:** The Distributor shall pay to the Licensor ____% of Gross Receipts derived from the exploitation of New Media Rights without any deductions therefrom.
6. **Cross-Collateralization:** The Distributor shall recoup the Minimum Guarantee on a cross-collateralized basis from the Licensor's share of the Gross Receipts obtained from the exploitation of the Licensed Rights. If the Distributor's Cinematic Distribution Expenses exceed Cinematic Gross Receipts, then the 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 the Distributor cross-collateralize the Gross Receipts of the Picture with the Gross Receipts of any other picture licensed by the Licensor to the Distributor.



H. **Delivery:** Within thirty (30) days of the Licensor's notification to the Distributor that the initial materials are available for delivery to the Distributor ("Notice of Initial Delivery"), the Distributor shall notify the Licensor in writing of the 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 the Distributor with the Notice of Initial Delivery. The 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. The Licensor (and/or its designees) shall have free access to all materials (including all language tracks) created by or for the 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 United States Distributor, the Picture shall not be released in any media in the Territory prior to the US Theatrical Release. Subject to the foregoing holdback, Theatrical Release of the Picture in the Territory by the Distributor must occur within six (6) months after Notice of Initial Delivery. The Licensor will notify the Distributor of any further holdbacks required by the US 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. The Distributor shall supply the 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 the Licensor's other rights and remedies under this Agreement, at law, in equity or otherwise, the Distributor shall be in default of this Agreement and this Agreement may be immediately terminated by the Licensor in the event that: (i) the 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) the Distributor fails to issue statements as required by the Standard Terms and Conditions; (iii) the Distributor fails to sign a Notice of Assignment and the Distributor's Acceptance (if required hereunder) in the form required by the Licensor's bank within ten (10) days after the date which is the later of (a) the execution of this Agreement by the Distributor and (b) the Distributor's receipt of such Notice of Assignment and the Distributor's Acceptance; or (iv) the Distributor fails to issue a letter of credit (if required hereunder) in the form required by the Licensor's bank within fourteen (14) days after the date required hereunder. In addition to any other right or remedy of the 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 the Licensor. The Distributor acknowledges and agrees that, in reliance upon the promises made herein (including the promise to timely pay all amounts of the Minimum Guarantee), the Licensor will remove the Picture(s) from the marketplace for the Term in Territory for the Licensed Rights for the express benefit of the Distributor, and that, in the event of the Distributor's default, the Licensor will be entitled to compensation for holding the Picture(s) off the market for such period. Accordingly, in consideration of the Distributor's holding the Licensed Rights in the Picture(s) in the Territory for such period of time, and without limiting in any way the Licensor's right to seek and obtain the full amount of the Minimum Guarantee and any other remedies available, the Distributor agrees that all sums paid to the Licensor prior to such default shall be retained by the Licensor as compensation in the event of a default regardless of whether the 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 the Licensor's rights with respect to the Picture shall be terminated for any reason, the Licensor shall have the right to terminate this Agreement by written notice to the Distributor. If any monies have been paid by the Distributor, the 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 the Distributor expressly acknowledges and agrees that the Licensor shall be entitled to injunctive or other equitable relief to restrain, prevent or enjoin any breach by the Distributor of this Agreement or any infringement of the Licensor's rights in the Picture(s). The Distributor further agrees that its remedies will be limited to an action at law for damages, and in no event shall the Distributor have the right to seek or obtain any injunctive relief against the Licensor relating to this Agreement or the Picture(s), and the 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 legal provisions thereof).



The 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 3

Sample E&O Application Form⁴

Television and Film Errors and Omissions Insurance

⁴ Source: This form was kindly supplied by Mr. Peter Dally, a British solicitor.



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 the author of such work.

The production is:

Television “entertainment”

Television factual (but not investigative)

Television factual (investigative)

Television drama

Television: Children and religious

Television: Daytime

Television: Other. Please give details.

Film for: Cinema release

Film for: Television release

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 US law?

Is the production

Entirely fictional?

Entirely fictional, but inspired by specific events and/or occurrences?

A portrayal of actual facts which includes significant fictionalization?

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 COT?

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 1, 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 works 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 versus 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 licenses 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.

If yes, have licenses 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 synchronization?

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 licenses? 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 licenses been obtained from performers, authors, performers, etc., to produce and distribute this merchandise?

If no, explain.

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

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).

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

CLAIMS DECLARATION

Has any claim been brought
against you arising out of:



such production is based? If
yes, please give details.

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 or our proposal for insurance.
3. *I/we agree that this proposal form and all other written information which is provided are incorporated into and from 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 4

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].”