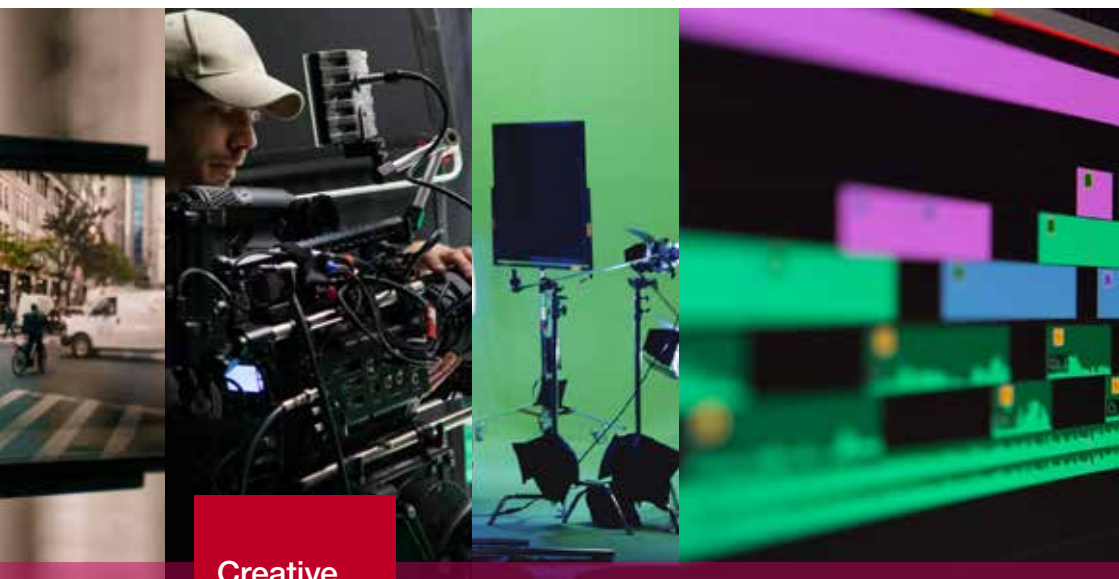


# **Rights, Camera, Action!** **Intellectual property rights and the filmmaking process**

2nd Edition



**Creative  
Industries  
Series**

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## **Intellectual property rights and the filmmaking process**

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# Preface

This book is written principally from the perspective of a small-size film producer or entrepreneur. Their economic success depends on matching ideas with talent, obtaining relevant intellectual property (IP) rights and using those rights to attract finance from commercial film distributors. That success also depends on consumers in their living rooms, on public transport or in movie theaters receiving the end product with a heartfelt laugh or a tear in their eye.

This perspective reflects the dominant reality of the film industry worldwide. Most readers will have some anecdotal acquaintance with Hollywood, and those who know about its remarkable business model will probably agree that, rather than representing a worldwide norm, it is an almost entirely singular phenomenon. Its business model is intimately connected to the specific industrial history of the United States and is not reflective of filmmaking traditions elsewhere: nearly 20 years into the new century, most films worldwide are made by driven, dynamic cultural entrepreneurs with a strong creative vision, an appetite for stories, dreams of critical and commercial success, and almost no money of their own. This book is primarily written to educate those who aspire to join this spirited community, whose efforts do so much for IP-based economic growth and cultural diversity all over the world.

The decision to adopt the producer's perspective is also to provide an effective educational resource on the intricacies of rights and the film production process within a short publication. Of all those who contribute to the making of a film, the producer is closest to the heart of the process. They do their best to direct traffic at the crowded intersection where talent, rights, money and dreams meet and, in an ideal scenario, they move them all in the same direction. In this unique position, the producer must have a thorough understanding of how IP rights can be used strategically to obtain production funding and attract the best authors, actors and other talent to a project. Their insights into the process should reflect a genuine interest in understanding how films come to be made, and the dynamic role IP rights play in their creative and economic genesis.

When this book was first published in 2008, the audiovisual rights value chain was on the verge of unprecedented change. A few years earlier, Apple had spearheaded the online revolution with the 2001 launch of iTunes, but the initial offer was restricted to music; by 2007, film and television content had become a substantial part of the offer. Netflix was still a DVD-to-your-doorstep physical rental service and the vast Blockbuster physical video retail stores were still a familiar sight on the high streets of the United States and elsewhere. Two years later, in 2010, Netflix launched its online streaming service. Just 12 years later, by March 2022 Netflix boasted over 221.8 million subscribers to its online platform worldwide, and its global expenditure on content acquisition and commissioning was estimated to have reached a staggering USD 17 billion in 2021 against Amazon's USD 13 billion: however, demand for films and shows premiering on the service has made Prime Video a leading driver for Amazon Prime membership around the world. Apple was reported to be spending a roughly equivalent amount on new original film and video content, to accompany the reorganization of its range of online video content through Apple TV+. Like Amazon, the Cupertino firm could afford to take the long view as it began to compete in this space: at the start of 2019, the cash reserves held by Apple stood at USD 245 billion, only USD 5 billion short of the GDP of Bangladesh, a country with a population of 160 million.

The over-the-top (OTT) direct-to-consumer phenomenon is not restricted to a small clutch of global brands with outsize market power and reach. In 2019, the French broadcasting group Canal+ bought IROKOTV, a global OTT platform offering a vast selection of Nigerian "Nollywood" films and low-cost television episodes to a vast African market at home and in the global diaspora. The Canal+ investment signaled growing confidence in the prospects of specialized platforms able to optimize content and prices to the purchasing power of emergent consumer economies. In India, video on demand (VOD) revenue is forecast to reach USD 1.85 billion in 2022 and to sustain a CAGR growth rate of 10.8 percent in the period 2022 to 2026.<sup>1</sup>

The decade from 2008 also saw audiovisual content consumption released from the restricted options of the cinema and the living room: in 2008, the number of smartphones sold worldwide stood at just under 140 million. By 2018, manufacturers were selling 1.56 billion devices globally and the total number of users reached 15 billion in 2021. In countries and regions (e.g., Africa) where physical broadband infrastructure deployment is still in development, the smartphone has now become one of the leading media for consuming all forms of filmed entertainment, driving demand for a wide range of content, from amateur films to tuition and music videos, and from webisodes to features and television series.

The global explosion in online consumption and business models has sent shockwaves through the traditional audiovisual chain, giving rise to new pressure points and fresh conflicts about long-established practices. In many mature national markets, cinema exhibitors have been pushing back against pressure from distributors to reduce the duration of the theatrical release and get films to other platforms earlier. In the United States, traditional pay-TV has been challenged by the growing practice of “cord cutting,” with consumers opting out of traditional cable and satellite offers and subscribing instead to legal services directly available on the open internet, often at more competitive rates. And traditional free broadcast television has seen its value proposition threatened by competition from cash-rich VOD operators. More recently, the impact of the COVID-19 pandemic and the original lockdown measures adopted in many countries around the world in 2020 resulted in the temporary closures of cinemas and the consequent explosion in broadcast and online consumption of filmed entertainment. At the time of writing, the audiovisual industry worldwide is grappling with the potential implications of this in the longer term.

To describe these seismic changes as mere disruption does not do justice to the sheer scale and depth of the revolution in technology and business models still underway today, and its impact on the patterns of transactions based



on copyright and related rights that are the focus of this book. The power shift away from the traditional film studios and legacy broadcasters to algorithm-driven, direct-to-consumer OTT services delivered principally through the open internet is an unprecedented realignment in the history of the audiovisual medium. In preparing the second edition of this book, I have sought to integrate as much information as possible on the practical knowledge gained by working producers as they deal with this revolution in production and distribution models, and the expansion in the range of rights transactions and licensing opportunities that it presents.

This book describes the forms of copyright-based transactions and contractual practices that together form what could loosely be described as an international standard. It can be observed in countries where film and audiovisual production industries have reached a certain level of maturity in terms of legal, financing and distribution infrastructures. Some countries where such industries are still emergent face challenges in delivering a supportive infrastructure for creators, producers, performers and other right holders to access the national copyright framework and ensure they are appropriately protected and incentivized by it. Experience also shows that – over a certain budget level – no matter where a producer lives and works, they will need to reach out to the international community of film financiers and distributors, and so become familiar with the global market for film rights and the legal standard required to establish the necessary copyright documentation.

As far as possible, I have tried to illustrate our analyses of how rights are optioned, bought, sold or licensed by summarizing real-life case studies. These required the consent of the film producers, authors and artists who were involved in those contractual arrangements, and I am deeply grateful to those who freely gave their time (a precious commodity for a film producer) to help us breathe life into this publication. In some cases, I was given permission to use specific figures, taken from real contracts. Often I chose not to use those figures, partly out of consideration for the sources, but also because such figures relate to the value of specific rights at specific times, are mostly reflective of a particular film, and are therefore unreliable indicators of the average value of those rights across the board.

Initially, this publication was conceived to focus exclusively on the copyright-related issues as they relate to the making of feature-length “cinema” films. Our omission of other forms of audiovisual expression, such as the vast sector of programming now made for streaming video platforms and traditional broadcasters, is a choice dictated by our desire to convey a sense of the complexity of rights-based transactions in an audiovisual medium which engages the full range of rights across the entire value chain. The story of how feature films come to be made is rich and intricate enough to merit a stand-alone publication. However, this exclusive editorial focus does not imply any lack of interest in the rest of the audiovisual enterprise sector, whose IP rights challenges and opportunities deserve to be explored in just as much detail. This publication is part of the World Intellectual Property Organization (WIPO) *Creative Industries* series, and is one of two books about the audiovisual sector. *From Script to Screen: Copyright for Audiovisual Professionals* provides detailed information on many of the practical issues that makers of both films and television programs face in relation to copyright law and practice.<sup>2</sup>

Film, perhaps more so than any other form of cultural expression, is a collaborative phenomenon. While I have described the role of the film producer as pivotal, their efforts are futile without the engagement and motivation of the talent working on the film, especially its authors and performing artists, on terms which will secure their enthusiasm and commitment. Bringing about this creative chemistry requires the intuitive skills necessary to inspire others. It also requires a willingness to strive for balance and fairness in the negotiation of the rights and remuneration of the authors, performers and other contributors. I hope this book will act, in its own modest way, as a helpful guide for the novice producer willing to walk this ethical path.

Bertrand Moullier  
London, 2022

# About the author

Bertrand Moullier is an independent audiovisual industry consultant based in London. His company, NARVAL Media Ltd, provides advisory and advocacy services to international trade associations representing the different components of the audiovisual value chain. Prior to his consultancy career, he was an executive in trade associations representing the audiovisual production industries in the United Kingdom (the Producers Alliance for Cinema and Television) and globally (the International Federation of Film Producers' Associations).

He is an honorary research fellow of Exeter University in the United Kingdom, where he has taught on regulatory and business issues in the film/television industry. He is also a contributing lecturer at the National Film and Television School's annual Atelier program, teaching students from all over the world. He is the author of two studies on the Indian (2006) and Egyptian (2007) film industries commissioned by the Creative and Innovative Economy Center at Georgetown University (Washington, D.C.). He is also the author of *The CISAC Story* (2016), a history of the first 90 years of the International Confederation of Societies of Authors and Composers, and co-author with Benoît Muller of a WIPO scoping study on *Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries* presented to the WIPO Committee on Intellectual Property and Development at its 12<sup>th</sup> session in November 2013.

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# Glossary

**Above-the-line** Line items in the film's budget that refer to sums paid to key talent and right holders 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 ensures that the film will attract finance and/or distribution opportunities.

**Below-the-line** Line items in the film's budget that refer to sums paid to contributors who are engaged on a work-for-hire basis.

**Cap** Usually a limit to sales or distribution expenses that cannot be exceeded without the producer's permission.

**Chain of title** The documents and contracts that demonstrate exactly how the rights in a project are controlled by the producer.

**CGI** Computer-generated imagery.

**Charge** A legal charge over the rights of the film that ensures contractual obligations are fulfilled.

**Collection agency** An agency set up to administer the collection of revenue from the film's exploitation and the distribution of that revenue to the financiers of the film. The collection agent also distributes the net profits.

**Common law rights** In the context of filmed IP, the convention in countries such as the United Kingdom and the United States is that the producer is the author of the work and they control its final shape and form.

**Completion bond/guarantee** Specialized production insurance that guarantees the timely delivery of the film according to an agreed budget.

**Co-production** A film that combines the creative, production and/or financial input from more than one territory.

**Co-production treaty** A cross-national governmental agreement that enshrines how a co-production must be structured to benefit from national incentives.

**Cottage industry** Any small, low-profit, national-based industry with little capital that relies on local markets to survive.

**Crossover film** A modestly budgeted film (perhaps with a quirky edge) that manages to attract a much broader audience than originally envisaged.

**Day-and-date** A simultaneous release of a film across multiple territories and, more recently, multiple distribution platforms.

**Debt financing** Finance lent to the production and recoverable in first position.

**Deferrals/Deferments** Delayed payments or remuneration paid to a supplier or contributor as and when the producer has revenue from the film.

**Delivery** The technical delivery of the elements of the film to distributors and/or financiers to allow it to be sold and/or distributed.

**Development** The time and actions necessary to move from an idea to a completed script (or screenplay) that is ready to be filmed.

**Dialoguiste** The writer of dialogue only.

**Director's cut** The early form of the film that is in the direct control of the director.

**Droit d'auteur** The right of the author to assert paternity and moral rights over the works they create; prevalent in certain countries including France and Italy.

**Equity** An investment that attracts a significant share of the profits of a film but is recovered after debt.

**Escalator** Bonus payment made to the producer or participants if performance thresholds are exceeded or awards are received.

**Executive producer** Usually a producer whose principal task is the financing of the film.

**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 edited 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 the bid of a third party.

**First position** The financing that comes out first as revenue is accrued.

**Gap financing** Finance (usually debt) against unsold territories.

**Gross deals/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 access cash flow subject to a minimum guarantee via a bank.

**License** A time-limited grant of rights.

**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 managed properly on a day-to-day basis.

**Long tail** In commercial terms, an expression coined by Chris Anderson to describe products that are in low demand or have a low sales volume but which can collectively make up a market share that rivals or exceeds the relatively few current bestsellers and blockbusters.

**Minimum guarantee** Finance promised against exploitation of a film in a territory and/or medium.

**Moral rights** The right of the author of a work (usually the director) to control its final shape and form.

**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 deal** A pre-negotiated deal, usually between studios or major producers and local distributors and/or broadcasters, ensuring certainty of distribution.

**Package** Consisting of things such as expressions of interest from one or more lead actors and the attachment of a director to a project.

**Participation** The share of net profits owned by a creative or financial contributor to the film.

**Polishes** Short writing engagements 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/television, 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 into the release of a film in terms of the physical prints and the costs associated with marketing the film.

**Producer** The person or company responsible for the making of the film, usually controlling the rights.

**Production bonus** A further sum paid to a writer or right owner on the first day of principal photography.



**Production budget** The cost of making and completing a 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.

**Rebuttable** Rights granted by moral law to a right holder, allowing them to retain their moral rights.

**Re-format rights** The rights of a producer to convert the script to another format than originally envisaged, e.g., to television instead of film.

**Reserved rights** The rights that a writer of a spec script or a right owner might reserve for themselves when granting an option or license – often the radio or stage rights.

**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 a film.

**Rough assembly** The early cut of a film in post-production.

**Royalty** The payment to a right holder of a share of a film's exploitation in certain media.

**Sales agent** Corporation set up to sell rights on behalf of the producer to distributors around the world.

**Sell-through** DVD/Blu-ray distribution through which the purchaser owns the unit. Electronic sell-through (EST) refers to transactional VOD in which the consumer purchases the video of a file for permanent ownership.

**Separated rights** Similar to reserved rights but granted to a writer or right owner in a work-for-hire context.

**Single-purpose vehicle** A UK limited company responsible for producing and delivering the film.

**Spec script** A non-commissioned script owned and controlled by the author until its purchase or option by a producer.

**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 usually very successful films to local United States television broadcast networks.

**Ten-percenters** Slang term referring to talent and literary agents.

**Tent pole films** The half-dozen pictures per year on which the success of the United States studios depends.

**Treatment** A short document that outlines the shape and form of a planned 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** The time period in which a distributor or broadcaster is given the exclusive right to exploit a film.

**Work-for-hire** The contributors to a film whose rights are purchased with their employment contract.

## Notes

1. Statista – India Video On Demand Report. Available at <https://www.statista.com/outlook/dmo/digital-media/video-on-demand/india>.
2. WIPO (2017). *How to Make a Living in the Creative Industries*. Available at <https://www.wipo.int/publications/en/details.jsp?id=4166>.

# Eye of the Needle – the Disciplines of Development

## Digging for gold – the search for the perfect script

In filmmaking, “development” refers to the time and actions necessary to move from an idea to a completed script (or screenplay) ready to be filmed and a “package” consisting of elements such as expressions of interest from one or more lead actors and the commitment of a director to the project.<sup>1</sup>

The script is the most important part of the development process. Very few films are made each year without a completed script, and those that are tend to have very low budgets and are produced by fledgling filmmakers keen to experiment with form and performance. A relatively small number of films are also made using partial improvisation, though these tend to be done within a solidly scripted story structure. In *The One I Love*, a low-budget, independent US film released in 2014, the actors improvised all of their dialogue. However, producer Mark Duplass specified in interviews that every scene had been carefully written, with specific directions regarding the movement of the plot and charting what the characters were meant to do and feel at any particular time. Such films are extremely rare. Most critics would agree that generally only a masterful director such as Mike Leigh can make films that successfully incorporate improvisation.

Therefore, most films have a detailed script, without which they stand little chance of attracting money from financiers to make the film. The basis for a script can include an original story, a novel, a non-fiction book, an existing script for another film, a theater play, a magazine article or a real-life story. The script itself is always an original creation to which IP rights are attached (i.e., rights must be purchased from or licensed by the author of the script or screenplay). However, if it is not an original story but an adaptation of an existing creation, other IP 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 consists of the producer ensuring that all of the rights on all the underlying material used to produce a completed script are acquired or licensed, including the rights of the writer (or writers) commissioned to write the film script. The producer also needs to be able to produce written evidence that they are in control of all those rights. This paperwork is known as “chain of title,” and it is important because no bank or other source of funding in the mature film industries will financially support a film without assurance that the production will not be halted by the court injunction of a disgruntled author or other right holder whose work has been used without due permission and financial compensation.

As noted in the introduction, in some other parts of the world development may have less of a formal legal structure, and the process can vary. For example, UK or US producers often initiate the original idea, commission a professional script writer and then proceed to attract a director to the project. Meanwhile, in France and Italy a director is more likely to write their own script and seek a producer to raise the necessary funding. In India, until recently, the script simply did not have the same status as it does in the United States and European contexts: film stars and the promise of spectacular set pieces choreographed and directed by experienced artists were deemed more important. Projects are most often sold to film stars by the director acting out each scene, without necessarily having reference to a printed script.

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

## **Passion and eloquence – attracting funds for development**

At first glance, passion and eloquence may not seem especially relevant to films and IP rights.

However, they are crucial. Negotiating for the licensing or acquisition of underlying rights and getting the best possible standard of work out of a commissioned script writer require interpersonal skills just as much as a good working knowledge of IP transactions. Authors of such works will often want to see evidence of the producer's passion for the project and connection with their work before considering a deal.

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

There are multiple sources of development funding in Europe and the United States. Public sector loans are available on reasonably soft terms from national public funds set up to sustain local film development. The European Commission in Brussels offers to support production companies over a group (or “slate”) of film projects, by providing up to 50 percent of the budgeted development costs. It does this through the MEDIA strand of its Creative Europe program.

In terms of development skills, the producer looking for development funds on a project needs a good general knowledge of the local and global marketplace for film, but also must have considered the commercial prospects specific to the project.

For most producers around the world, public funding for development 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 worldwide:

- **Reimbursement** – Funds are loaned generally based on the presentation of an itemized development budget, i.e., a budget in which every main 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 collectible at the start of production. Percentages vary depending on the nature of the risk, the budget of the film and the term of the loan. Many lenders will additionally negotiate for a percentage of net profit from the exploitation of the finished film, typically 25 to 50 percent.
- **Turnaround** – This refers to the terms of a contract under which a financier may be entitled to let go of a project, either at their own request or at the request of the producer. The financier will normally have negotiated a deal which ensures that a third party taking over the further development of the project would have to repay development expenditure to date, generally with a premium and/or interest charge, if the film is eventually made.
- **Security** – In order to minimize their risk, the financier may take assignment of all the rights secured by the producer in the project over time and prevent them from selling those rights on to a third party without consent.

## Buying time – how to negotiate an option

In an “option,” the producer pays money to a right holder to be given an *exclusive* period of time during which they are the sole person/company that can acquire the rights relevant to the work. In effect, the option contract ensures that its beneficiary is the only individual or person legally empowered to arrange to adapt the work 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 competitive advantage over anyone else who may be interested in it. The object of the option can be any kind of underlying work, such as a book or a pre-existing script. The option also gives the producer the exclusive choice of whether or not to buy the rights to the underlying work at a later stage.

Paying money for an option is much cheaper than having to purchase the rights to the work straight away. It would be

inadvisable for the producer to pay the full price for rights acquisition immediately, without having first ascertained:

- whether or not the underlying work can be successfully adapted into an audiovisual work (e.g., there are many good books that would not necessarily make a successful film); and
- if there are reasonable expectations for raising funds to bring the adaptation to fruition.

Consequently, the option limits the initial development risk for the producer. On average, only around 30 percent of film projects developed in Hollywood make it into production, and this ratio is similar in other mature film and television industries around the world. Typically, most small- to medium-sized independent production companies will be developing several projects at once, knowing that a high proportion – possibly as many as two out of three – will never make it into production. Therefore, any money channeled into development is entirely at risk, with millions of dollars written off worldwide each year. Considering this risk, the option gives 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, option agreements tend to be over an initial 18 months, renewable after that for an equal period, given that a long time is spent both developing a script and negotiating with talent agents. European option agreements tend to be shorter: around one year initially, with possible renewal for another six months or a year (or two additional six-month terms). Before granting a renewal, the right holder 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 right holder, as author of the underlying work, the power to decide arbitrarily what constitutes progress. Defining specific, realistic targets may help to avoid misunderstandings about this aspect of the negotiation.

The payment of the first option period is generally treated as an advance on what will become the rights acquisition payment, if the producer eventually chooses to *exercise* their option. The fee will

not be refunded by the right holder if the producer chooses not to exercise the option. In the anglophone film industries, the fee is typically about 5 to 10 percent of the price of the rights purchase, and the figure is comparable elsewhere in the world where options are used. A second option payment is not treated as an advance on the value of the rights purchase, but rather as a one-off, non-refundable and non-deductible payment.

Some option agreements include a clause to ensure that a share of net profit will be paid to the right holder in the underlying work if the film gets made (and if it is ever successful enough to return net profits). The percentage is between 2 and 5 percent 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. The net profit consists of whatever money is left after the bank has recovered its loan(s) and interest, the international sales company has collected its fees and deducted its marketing costs, and the financiers have recouped their investments, along with any deferred fees which were not paid fully to the cast, crew, director or producer during production. However, most films worldwide do not have sufficient success to recover their full production costs and to pay back deferred salaries of fees, let alone to make a net profit.

Some right holders 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 that all but the most experienced and established film producers try 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 of working in film, or if the intention is only to base the film very loosely on the underlying work.

There are no quoted market rates for options anywhere. Depending on the degree of fame of the right holder and the work optioned, the seniority of the production company or the caliber of the star expressing an interest, these rates vary wildly.



In the Anglo-American film industry, some producers manage to get an initial commitment from the author of an underlying work without having to sign an option agreement. The producer expresses a written interest in the work and commits to looking at it more closely to determine if it could be made into a successful film. This type of pre-option agreement is based mostly on trust and is more suitable for established producers with existing connections in the author's world.

Before signing an option, one of the most important tasks for the producer 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 them from selling the rights to the producer at a later stage. An entertainment lawyer may be helpful to the independent producer at this stage, or there are specialized firms that offer a tracking and checking service, providing reports on individual copyright works.

## The big jump – purchasing underlying rights

The ink on the option agreement is dry, and the producer now faces the prospect of recruiting and commissioning a writer to write a good script and attract the interest of film financiers to the project.

While the script is going through its various drafts, the producer will also need to start estimating what the film will cost. This budgeting evaluation exercise will prove useful if the producer finally chooses to exercise the option and purchase the rights to the underlying work.

Once the producer has completed these stages they are ready to exercise the option, meaning that they will make an offer to buy out the underlying rights. 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, typically between 1 and 3.5 percent for smaller films. The purchase price is usually set when the option is negotiated, because the option is expressed as a percentage of the purchase price. There are often pre-agreed “floors” and “ceilings.”

Rights purchase agreements require a good deal of detail if the producer is to avoid unresolved issues and legal problems later in the development and production process. Below are some strategic points to address.

### **Rights acquired**

With the growth of new digital media, including VOD, the range of rights is changing and expanding all the time. Therefore, many holders of rights to underlying material will not accept a catch-all clause covering “all rights in the universe, etc.” It is important to be specific and exhaustive about the set of rights covered by the agreement to avoid conflicts of interpretation later. In some cases, the producer may only want to acquire a limited set of rights, or some rights may have already been acquired by another person or company.

### **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 time, whereas an assignment is most often a full-period-of-copyright term, where legally permitted. The choices available to the producer in this part of the negotiation can 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 *droit d’auteur* countries (i.e., most of Europe, francophone Africa and Latin America), where authorship of the work is vested in the individual and it may be more difficult to negotiate an in-perpetuity assignment. French writers, for instance, use this presumption to impose license-based agreements for more limited periods of time.

## Moral rights

Moral rights allow an author to protect the integrity of their work and assert their paternity over it. Integrity refers to an author's right to protect the work as they made it and to oppose, by legal means, any attempt to change the work without their prior consent, in a manner that would make it unrecognizable or radically alter its style, content or message. Paternity refers to the right of the author to assert that they are indeed the author of the work. It is vital to get absolute clarity over the application of moral rights in any rights purchase agreement. That said, 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 moral rights are asserted, they may be waived. A waiver is a written undertaking by the author not to prevent, in any way, the commercial exploitation of the work derived from the underlying source (book, script, theater play, etc.) whose rights are the object of the purchase. In Europe, the United Kingdom and Ireland adopted moral rights into their copyright acts in 1996 and 1998, to bring themselves in line with European law. However, those two countries also permit waivers for moral rights. At this stage, producers in all three countries consider waivers essential to avoid creating a sense of insecurity for film financiers, who may perceive a risk from an author asserting their moral rights if they take objection to the screen adaptation of it (or subsequent re-edited versions). However, the uncompromising approach to moral rights in *droit d'auteur* countries has not resulted in a climate of uncertainty over the exploitation of films. Contracts for authors in those countries include detailed and specific information on the context in which moral rights may be asserted, and ensure that this can only happen in cases when the integrity of the work has been blatantly breached or if the producer has chosen to ignore the author's assertion of their paternity through an end credit in the film. Conversely, although it is not described as an assertion of the paternity right, most authors of underlying works dealing with film producers in the United States will find that there are standard clauses to ensure that a screen credit is granted.

## 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 on sale. Radio and stage versions of the work are also a standard exclusion. Reserved rights cannot be exploited by the author of the underlying work without constraints, however: in most agreements the author will agree 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,” which means if the author later wishes to sell the reserved rights, these must be offered to the contracting producer first. Equally, the producer may be granted a “last refusal” right, meaning the author is obliged to offer the producer a sale of their reserved rights on terms equal to those offered by another bidder.

## Nothing like real life – films based on real-life people or “true stories”

Joel and Ethan Cohen, two of Hollywood’s most respected writers and directors, are known for their provocative use of the “based on a true story” byline in the opening credits of some of their films, including their 1996 critical and commercial hit comedy-thriller *Fargo*. When confronted in interviews, the brothers revealed that the claim of a fact-based source was in fact part of their make-believe, perhaps attributable to their keen sense of the absurd, and a wry cultural comment on the dubious authority of the “true story.”

Many filmmakers, however, actually do make films based on real lives, and must navigate choppy legal waters in the process. In addition to the decision that filmmakers may make to acquire rights to any factual or biographical book or magazine article, or any other work portraying living characters and their life stories, careful consideration must also be given to avoiding any infringement on the individual rights of the living people whose lives the film intends to portray and/or dramatize.

The degree of care and legal precautions required will vary according to which national jurisdiction applies in the event that a real-life person portrayed in a film decides to sue for libel, defamation or breach of their right to privacy. For instance, up until very recently, UK libel laws were considered advantageous to the plaintiff. Meanwhile, the US legal standard, with its strong emphasis on freedom of speech (guaranteed by the First Amendment), has a long tradition of making it more difficult for people who are (or believe themselves to be) the subject of a film to sue filmmakers successfully. US jurisprudence, for instance, separates out content such as advertising, which is categorized as “commercial speech,” and books, films or television fiction, which normally fall under “expressive speech,” for which First Amendment protection is more robust.

As a general trend, film producers have found strong support in US courts in their defenses against defamation, breach of privacy or “false light” lawsuits. First Amendment case law has effectively given filmmakers considerable creative leeway when portraying real-life people as part of a dramatized form meant for entertainment.

In 2000, surviving family members of the East Coast fishermen who drowned during a devastating storm in 1991 sued Time Warner after the release of *The Perfect Storm*, a star-studded film based on a bestselling factual book about the tragedy. Their case alleged “unauthorized commercial misappropriation and invasion of privacy.” The court ruled in favor of the film studio, having concluded that the likeness of those individuals had been used as part of expressive speech.

The right to privacy extends to different areas and includes protection against unwanted scrutiny of the nature of intimate family bonds or a person’s sexual preferences and their private space. However, this principle is not absolute: a court will always balance it against the principle of public interest. In particular, if a person’s life happens to be in the public eye, the plaintiff’s right-to-privacy argument will be more difficult to assert because, as a public figure or celebrity, their actions may have public interest implications.

In assessing libel risks when developing a film based on or inspired by one or several living people, producers should factor in the

possibility that potential plaintiffs may shop around for a country where defamation and libel laws put the burden of proof on the defendant. In a notorious 2008 case involving a factual book on the financing of international terrorism, a wealthy Saudi citizen sued American journalist and author Rachel Ehrenfeld through a British court for alleging that he had financial links with Al-Qaeda. Although the book had not yet been published in the United Kingdom, the fact that a small number of copies had been sold online to UK residents provided the legal hook. The maneuver led to a countersuit in a New York court by the author and the passing of a New York State act to protect local authors from the effect of what Ehrenfeld and her supporters had denounced as “libel tourism.”

## Into the void – commissioning a script

The producer has exercised their option and purchased or licensed the rights to the underlying work; by that stage, the script for the project may be fully in development, or even completed and ready to shoot.

Of course, this is not the only possible scenario. Books and other underlying works such as plays, musicals, magazine articles and real-life stories are not the only sources for scripts. A significant number of films are based on original scripts commissioned directly by a producer, a commissioning source such as a television or VOD platform executive, or a screenwriter. There are also many instances of “spec” scripts – for example, screenplays authored directly by a writer without a prior commission and sent to producers in the hope of eliciting interest and an eventual purchase. Alternatively, a script may be pre-existing. For instance, it might have been commissioned in the past by a producer who later decided not to go ahead with the project and instead put the script in “turnaround,” a practice that gives the author, or their successor in terms of right ownership, a window of time within which to set up the project with another producer.

Whatever the provenance of the script, in most jurisdictions writers of scripts are considered authors. Their script may be seen by the filmmaker as a template for a director to take and turn into an

audiovisual narrative, but most national IP laws recognize the script 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, rewrites or “polishes” that the producer expects as part of the agreed fees. The legal status of the writer’s contract varies according to prevalent copyright and related rights legislation.

In the United States, unless a script is written and submitted by the writer themselves, the contracting producer is presumed to be the sole author of the work and is therefore entitled to the copyright and all rights in the script that they have commissioned. Under this “work-for-hire” arrangement the writer merely fulfills a service contract and has employee status but owns none of the initial IP for the work.

In the United Kingdom, the writer of any script, whether commissioned or unsolicited, is deemed the author of the screenplay itself, but not of the resulting film. Therefore, in this context a writer’s contract is both an employment contract and a rights acquisition contract, with remuneration specified for the various stages (treatment, first draft, first draft rewrites, second draft, second draft rewrites, etc.). 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 pertaining to the material generated by the writer. Typically, when the rights pertaining to feature film scripts 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, which generally also includes a limited airing on a VOD platform closely related to the initial broadcast (this type of non-linear television is sometimes referred to in Europe as “catch-up” television). Any further transmission thereafter is covered by collective bargaining between the local writers’ guild and the producer’s trade body, with “residual” payments corresponding to specific forms of exploitation after a certain 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, an author’s power to assert their rights is useful on at least two counts:

- If there are issues over late payment (or non-payment) by the producer of the agreed fees, the writer may withhold the assignment of their rights to the producer, and make other parties to the financing of the film aware of it, until the money has been received.
- 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 that no rights are retained by the script writer, influential writers can successfully negotiate the retention of 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 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 allows the writer to buy the script back from the production company after a certain time (normally three or five years) if production of the film has not started. 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. Rather, it is an outright repurchase which allows the writer to enjoy full and ongoing ownership of their work.

In *droit d’auteur* countries in Europe, the writer of the screenplay, whether it is original or a screen adaptation based on underlying material, has a presumption of authorship of the script as a distinct work. Interestingly, they are also deemed to be an author of the finished film, regardless of how much of the script ends up being shot by the director. As such, all transactions with the producer entail a negotiation for the full or partial assignment of those author rights. The writer’s upfront remuneration for writing the script is also legally treated as an advance due to the writer as the author of the



work. The advance is against a proportion of all net receipts directly from the commercial exploitation of the film in all relevant media.

In practice, the advance will represent most of the writer's remuneration, as most films fail to generate sufficient net revenue, and this revenue must be shared proportionately with other creative contributors who share in the authorship of 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. Each shares in the authorship of the work and their contracts have equivalent clauses, based on the principle that any assignment of their rights to the producer may only be legally valid if their contracts stipulate a percentage of commercial exploitation specific to each form of exploitation.

Other regions of the world have adopted a variety of legal traditions with regard to the treatment of authors, many of which – initially at least – can be seen as historical legacies from colonial eras. For instance, national copyright laws in Africa have been broadly divided between the Continental European *droit d'auteur* approach (e.g., from Portugal and France) and the British copyright regime. The 10 francophone African countries are signatories to the Bangui Agreement of March 2, 1977, on the creation of an African Intellectual Property Organization (revised in 1999 and again in 2015).<sup>2</sup> Article 32(1) of the 1999 revision, for instance, establishes that "in the case of an audiovisual work, the first owners of the moral and economic rights shall be the joint authors of the work, such as the director, the script writer, [and] the composer of the music."

In the real world, in countries where copyright contractual practices and audiovisual infrastructures are less established, and where working capital for financing projects is scarce, authors of screenplays are often presented with "buyout" deals by producers. These contracts stipulate an all-in, upfront payment against full assignment of all rights in the script, with no residual entitlement by the author to a share of future revenues. The issues surrounding such practices are complex, and this book cannot comment on their fairness. However, regardless of an author's status in their

industry, the baseline principle is that it is important for the author of the script to insist on a written contract and to be fully aware of the rights being given away and retained. A written contract protects the producer as well as the writer, as it is a component of the copyright documentation – the chain of title – which will prove to potential distributors and/or financiers of the project that the rights have been acquired or licensed legally.

## The art of war – 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 – also humorously described as “ten-percenters” in Hollywood and elsewhere, in reference to their commission – have been a growing force in the worldwide film industry, from Hollywood to Bollywood. 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 upward, by negotiating high fees and revenue shares for the stars, directors and writers. In recent years, some observers say this trend has become more accentuated, with the larger talent agencies not only extending their reach to the global market outside of the United States but also integrating vertically into film/television content financing and international sales, leading to concerns about potential conflicts of interest.<sup>3</sup>

Agent representation can be a major asset in a script writer’s approach to the film industry. Writers are vulnerable because their work, despite being considered vital to a film’s success, is often treated as disposable by the producers and film financiers during the development process. Acting out of their own sense of necessity, producers often decide to replace the writer or bring in an additional writer to get the final shooting script that satisfies their own expectations, as well as those of the financiers and 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 that the writer is kept creatively involved by the producer throughout the life of the project, from conception to filming.

However, such terms are 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, through a process known as “collective bargaining,” their unions have negotiated standard clauses whereby a producer may not withhold payment on a commissioned script if they happen to be disappointed by its content. In return, producers have approached writers’ contracts in such a way as to limit their risk after the first draft stage: they will sometimes insist that the contract be flexible. In this “step-deal” approach, the writer can count 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 rewrites 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 once the shooting of the film is underway.

This deal only works well if the writer does not have to share credit with another writer brought in by the producer after the first draft stage. An established writer with a good agent can insist on terms that do not allow a second writer to be brought in to rewrite their first draft, or terms that ensure the initial draft is dispensed of before a second writer is brought in.

## Development – the real stories

This section presents three case studies borrowed from real development situations. Each typifies a specific set of development issues, and ways of structuring the development process in response to them.

## The Lord of the Rings’ long journey to the screen

Already a hugely popular book since its first publication by the literary scholar J.R.R. Tolkien in 1954, *The Lord of the Rings* went on to become a success story of phenomenal proportions in the history of cinema. By the time the third film in Peter Jackson’s celebrated trilogy had finished its initial worldwide theatrical run, the films had garnered a staggering USD 2.9 billion at the box office. And, as often happens, success in this opening market heralded a franchise that went on to break all prior established records in video, television license and merchandizing revenues.

However, the road to making this commercial and critical behemoth had been long and tortuous. From negotiations on the initial purchase of audiovisual rights from J.R.R. Tolkien and his publisher to the completion of Jackson’s first film, almost 45 years elapsed. The adaptation of *The Lord of the Rings* from the page to the screen is one of the most spectacular illustrations of the difficulties of development in the film industry, and of the potential for a complex chain of transfer of rights between a succession of film producers and studios.

Below is a timeline for *The Lord of the Rings’* epic journey from the page to the big screen:<sup>4</sup>

**1954–1955:** Publication of *The Lord of the Rings* by J.R.R. Tolkien. The three books are an immediate success in the United Kingdom and go on to become a hit in bookstores worldwide.

**1957:** The literary agent Forrest J. Ackerman presents the author with graphic sketches and a treatment for an animated film based on the trilogy. Tolkien dislikes the synopsis and turns down this first opportunity to license the film/television rights.

**1958–1966:** Tolkien and Allen & Unwin, his publishing house, set a strategy for dealing with requests for audiovisual rights from film producers, which the author summarizes as: “Art or cash. Either very profitable terms indeed; or absolute author’s veto on objectionable features or alterations.”

**1967–1969:** Independent producers Gabriel Katzka and Samuel Gelfman pitch a film concept based on the three books. After two years of negotiations, a contract is finally signed; the producers pay a substantial sum upfront for the rights purchase. Unusually, the rights are assigned in perpetuity. However, the contract is said to be so complex and ambiguous that it allegedly continues to raise issues with the Tolkien estate to this day.

**1969–1975:** With the rights now with United Artists, the studio explores options for the adaptation of the work. The project is briefly envisaged as a partnership with Apple Films, the firm representing The Beatles’ film interests: the intention is for the four members of the legendary band to be cast in the lead roles. The project does not go ahead.

**1976:** The successful independent music industry mogul Saul Zaentz buys out the rights to Tolkien’s books from United Artists. At this point, Zaentz has significant prestige and access to talent, as his film *One Flew Over the Cuckoo’s Nest* won a raft of Academy Awards® in the same year. Zaentz also acquires the trademarks linked to the characters and places in the books. This would prove strategic in due course, when the release of the film triggered an explosion in merchandizing sales.

**1978:** Zaentz sets up Tolkien Enterprises as a vehicle to license a range of cultural products – from musicals to merchandizing – based on the IP secured from the Tolkien estate and the publisher. After an unsuccessful single feature-length cartoon based on the books, the rights remain dormant in the ensuing two decades.

**1995:** The young New Zealander filmmaker Peter Jackson pursues the project. Jackson has just made his first film in Hollywood (*The Frighteners*), after a career in New Zealand making low-budget genre films.

By this time, Zaentz has a “first look” deal with leading US independent studio Miramax, which rescued his multi-award winner and commercial hit *The English Patient* when financing for the film collapsed shortly before filming was due to commence.<sup>5</sup> Jackson discusses the project with Zaentz and Miramax.

**1997:** In January, Miramax completes the acquisition of all rights to *The Lord of the Rings* from Saul Zaentz and launches development on the project. Jackson and his colleagues begin work on the script, based on a two-film concept with a notional combined budget of USD 70 million. Jackson’s Wellington-based film company Weta also begins work on production and creature designs, including cutting-edge new computer-generated visual effects.

**1998:** In June, with two scripts now close to completion, Miramax is concerned about cost forecasts rising to nearly USD 140 million. By this time, Miramax is owned by Disney and bound by an agreement not to put any project budgeted above USD 75 million into production without the studio’s consent. Disney decides to pass on the project.

Miramax gave Peter Jackson a short window of time to try to set the project up with another studio. This practice, known as “turnaround,” involves one company making a package of rights and pre-production assets available to other bidders, for a project it no longer wishes to pursue. Reportedly, Miramax set especially stringent turnaround terms: the company taking over the development package on *The Lord of the Rings* would pay Miramax USD 12 million upfront to buy back the USD 10 million pre-production costs already incurred and USD 2 million in New Zealand currency pre-bought by the company. Note that it is unusual in turnaround scenarios for the entire sum to be demanded upfront; the usual practice is to request a percentage as deposit and the balance at a later stage, generally upon commencement of principal photography on the project.

Miramax would receive 5 percent of the gross receipts from worldwide cinema box office takings and the two chief executive officers of Miramax would receive an executive producer credit on any finished film or films. As the original producer attached to Miramax, Saul Zaentz also received a substantial percentage of the box office gross.

New Line, a former New York independent distributor acquired by Time Warner, expressed an interest. After presenting New Line executives with a hastily concocted “documentary” on the pre-production of *The Lord of the Rings* in New Zealand, Peter Jackson was able to rescue the project. New Line met Miramax’s demanding

terms, with New Line's chief executive officer having made the decision to divide the saga into three films rather than the two originally envisaged.

The first film in the trilogy was released in 2001. For a film conceived initially as heroic fantasy aimed squarely at the 16- to 24-year-old market, it managed the rare feat of achieving both blockbuster status and almost universal critical praise.

## The gestation of *Gemma Bovery*

*Gemma Bovery* was made in 2013 for a budget of EUR 9.7 million. It was based on a bestselling British comic novel which ferociously satirized the microcosm of English middle-class people buying properties in rural France, in pursuit of a bucolic lifestyle that proved elusive to many and disastrous to the book's eponymous heroine. Not only did the book become a popular title in the UK market, but it also did well in France and many other markets, where translated versions met with critical and commercial success.

By the time producers started discussing the project, *Gemma Bovery* and the author were considered "hot property." As a development case study, *Gemma Bovery* is complex. It entailed the acquisition of the film adaptation rights from the book's author, Posy Simmonds, and the commissioning of a script from three different contributors. These included two professional French screenwriters and the director of the film, Anne Fontaine, herself an experienced screenwriter.

*Gemma Bovery* was set up as a Franco-British co-production. The lead producers were the Paris-based Ciné-@ and the London-based Ruby Films, both of which had considerable prior experience of such co-productions.

The co-producers first secured an exclusive option to adapt Posy Simmonds' book in 2011. On the strength of this agreement, and in view of the book's high status, they were then successful in securing an investment from the British Film Institute (BFI). Among other functions, the BFI is the body responsible for channeling state

funding into original British film productions against a guarantee from the producers that they will secure the balance of an agreed overall initial development budget. The BFI contribution represented just over 26 percent of the initial development budget, with the balance coming from the producers.

In a feature typical of this type of funding agreement, the public body became a pro-rata co-owner of the rights in the option on the book (the underlying work) as well as the future screenplay to result from the development work schedule and other related development material. This customary share-out of IP is a temporary arrangement; it is negotiated as security against the public body's development investment, and would normally be contractually reassigned to the producers at the point at which the BFI had recovered its investment, as was the case for this project. Note that such a recovery would normally be expected upon commencement of the production of the film.

The BFI investment, combined with other sources contributed by the two lead producers, enabled them eventually to exercise the option and to then draw up contracts with three writers for the adaptation of the novel. The option agreement contract was first drawn up in July 2011. It was extended by letter in April 2013, the author of *Gemma Boverly* and her agent having been satisfied that the co-producers were making good progress with the adaptation. The parties latterly agreed a license price for the rights, granting the producers a 17-year exclusivity period within which to exploit defined resale rights, with an additional right of "first negotiation – last refusal" after the period had elapsed, in case they wished to prolong the license. Note that not all of the rights were included in the license. The rights that the author did not license included sequel rights and stage rights. However, the author also agreed to a seven-year moratorium period for the exploitation of such rights, to avoid interfering with the film project and its commercial exploitation cycle. Conversely, the producers agreed that if they had failed to bring the project into production within 10 years from the signature date, all rights in the license agreement would revert to the author.

In addition to the license purchase price, the producers agreed to the following terms in favor of the book's author:

- a one-off payment of GBP 12,500 no later than the first day of the film going into production ("first day of



principal photography”);

- a guaranteed payment equivalent to 3.5 percent of the film’s approved budget, after deduction of the license price, with an overall cap at a maximum of GBP 500,000;
- a commitment to paying 5 percent of future net profits;
- a set of additional “escalator” payments, linked to the commercial performance of the film and starting at EUR 10,000 after the film reached over USD 8 million in gross revenue at the box office in US cinemas;
- further escalator payments of EUR 10,000 each time the film grossed an additional USD 1 million in the United States;
- similar escalator payments for the UK cinema box office and upon winning certain awards (BAFTA and Academy Awards®).

Note that as far as independent films are concerned, such contractually pledged escalator payments rarely materialize, as the box office threshold required to trigger them is not usually reached.

Under the non-pecuniary terms (described as “approval and consultation rights”) included in the agreement, the producers agreed to the writer’s demand that “the Work be kept in the same geographical setting; secondly, the story line will remain substantially the same [...]; and thirdly no major characters which do not appear in the work may be introduced into the Film, and no major changes may be made to existing characters.”

The producers also undertook that the title of the finished film would not differ from the book’s title, unless there was prior agreement with the book’s author or unless legal, censorship or other regulatory reasons compelled them to change it.

Finally, the producers agreed that the author should be able to approve any further choice of screenwriter, director or lead actors other than those initially approved.

The rights acquisition terms summarized above are fairly typical of the general structure of such agreements; however, as the source graphic novel for the film was such a high-profile publishing success, the advantages secured by the writer are not necessarily the norm

for authors of less successful underlying works. This is not only the case in terms of the size of the financial package but also in terms of the parts of the rights purchase pre-agreement that set the degree to which the author of the source work may have control over the adaptation into a film or television production. In this instance, the writer leveraged the proven attractiveness of her published work to secure a relatively high level of shared control.

For the remainder of its two-year development history, *Gemma Boverly* demanded the input of two writers credited for the screenplay (the film's director, Anne Fontaine, and the seasoned French screenwriter Pascal Bonitzer), both of whose contracts were signed in the late spring of 2011. Also involved in the project's genesis were a French treatment writer (Nicolas Mercier) and a British script consultant (Declan May). Upon its release in 2013, the film received mixed reviews but went on to be reasonably successful, grossing over USD 4.5 million in cinemas worldwide and achieving territorial rights sales in many countries.

## Oh là là! – an original script

In this case study, a French film director had an original idea and approached a producer. The film *Oh là là!* (French title: *Seconde Chance*), produced in 2006, was to be based on an original screenplay inspired by the private correspondence of Madame du Deffand, an influential 18<sup>th</sup>-century female aristocrat who hosted a fashionable literary salon, which attracted some of the most eminent French philosophers of the era. The film charts Madame du Deffand's relationship with Julie de Lespinasse, a poor orphan adopted by the Lady who, as she blossoms into a woman, becomes her rival, opening her own popular high society salon. The letters, being historical archive documents, were in the public domain; consequently, no clearance of underlying work was required.

The approach to the development required hiring the director and a co-writer at the same time, to develop the script together. Both writers assigned all commercial exploitation rights to the producer. Although each writer was contracted independently, each agreement

acknowledged that the writing of the script was to be a collaborative effort between the two. Both the director's contract and her co-writer's contract also acknowledged that she was the designated director for the film to be made.

In *droit d'auteur* regimes such as France, both the screenwriter and the director are deemed to be the authors of the resulting film (very often, the director is also the sole author of the script). In that system, the way in which authorship translates into financial terms is that any payment the producer makes to the authors before and during production, as a remuneration for writing and/or directing, is treated as an advance against a share of all commercial revenues from the film, which they are entitled to by law. Some of the sum paid upfront may also be treated as salary.

Therefore, in the case of *Oh là là!* the two writers' contracts set out the precise list of rights purchased through the contract and meticulously laid out the percentage they were to receive from the separate revenue streams derived from the commercial exploitation of the film (cinema, video, foreign revenues, free television, paid television, etc.).

Another way in which the presumption of original authorship is expressed is through the fact that the purchase of the rights is a limited license, not a full assignment. In this case, both writers agreed to a license period of 32 years, a standard in the French industry. However, a subclause ensured that all rights would automatically revert to the writers after four years from the signing of the contract, should the producer be unsuccessful in making the film within that period. This type of turnaround clause is common in the film industry.

While development is taking place, the producer is already engaged in the difficult business of testing the interest of key talent (directors, lead actors) in the concept of the film (or draft script) and approaching potential financiers. The next chapter covers the means of financing a feature film today, and looks in detail at the "value chain," which any producer must understand if they are to embark successfully on the uncertain journey of trading IP rights against financing for the film.

## Notes

- 1 Rachel Ehrenfeld (2005). *Funding Evil: How Terrorism is Financed and How to Stop It*. Lanham, MD: Taylor Trade Publishing.
- 2 Annex VII Bangui Accord, Cotonou Act 2015. Available at <https://mali.eregulations.org/media/Accord%20OAPI.pdf>.
- 3 David Ng (2018). Talent agencies are reshaping their roles in Hollywood. Not everyone is happy about that. *LA Times*. Available at <https://www.latimes.com/business/hollywood/la-fi-ct-talent-agencies-20180406-story.html>.
- 4 The principal source for this case study is the book *The Frodo Franchise*, a remarkably insightful study of *The Lord of the Rings*' journey to the screen by the respected film scholar Kristin Thompson, published by University of California Press in 2007. Trade magazine articles and other sources were also consulted.
- 5 A first-look deal is a legally binding agreement whereby a producer consents to present all of their projects in development to a specific financier/distributor on an exclusive basis; the financier thus has first call on the project before any competitor can come in and bid for the rights.

# Financing Films – On the Merry-Go-Round of Debt, Equity and Distribution Rights

When distilling private sector film financing to its most basic essence, a combination of some or all of the following ingredients will be present: debt, equity and rights. Additionally, public funds – including tax credits, rebates and other forms of public sector incentives – are available in a growing number of countries. How public funding interacts contractually with private sources is a complex subject beyond the scope of this publication.

This chapter is primarily concerned with the use of IP rights as they relate to the discipline of creating and financing films from original idea to screen. However, it is important for all newcomers to film production to understand the broad principles of forms of private sector film financing which do not directly involve rights transactions, and to appreciate how they interlock with each other in the making of a film. The aim here is to help readers develop a strategic approach to combining sources of finance to control the revenues and/or rights to the greatest extent possible.

Each investor approaches a project from a different perspective and with different objectives in mind. The tactical advantages for investors coming early into the project include being able to negotiate a strong position in the sharing out of eventual revenues and minimizing their risk through whatever tax incentives may be available. Investors coming late into a project may also be in a strong negotiating position in that the project parameters may be better defined by then (e.g., lead actors), enabling them to benefit from the need for the producers to cover a final gap in the budget, which gives them a strong hand in negotiating return on investment.

Individual investors tend to have very different relationships to risks. For instance, while some may be focused on the direct advantage

of a specific tax shelter vehicle, others may be more interested in securing a strong position for potential revenues, with a high premium against their investment (note that these two considerations are not mutually exclusive). In this respect, it is important for producers to have researched and considered the investment culture of all of the private sector financiers they are considering as suitable partners for their project.

## **Sink or swim – the trials of debt financing**

“Debt financing” is a general term which encompasses a complex set of realities. In its crudest form, debt financing is distinguishable from equity or rights in that the lender is not entitled to a share of the revenues from the exploitation of the finished film, nor to a share of its profit, nor to any part of the IP in the film. The debt financier typically provides a loan repayable before the film is completed, and/or “in first position” in the exploitation revenues of the film, i.e., before any equity investor begins to recover their money. This type of loan is in theory no different from a standard bank loan, and the lender is merely looking to make money out of the interest and fees charged on the loan.

In practice, debt financing for film is often more complex. Below are three standard examples borrowed from different practices around the world.

### **Pre-production loans**

Pre-production loans are offered to producers who have already covered their entire production budget through contracts with investors but are unable to start production because they cannot receive the cash from those investors until after the start of principal photography on the film, i.e., the start of filming (typically because the legal paperwork demanded by the investors has not yet been completed). Pre-production loans are seen by financial institutions and banks as high risk, because when the producer applies for the loan they often have no way of guaranteeing the film will effectively start production or be completed. Consequently, lenders often insist on taking a charge on some or all of the asset value constituted by

the IP of the film, as collateral for their risk. Collateral is anything of value that the bank may be given the right to sell in the event that the borrower is unable to reimburse the loan.

### Gap financing

Some institutions in the West specialize in “gap financing.” Contrary to straight debt financing or pre-production loans, the lending is against the gap in the budget which has yet to be covered by financiers. In today’s market, the gap covered by such lenders will typically not exceed 10 to 15 percent of the overall budget. Gap financiers will also insist on an assessment of the value of the gap by a credible international film exporter, known in the business as a sales agent (see Chapter 5). In this analytical exercise, the sales company estimates the sale value they believe the film could fetch in the countries where the rights have yet to be sold, and makes several pre-sales to demonstrate the film’s appeal. The lender will rarely agree to cover the gap if the sales agent’s estimates do not cover up to 150 to 200 percent of the value of the gap. For example, imagine that the film’s budget is USD 4 million (a mean average for a low-budget independent North American or European film with no stars) and the producer needs to cover a gap of USD 600,000. The sales agent handling the film has not yet pre-sold or sold to much of Eastern Europe, as well as valuable territories such as Japan, Germany, Korea, Russia and Spain. Its total estimated sales figures for those territories come in at USD 920,000. Unless the gap lender disagrees with the estimate, the figure meets their loan security requirement and they may choose to go ahead with the transaction, covering the USD 600,000.

### Laboratory debt

Laboratory debt refers to the practice whereby the producer asks the laboratory responsible for processing the film stock and/or producing material such as digital intermediates (digital masters) to defer their invoicing until the film is almost complete and ready to deliver to distributors. The deal may also include elaborate post-production services such as editing, dubbing, color grading and

computer-generated imagery (CGI). This practice is still current among some low-budget filmmakers in the West. It is, however, much more common elsewhere in the world: up until a few years ago, most low-budget Indian films financed themselves in part using this deferred payment facility. Film laboratories in India are often powerful monopolistic businesses in their respective language markets. They are also strong cash businesses that depend on high-volume low-value work, rather than the reverse. Loaning to producers in the form of deferred services does not threaten their strong cash flow and is one way in which they can secure a competitive advantage. As a result, low-budget filmmakers all over India can expect to defer between 20 and 25 percent of the cost of the film through this form of debt, though the practice has been declining as the industry has professionalized and developed other modes of financing.

However, there is a downside to laboratory debt from a producer's point of view. In India, laboratories expect repayment in full before post-production of the film is completed. Because the laboratory is generally in possession of the film's negative and the producer must agree to a charge on it until repayment, the laboratory can easily sequester the negative until payment is forthcoming, preventing the film being released. Until recently, this undesirable outcome still occurred frequently, and the vaults of most of India's leading studios and laboratories were overflowing with films (finished or unfinished) that were awaiting settlement.

Debt financing is also connected with IP rights management. In all three cases of debt financing described above, the lender will normally take over rights in the project as collateral. In acquiescing to this, the producer accepts the risk that failure to repay on the lender's terms may result in a shift in the control of IP assets locked into the film. Therefore, debt financing is not only very onerous for the producer (rates are high because of the perceived nature of film as a high-risk enterprise), but potentially disastrous in enabling a confiscation of the rights by a third party with no interest in the film reaching an audience.

This does not mean that producers should avoid debt finance: they may have no other option, as is often the case with the use of laboratory debt in the low-budget film industry in India. Provided that the film is completed, debt financing is advantageous as, unlike



equity, the lender does not share in the profits of the finished film. Debt is normally the final piece in the puzzle of film financing. As the principal source of debt financing, a bank will not normally take a risk on a film that is only partly financed and will loan against existing contracts from other sources of financing.

## Participation/deferred payments

This form of film financing is part of the toolkit of independent film financing around the world. Very often, a project budgeted at a certain level may struggle to close its financing. In negotiations with funding sources, the producer(s) and director may find themselves under pressure to take part or all of their fees out of the budget and into the back end. This practice reduces the budget to be covered out of upfront investment, but puts these participants in a significant risk position, because the film may not make enough money for them to ever recover their deferrals. To accommodate this, they may be able to negotiate an improved position in the film's "revenue waterfall" – the complex legal and financial infrastructure determining the split of a film's exploitation income. For instance, they may be able to negotiate an agreement that allows them to recover fees up to a certain amount, alongside the equity investors in the film. Whether such accommodations are obtainable or not depends largely on the bargaining power of the individuals or the production company itself.

Participation deals are also common for the main cast. Independent films the world over can struggle to sign up significant stars owing to the size of their fees. Some commercially and artistically ambitious films are therefore in a quandary: on the one hand, the filmmakers have certain creative ambitions which may not be compatible with attracting a mass audience; the presence of stars might make the project more commercial. On the other hand, having stars tends to push the budget beyond the point at which investors would be confident about covering their risk, owing to the nature of the project. Offering the star the option of taking less upfront as salary, and more from the revenues generated latterly by the finished film, offers one way out of this dilemma. However, the stars then effectively become co-owners of the IP in the film, and their bargaining power means

they are in a position to take a significant part of the film's revenues (not just the deferred element of their salary, but also an additional reward for their risk).

## Cutting the cake – the basics of equity financing

Unlike debt financing, equity financing involves an investment being made with an expectation of returns through an ongoing share in the revenues generated by the film(s), with investors charging a premium against their risk exposure.

A fledgling filmmaker needs to start with the basic understanding that equity investment falls into two broad categories: investment in an individual film, and investment in a company's film activities.

The second category – equity investment in companies – is still a relatively rare occurrence in the cinema sector almost everywhere in the world.

For the first edition of this book, in 2008, a number of senior corporate financiers in India were approached to summarize the key factors they consider to be keeping equity investors away from film companies. They all agreed on the following:

- Poor track record in financial performance – A wave of film and media sector initial public offerings (IPOs) (companies raising finance in the capital markets through issuing public shares) began in 2001, initially attracting record numbers. However, most of these companies have since had disappointing commercial results.
- Lack of stable cash earnings – The predominant company model in the film industry remains that of a “cottage industry” – the single producer with a small company, only able to develop and make one film at a time and therefore unable to share their risk across a number of films.
- Lack of integrated film companies – Film revenues are split between many smaller companies instead of being concentrated through fewer companies able to integrate development, production, distribution and exhibition.
- Deficiencies in management – Equity investors consider the

management culture of film companies to be largely lacking in core skills and limited in its ability to turn business plans into reality.

What is striking about this survey of Indian equity investors is how their analyses of the core weaknesses of the film industry converge with those of similar experts in the film industries in Europe or North America. Although the Indian film industry has matured considerably, these factors remain today. They also apply all over the world: with a few exceptions, film companies are considered too small scale and too asset poor to entice most investors.

Anyone looking for an equity investor to support their film company business plan first needs to be aware of this universal perception, because it is a considerable barrier. Film entrepreneurs may argue that the reluctance of the investment community to get behind them leaves the sector in a double bind. They need capital to finance their overheads, become able to develop entire slates of films, own IP and control revenues. But at the same time, the equity markets are waiting for bigger companies with larger throughput and steady cash flow, and are loath to take risks on the small-scale and underpowered companies that make up most of the sector.

For the filmmaker/entrepreneur hoping to raise equity to support the mid- or long-term strategy of their company, it is important to be realistic about investment prospects: the newer the film company, the less chance it has of obtaining this type of financing. The business plan will need to be of outstanding quality, with considerable clarity on the company's objectives and the genres of films it wishes to make, and a detailed strategy for project financing, distribution and revenue sharing.

In broad terms, it can be argued that as the film industry becomes more capable of attracting a critical mass of equity investment, the greater its bargaining power will become in negotiations over rights with distributors, television broadcasters, video licensors, telecom operators and other categories of film buyers. Conversely, a chronic lack of self-financing capacity makes the independent producer less able to own or control rights to a film after it is completed, as most of the strategic rights will have been licensed away to the private

sector financiers. For most producers, rights are disposed of early, when the project is vulnerable to being turned down. In this way, the IP value becomes either diluted between a variety of buyers or concentrated in one commissioning entity (e.g., a public broadcaster or VOD platform), and little of it remains with the producer, leaving their company without assets and reliant on a precarious hand-to-mouth business model to keep going. The inherent difficulty of retaining control over the IP rights for productions and the associated obstacles to raising working capital affect a large proportion of film and television production companies worldwide.

Equity investment is also present in individual films. In many cases in the independent film industry, powerful rights buyers such as broadcasters or international distributors not only buy rights such as pay-TV, free-to-air or VOD, but also take an equity stake in the project.

In this instance, the buyer may make an offer for an overall price and negotiate with the producer (or distributor) over what proportion should account for the rights licensed or acquired and what proportion should account for the equity investment. The negotiation aims of the producer may vary according to their own perception of the likely success of the film. If the conviction is that the film will be an overall success at home and abroad, the best strategy may be for the producer to do everything to protect their share of the “upside,” i.e., the net revenues generated from the film’s exploitation, by negotiating with the buyer to assign more of the proposed financial offer to the rights acquired and to reduce the equity investment. However, the rights given away by the producer may be considered by them to be very strategic, in which case they may be more focused on trying to reduce the term of the licensing deal to get those valuable rights back while they still have some secondary or residual commercial value in other rights markets. However, if the term of the license is short, the price paid by the buyer(s) may be lower and the producer may need more equity investment to close the budget.

As a basic rule of thumb, equity investors (there can be several attached to the same film) recover their investment with a premium, which is a sum of money additional to the sum initially invested, and/or a participation in the net profits, on a pro-rata basis. Pro-rata means that for every US dollar of income earned by the film

– after agreed deductions of bank loans, distribution and sales commissions and costs – the investor will get a share proportional to the size of their investment, as a proportion of the film’s budget.

In practice, however, the investment recovery formula is rarely that straightforward. For reasons that are specific to the history of each deal, some investors may negotiate for an early “corridor” of income before other equity participants, until they have recovered a pre-agreed sum. Thereafter, the percentage of recovery may change again in favor of other equity partners in the film. Such preferential treatment is always negotiated and is justified by several factors. For example, the investor may have been involved from the start of the project and so may have taken a greater risk in comparison to others. They may also have separately provided a “bridging loan,” which helps the producers cover their cash outgoings until more money comes in at a critical point in the life of the project. Similar deals may be negotiated to share out the net profit of the film. The management of the revenue waterfall entails a complex interplay of legal agreements. Its execution is sometimes entrusted to specialized collections agencies, which are accountable to all the financiers and supply regular records of the film’s global income from rights exploitation, as well as managing the revenue distribution.<sup>1</sup>

## Message in a bottle – the rise of film crowdfunding

A relatively novel form of financing for feature films and television content is crowdfunding. This is the practice of funding a project or venture by raising money from many people who each contribute a relatively small amount, often in return for a credit in the finished production. Musicians, filmmakers, artists and book publishers have all successfully raised funds through crowdfunding, for example.

While it is still in its infancy as a form of film financing, crowdfunding has undergone rapid growth, especially in emergent markets: between 2016 and 2019, Kickstarter, one of the leading crowdfunding sites, reported that over USD 5 million had been raised for more than 4,000 creative projects in Mexico alone, 870 of which were in film and video.

Crowdfunding is a child of the internet. Via specialized platforms, the technology allows filmmakers to establish direct lines of communication with potential funders and enables creators and producers of films both to raise funds directly from enthusiasts and/or potential consumers of the end product and, in the process, to build supportive communities. Those communities can then help to spread positive information about the project and, subsequently, the finished film.

Crowdfunding is not monolithic. Filmmakers can choose between options according to what best suits their projects. There are four main strands that are relevant to films:<sup>2</sup>

- **Donation-based** – The contributor donates money without any pre-condition of financial or material reward. This is best suited to philanthropic projects (e.g., documentaries about environmental challenges or social issues such as global inequality).
- **Reward-based** – The contributor receives certain in-kind advantages as an enticement. This is used routinely on low-budget genre features (e.g., horror or sci-fi) that tend to attract a specific fan base, as an alternative to financial rewards (invitations to cast and crew premieres of the film, a pre-release exclusive gift of a DVD/Blu-ray, etc.).
- **Lending-based** – This method is a form of peer-to-peer debt financing; the contribution is treated as a loan, with terms that may be significantly softer than a regular bank (even one with an entertainment division) can offer. Some countries do not authorize such practices, or they submit them to strict legal constraints (e.g., in Poland a lender must be a corporate entity, not a private individual).
- **Equity-based** – The contributor is considered an equity investor and treated accordingly in the film’s revenue waterfall – i.e., with recovery of the initial investment in a favorable position plus a share of the film’s profit.

Some crowdfunding offers combine several features of these strands. From a filmmaker’s perspective, most crowdfunding options have several key advantages over straight debt or traditional equity financing. The main one is control over the project; in the crowdfunding model, the ownership is retained as no rights are

pledged to third parties, either as securities against loans or against distribution deals. Therefore, no one else can demand script changes or cast approval.

In the donation-based model, which is popular with producers of low-budget features, there is the further advantage of not having to pay a premium or interest on the cash contributions or split profit on the finished film.

Finally, crowdfunding generally has low transaction costs compared with other forms of funding; the websites through which the call for funds are channeled charge relatively low commissions, and there are relatively low legal costs (note that this does not mean filmmakers can bypass or minimize other standard legal costs involved in the making of the film).

However, there are also significant drawbacks and limitations. The sums raised are usually small, making crowdfunding at best a useful complement to traditional forms of financing, rather than a potential substitution method, for most films except for very low-budget projects, shorts, student films, or documentaries about issues that funders identify with or wish to do something about.

Crowdfunding, however, is not a static market: it is a high-growth area and now offers genuinely new opportunities, especially for younger filmmakers eager to get started and acquire credibility in the creative marketplace. Crowdfunding developments have been particularly encouraging in regions such as anglophone Africa, where public funds remain scarce and access to bank loans and traditional equity continues to be fraught with obstacles for most producers.

## **IP rights as the most strategic source of financing**

IP rights are by far the most valuable asset that the film producer is likely to hold when approaching the financing of a film project. Film industry insiders often describe the process of raising finance as “a begging bowl experience.” In reality, however, the producer is far

from a beggar. The chapter on development gave a glimpse of the range of risks the producer will have taken to acquire the underlying rights in all the works utilized to produce the script, book or anything else that becomes part of the concept of the film. Additionally, the producer may have attached a director and/or lead actor(s) to the project, making it more attractive to potential investors. Producers should never underestimate their ability to build up their negotiating power in this way. These are all valuable assets to bring to the table when trying to attract funders and financiers to a project.

At this stage, wherever in the world they live and work, the producer needs to have a thorough understanding of how different tiers of the market interact with each other within the complex architecture of rights licensing and acquisition deals, which together constitute the audiovisual value chain. The licensing of audiovisual rights, whether to raise funds before the project has begun or completed production, or to secure distribution pathways for a completed film, is generally subject to three interlocking forms of exclusivities: time, territory and medium (e.g., VOD, packaged video, pay-TV, cinemas). The producer needs a detailed understanding of how these work and how they condition every single negotiation for each set of rights. Without such knowledge, the producer will not know how to approach such negotiations or how to leverage the IP rights they control against production finance and distribution deals.

### **Exploitation windows**

In most countries, there is a pre-agreed order in which a feature-length film will be commercialized. Around the world, wherever a film industry has achieved a certain level of maturity and critical mass, and wherever broadcast television is developed, each form of exploitation happens in sequence, with each market (cinema, television, video, etc.) having its own exclusive window of time during which the film may not be exploited in a different medium. Table 1 illustrates both how this sequence was traditionally ordered and the changes from the addition of digital markets.

The purpose of these windows as a convention observed by the film industry (specified in rights licensing or acquisition contracts, and



sometimes imposed by law or regulations in specific countries) is to try to ensure that sufficient returns can be extracted from each sequential cycle of exploitation of the film to cover the financial risks involved in releasing a film in any medium. It seems logical that if the film is available in video stores, transactional and subscription via VOD, pay-TV and free television at the same time as it is being released in the cinemas, this simultaneous competition will be detrimental to each of these forms of exploitation. Buyers of the rights for each of these uses will have paid good money for the film and spent considerable sums on marketing and physical distribution costs (DCPs [professional standard digital prints for cinema exhibition], encoding costs for subscription VOD platforms, etc.). Consequently, they will want to protect their respective investment within their contractually agreed window of exploitation. They cannot expect to stay in business if their revenues are cannibalized by other media being exploited at the same time.

Of course, as discussed later in this chapter, this is not always the case, and a growing number of films are now being released according to a “day-and-date” pattern in which viewers can choose to access the film in other media at the same time as the film is programmed in movie theaters. These evolving new models reflect the reality of a film and audiovisual industry in a state of constant change and, in particular, the rise in the number of films that now go directly to VOD platforms after a shortened theatrical window, or none at all. Technology regularly forces the market to mutate, whether the film industry likes it or not. Very often, it doesn't, at least initially: when television was first introduced, the film industry in the West fought a rearguard action against it. In 1982, one prominent US film industry figure prophesied that the newly arrived Sony video cassette player would have the same terminal impact on the film industry as the infamous “Boston strangler” had on his female victims.<sup>3</sup> In today's world, the rapidly expanding range of digital media is forcing the industry into what is perhaps the most radical re-evaluation in its history since synchronized sound was first introduced. The value chain and the all-important windows of exploitation are being challenged as follows:

- Physical home video (VCD, DVD, Blu-ray) has been in steep decline as a film consumption media in all developed markets for the past decade. According to research by Omidia, global

physical video transactions dropped from USD 6.1 bn in 2011 to USD1.2 billion in 2021. Once the most popular and profitable film medium in the history of film, the DVD now appears fated to become gradually marginalized as a means of consumption in the medium term.<sup>4</sup>

- In sharp contrast, global consumer spending on films released digitally on mobile or fixed platforms went from USD 28.7 billion in 2017 to USD 71.9 in 2021, a 250 percent increase. In 2021, there were 1.3 billion subscriptions to online video services globally, a 14 percent increase on the previous year.<sup>5</sup>
- The growth of the online VOD market, especially of subscription-based online services (SVOD) available on the open internet, or OTT services, has been little short of spectacular. The financial figures reportedly spent annually by the likes of Amazon Prime or Netflix now regularly make headlines in the popular press. The fierce competition among online video brands and between them and the “legacy” media organizations has unleashed record levels of new investment into rights for film and audiovisual content. Although it has been a major driver in the decline of the physical DVD, the rise of VOD has introduced new windows of exploitation, thereby increasing the range of opportunities for film producers to license their rights against project finance and/or distribution revenue. For example, online transactional VOD has added a direct retail opportunity, while subscription VOD has made the pay-TV environment competitive again, after two decades of gradual monopolization by a small number of traditional operators.
- The global success of VOD streaming platforms such as Netflix and Amazon has triggered a radical reorientation of the business models of traditional film studios and media groups that once generated substantial revenue from linear television services. Many have stopped licensing their films and television shows to the successful new VOD platforms and are entering the direct-to-consumer VOD market with platforms of their own. While it is too early to assess the impact on the global market for new film and television content, it is possible to predict years of intense competition between the established streaming platforms and those new competitors, who benefit from prior branding, vast libraries of successful titles and considerable financial assets.

- From the perspective of producers and other right holders, the new revenue flowing from the licensing of rights to digital platforms is still, in most cases, very far from making up for the income lost to the sharp decline in physical video retail (DVD and Blu-ray).
- The new digital bonanza does not reach all parts of the film and television production industries. Globally, the majority of independent producers find it extremely difficult to get the large streaming VOD platforms interested in acquiring or financing their works. New third-party “aggregators” have emerged as intermediaries between producers and platforms. By aggregating large volumes of content, they are in a position to make bulk offers to platform buyers, who find it better to conduct business in this manner. Aggregators can be effective pathways to the VOD marketplace for producers unwilling or unable to establish direct business relationships with platforms. However, aggregators will charge additional commissions on any sale to the platforms; this added cost will need to be factored in, especially because VOD license prices for most films tend to be low, and many deals are based on revenue sharing rather than an upfront payment.
- The impact of digital technologies and direct-to-consumer internet models for film consumption has not been limited to the decline in physical video sales:
  - The global shift of the cinema infrastructure from film prints to digital cinema packages (DCPs) has generally had a positive impact on this aspect of release budgets, as the cost of striking DCPs from a digital master is more modest than the analogue equivalent. However, this economy has been more than compensated by rapid inflation in marketing costs. For the major American film studios, the amount spent on releasing a “tent pole” film in North America can be over USD 150 million, while larger independent films in the same market will generally need to spend at least USD 20 million.<sup>6</sup>
  - In many national markets, license fees obtainable from traditional free-to-air broadcasters have plateaued or declined for all but premium projects. This is in response to competition from digital platforms, as free-to-air broadcasters must often wait longer for their exploitation

window to open, unless they have shared in the control of the IP rights for the film at the development stage and can influence the order of play. This is an issue for many independent producers, who have relied historically on substantial contributions from the traditional broadcasting sector to get films financed, as is the case in many European Union countries.

The impact of global online piracy and the success of the new legal VOD platforms have resulted in increased pressures to make the film theater exclusivity time window shorter: between 2002 and 2014, the time lapse between the cinema and video market release decreased by 34 percent in the United States.<sup>7</sup> The trend had already started in the United States with the extraordinary explosion of the DVD sell-through market in the mid-1990s. Major studios began to rush the films out of the cinemas early in order to satisfy consumer demand for new DVD releases and reduce the length of time necessary to fully realize the value of those rights.

The rise to market prominence of legal online video services has helped consumers become accustomed to the notion of paying for content, especially as part of a subscription model. However, piracy in the digital age remains at a high level. The challenge for producers and other right holders in trying to protect their livelihoods is all the greater given that illegal activities on the internet hug the innovation curve tightly, resulting in constant changes in the systems developed by pirates to enrich themselves at the expense of content creators.

The table below illustrates the window system for the commercial exploitation of films. The table is comparative, to reflect the fact that this is a dynamic, constantly evolving practice: the two columns to the left present the model that prevailed during the analogue era and began to change with the rise of pay-TV and the DVD; the two columns to the right present the current evolution.

This evolution is still in progress. For instance, the practice of offering an option for consumers for a short period of time to see a newly released film on VOD at the same time as it runs in the cinema (“ultra VOD” or “premium VOD”) is a developing trend in some markets, which accelerated during the shutdown of cinemas

during the COVID-19 emergency in 2020. In addition, the length of time during which the cinema exclusivity applies keeps changing. Therefore, the table should be read as illustrative only.

**Table 1: Film exploitation cycle: the “windows” system**

Old windows		Evolving windows	
Medium of exploitation	Window	Medium of exploitation	Window
Theatrical release (cinemas)	4 to 24 months Exclusive	Theatrical release + growth of Premium VOD (PVOD) alongside theatrical	Varies from a single week to 4 months
Video and DVD rental and sales (or VCD) + pay per view	4 to 24 months after theatrical release	Transactional VOD (TVOD) and EST + DVD/Blu-ray sales/rentals	A few days to 6 months after theatrical release – sometimes offered during theatrical release at premium pricing
Pay-TV	12 to 36 months after theatrical release	Pay-TV and subscription VOD (SVOD)	Varies from a single week (operator commissioned the film for its platform and supports a small initial theatrical run for marketing purposes) to 12 months after theatrical release
Free television	12 to 24 months after theatrical release	Free television and free VOD (e.g., “catch-up” television)	Varies from a single week (broadcaster financed the film and agrees to limited cinema release) to 36 months after theatrical release
		Advertising-supported VOD (AVOD)	After free television, though some new AVOD platforms in the United States are also in the TVOD space (see above)

The developments presented and discussed above are most visible in parts of Asia, in the more mature film industries in Latin America and in the Western film industries in Europe and North America. Film industries in emergent economies are often presented with a different set of challenges. In Western and Eastern Africa, where many feature films are being made using digital video and on very low budgets (e.g., around USD 25,000 for the average “Nollywood” film in Nigeria), the market is still predominantly in physical video. Producers either sell their films (sometimes on a non-exclusive basis) to marketeers against a set cash price, or occasionally self-distribute through their own physical network, as is the case for much of the successful low-budget Riverwood film industry output in Kenya. In both scenarios, almost the only market outlet is physical copies of DVDs (and a now-declining, lower-definition video CD element). The local cinema exhibition infrastructure is still either non-existent or not sufficient to support the co-financing of most films through financial advances from distributors or exhibitors against box office receipts. Meanwhile, television struggles with budget shortages, so producers are often expected to pay for the privilege of airing their films on a television network. There are some pan-African satellite channels with larger budgets, but licensing the rights to these channels can be difficult for local producers: on the one hand, public sector broadcasters often operate with inadequate acquisition budgets; on the other hand, commercial broadcasters generally either self-produce the content they program or buy foreign fare at discounted prices.

However, the picture is changing remarkably quickly in many African countries: the digital switchover now in progress is freeing up the communications spectrum, raising the possibility of steady growth in new channels, even though there are issues around economic sustainability (for example, the advertising market in some African countries is limited). In some of the countries with greater film and audiovisual output, international cinema chains have been making substantial investments in new state-of-the-art, multiplex screens, with many of these new cinema sites now booking and programming local films, encouraging development in Nigeria, Kenya, Guinea, Côte d’Ivoire, Senegal, Benin, Cameroon, Togo and Gabon. Both the arrival of international VOD platforms on the African market and the growth of local ones are resulting in the rise of new opportunities for local film producers to pre-sell project rights or sell finished films into this segment of the market.

For anyone approaching the film production rights maze for the first time, embarking on the journey without some grasp of these changes to the value chain would be equivalent to a round-the-world yacht-racing skipper sailing without a compass. Knowing the value of each form of exploitation relative to the others in the chain enables the uninitiated producer to strategize their approach to financing through rights, to have realistic expectations of what each rights market may yield, and to determine a realistic production budget for the film. A criticism often leveled at film producers by financiers is that they tend to set their budgets according to their own creative vision (and that of the director), without considering what may be achievable considering the genre, the storyline, the actors envisaged and the current state of the marketplace for films, among other factors.

Considering the changes currently underway, a newcomer to the production business must become an avid consumer of information about the film industry worldwide, and how rights markets and business models are developing.

The basic map has been drawn; the time has now come to navigate the complex territory of rights transactions. We shall begin with a summary of the main features of a typical territory distribution agreement for all rights.

## **Into the rights jungle – the film distribution agreement**

The distribution agreement defines the terms of business agreed between a film distributor and the producer. In the process, the producer will license or assign the rights that they acquired at the development stage against remuneration and the prospect of the film being exploited across as many different forms of media and territories as possible.

According to established convention, rights are roughly divided into primary rights and secondary rights (the latter are sometimes called “ancillary rights”). To make matters more complicated, the definition of those two sets of rights varies from country to country. In the United States, primary rights tend to be defined simply as those that

relate to the primary market for films, i.e., the cinema. Secondary rights are those that correspond to the main windows which follow the cinema release, namely DVD/TVOD, pay-TV/SVOD, free television and AVOD. These definitions have evolved substantially since the advent of VOD, and this evolution is ongoing.

There is no such thing as a standard deal and agreement with a distributor. A producer may be dealing with an integrated company able to release the film in cinemas locally, on TVOD and on DVD; to license it to local television and/or SVOD platforms; or to sell it to foreign buyers at markets and festivals. Alternatively, they may be dealing with different distributors, each active in one or two market segments (e.g., cinema or video), and may need to license those rights separately. Whatever the format, below are some of the key points likely to arise during a negotiation.

### Type and scope of rights sold or licensed

As a matter of course, most distributors will expect the producer to assign or license all available rights. The producer's room for maneuver may be limited in this regard.

Still, as a matter of principle the producer may try as far as possible to reserve the rights that are less important to the distributor's business, and/or those which the distributor has no solid expertise in exploiting but which may make a difference to the revenues of the production company over time. These might include airline screening rights (now a lucrative set of rights due to the worldwide increase in air traffic) and may also extend to the "non-theatrical" rights, which include public performances of a non-commercial nature (educational institutions, conferences, etc.), and which may bring added visibility to the film in the long term.

The key strategic rights which an all-rights territory film distributor will generally insist on obtaining are as follows:

- **Theatrical** – The rights relating to the exploitation of the film in commercial cinemas. The theatrical market is still seen as the strategic market for launching most films, as the success or failure of the film in the cinemas has a significant knock-on



effect on performance (and therefore pricing) in subsequent rights exploitation windows. However, as Table 2 illustrates, the theatrical market is almost always a loss leader for the distributor, which creates more pressure for their investment to be recovered in subsequent segments of the value chain.

**Table 2: Distribution of revenues in the theatrical market pre-2000s**

Breakdown of a UK theatrical cinema release of a low-budget British film (1997)

	Revenues (GBP)
Total gross box office receipts over the cinema release period	4,000,000
Cinema exhibitor's share + VAT	(-)2,840,000
Distributor's gross receipts	1,160,000
Recovery of distributor's print and advertising expenses	(-)1,400,000
Distributor's commission (30%)	(-)232,000
Net from the cinema exhibition of the film	(-)472,000

- **Video (or “videogram”)** – These refer to all rights of duplication (and exploitation thereafter) of the film on analogue or digital video and optical disks including compact disc, VCD, DVD and Blu-ray. The rights generally encompass rental and sell-through uses, and are not to be confused with VOD or pay-per-view (below).
- **Pay-per-view** – These rights can relate to traditional forms of content delivery as well as to internet VOD. In traditional form, the viewer may only consume the film – which is transmitted by a broadcaster, under encryption – at a specific time. Contracts sometimes distinguish between “residential pay-per-view,” which involves the consumer viewing at home, and “non-residential” for pay-per-view uses in hotels or other non-domestic settings.

- **Pay-TV** – This refers to television offered to the public against subscription payments and requiring the use of a decoding device to read the encrypted signal, which protects the broadcast signal from being used without authorization. Having arrived before the explosion of the DVD in Western markets, pay-TV was a considerable force in the exploitation and financing of films from the late 1980s to the early 2000s. Pay-TV rights may be differentiated depending on the means of transmission, e.g., terrestrial, satellite or cable.
- **VOD rights** – In contracts, these rights may be broken down into different components. These include transactional VOD (TVOD), which involves paying a fee for a specific film or series, and may include electronic sell-through and pay-per-view; subscription VOD (SVOD), e.g., Netflix and Amazon Prime (the latter offers both SVOD and TVOD options); and AVOD, which is free VOD supported by advertising, e.g., YouTube, Tubi TV, or the online “catch-up” services of free-to-air broadcasters. Whatever the form or use, what distinguishes VOD from, say, television-related pay-per-view, is the fact that the consumer always has the power to choose when and where to watch the licensed film.
- **Satellite television** – This refers to television services available to the audience direct to home and requiring the installation of a satellite reception dish. These rights may sometimes replace or extend those of free-to-air television in countries where free-to-air broadcasting is limited due to geography and/or economic factors; they may also be part of the pay-TV rights category, in situations when the satellite signal is delivered direct to home in encrypted form to an individual subscriber using a licensed decoding device.
- **Free-to-air television (or free television)** – this refers to television services received by the audience free of subscription charges and not normally requiring a decoding device to be viewed. These services are usually supported through income sources such as advertising, sponsorship and state aid or a specific annual tax or levy on each household with a capacity to receive those services.

Distribution agreements will generally contain clauses ensuring that the distributors can lawfully make certain changes to the film

for the purpose of distribution. These may include changes to the title, cuts designed to comply with film classification or censorship requirements, dubbing and subtitling. The producer should therefore ensure that all relevant “consents” have been obtained from the authors and creative contributors to the work, to avoid any misunderstandings that could lead to legal action by a right holder whose consent or license was not sought, for breach of exclusive rights or moral rights.

### **Advances and minimum guarantees**

In mature film industries some local film distributors have the financial means to participate in the financing of films by investing in them at the development or early production stage, by putting up financial advances against future revenue projections. Until recently, Hollywood was generally seen as the most accomplished model for distributor-led financing, and the overwhelming majority of high-budget US films continue to be financed through a studio distribution deal which covers a very large proportion of the cost of production against the acquisition of most or all of the rights pertaining to the project.<sup>8</sup> Historically, a Hollywood studio was essentially one large global distribution and marketing entity able to acquire a critical mass of IP rights and exploit them on a worldwide scale.

However, film distributors elsewhere in the world are typically smaller and less well financed, and therefore far less able to contribute funds to film production in the form of advances. The United Kingdom and India are two examples of highly mature film industries where distributors are fragmented and are seldom involved in the business of financing films. In India, the “hero” films (those starring the most eminent male stars) can attract advances from distributors that are sometimes equal to or even more than the cost of production. In the latter case, this means the production may be in profit even before it starts. However, many films made in India each year start production without the involvement of a distributor in their financing. This means they start filming without a single right pre-licensed to a distributor or a platform, and thus have no guarantee that the film will be able to secure commercial

exploitation after completion. Those that do receive distributor financing tend to come from established producers, attached to projects driven by the popularity of the lead actors, music composers and choreographers. In general, unless a bankable star is cast, the distributor's advance will be well below half of the budget, and the producer may struggle to cover the gap from other sources. Table 3 illustrates a typical film financing structure for a South Indian film with no star.

**Table 3: Financing sources for a low-budget Telugu or Tamil film (India) in 2010 (illustrative only)**

Producer's own funds	15–20%	May include deferred fees for the producer and director or the lead cast members (fees are in the budget but are not paid up; they are to be earned back from future exploitation of the finished film)
Equity or debt	25%	Generally provided by local high-net-worth individuals or by larger film companies (e.g., Adlabs)
Film distributor's advance	25%	33% paid before delivery of the finished film, balance thereafter
Laboratory debt financing	25%	Lab + post-production facility, including camera hire
<b>TOTAL</b>	<b>90–95%</b>	<b>Balance often covered through in-kind contributions</b>

In the United Kingdom, as in most of Europe, many of the leading local film distributors have sustained their businesses mainly through buying distribution rights to US films, through output deals with major international companies, including the Hollywood studios and leading independents. However, these deals are less prevalent today as the larger international VOD streamers continue to disrupt old practices. Local films are often seen as higher risk, because they tend to have smaller budgets and to cast actors who may be stars on television but whose ability to attract audiences to the cinema is seen as uncertain. Additionally, the costs of launching a film with the cinema as the primary market have increased substantially, with marketing costs well ahead of overall inflation.

As a general rule, most independent low-budget filmmakers, no matter where they live and work, find it very difficult to attract a distributor to their financing plan before the start of production. Most successful films in this sector of the worldwide film market are picked up by distributors after completion (at festivals, film markets or preview screenings organized by the production or sales company), or toward the end of production, when a rough cut of the film may be presented to potential buyers. A rough cut is a version of the film in which most of the scenes are in the right order and dialogue has been synchronized, but post-production elements such as optical or digital effects or the soundtrack are not present.

For those lucky producers who have managed to attract a distributor to part-finance their film by pre-purchasing some or all of the rights to it before completion, the contract will normally include specific commitments on the part of the distributor.

A dominant practice is for the distributor to commit to a minimum guarantee (MG). Under this type of deal, the distributor guarantees to the producer the payment of a set amount, which will be paid regardless of whether the distributor generates enough revenues from the exploitation of the film to cover the agreed sum. The distributor is therefore at risk. In some cases, the distributor may agree to advance the entire MG to help the producer make the film. However, this is very rare – in most cases, the distributor will only provide an initial deposit (20 percent or less of the MG) and will pay the balance on delivery. In countries where banks offer such facilities, producers may then be able to borrow the balance, using the MG contract as collateral (banks often require a letter of credit). The reputation of the distributor will be a factor in a bank's decision to provide such a loan.

The MG is always recoverable by the distributor out of first income from the film's commercial exploitation, sometimes with interest charged on top, before the producer can share in revenues. As mentioned above, advances also put the distributor at risk because the revenue generated by the film's exploitation may not match the amount of the MG. However, they will generally secure a bigger share of the revenues if the film is successful.

## Share-out of distribution revenues

The most standard approach worldwide is for the producer to receive a share of the net income the distributor receives from sales and/or direct exploitation. This is received by the producer from the point after which the distributor has recovered their distribution commissions (the worldwide film industry norm is between 20 and 35 percent, though percentages vary according to each set of rights exploited), their distribution expenses and, if applicable, the value of the advance. The recovery of the advance may also be with interest, and the distributor may insist on a share of the net profit if the advance was significant.

From the exhibition of the film in the theatrical market, the distributor receives a percentage which varies across the world and is, on average, between 25 and 50 percent of the film exhibitor's gross. The balance is retained by the cinema to cover its overhead costs, i.e., the costs of operating the cinema and making a profit. France has a specific statute which compels distributors and exhibitors to share receipts 50/50; the United Kingdom, United States and India are driven by individual market negotiations, as is much of the rest of the world. In the United States, the proportion varies according to the perceived value of the film to the exhibitors but averages out at 50 percent, though negotiated percentages may vary with each passing week of release. In the United Kingdom, most independent films can only hope for between 27 and 30 percent of gross theatrical receipts to be retained by the distributor.

Thereafter, the split between the producer and the distributor will vary according to each agreement. In the United States, historically, producers directly attached to a major studio would typically have received 50 percent of the distributor's net, after deduction of advances, print and advertising costs, and studio overhead charges. In fact, since the producer then had to pay out net income percentages to key talent in the film, their actual percentage earned could be much less than 50 percent. This was also the prevailing split of net profit in the rest of the world, but these practices are constantly evolving.

On packaged video revenue (DVD and Blu-ray), the deals vary between countries and it is not possible to cover them in detail

in this publication. Newcomers to film production should begin by understanding the notion that video/DVD release is an entirely different business model from that of the cinema release. Unlike for a theatrical release, the distributor does not usually recover their manufacturing and marketing costs upfront. Instead, the company tends to retain most of the revenue and pays a straight royalty back to the producer (or sales agent). The royalty percentage is variable according to the circumstances of the local market and local practice, but it is typically between 10 and 30 percent of the price.

The physical video market differs from the theatrical market in another respect: while revenues generated from the cinema come and go within a few months, video exploitation can go on for years, continuing to generate revenues. However, while films on cinema release must generally compete with a limited number of other new films in any given week, films in the video market compete with hundreds of other titles at any given time, both new and exclusive releases and older titles. In this context, the management of a video catalogue by the video publisher becomes the main factor in making a film visible and competitive. Therefore, where possible the producer should always take great care in choosing a video publisher with a strong track record in managing catalogues over a long period, to ensure that their film gets the marketing support and market profile it deserves.

### **Assignment of the film's copyright**

The film's distributor may try to negotiate a full transfer or assignment of the film's copyright. The distributor's reasoning may be that control over the copyright will enable them to exploit the film fully in all markets (if they have obtained worldwide exploitation rights) without impediment and to take direct legal action in the event of the film being unlawfully copied and distributed by a third party.

### **Size and apportionment of distributor's expenses**

Every distributor will incur marketing and physical print costs to give the film its best chance in the marketplace. In negotiating the

distribution agreement, the producer will try to ensure both that there is a sufficient commitment to print and advertising expenditure on the part of the distributor, and that these expenses are capped, so the distributor does not exceed the pre-agreed budget without the consent of the producer. The higher the expenses, the less likely it is that the producer will recover any income from net profit, so they will want to ensure that the overspend is justified.

The producer will also try to negotiate consultation rights over the shape and direction of the marketing campaign to support the release of the film.

### **Term of assignment or license**

As the rights market has become more elaborate and prolific with the introduction of pay-per-view, VOD and other digital media, this aspect of the negotiations between the producer and the distributor has become more complex. This is because both parties see the term of assignment as a strategic aspect of their long-term commercial interest. There is no specific rule of thumb for the term of an assignment or a license. Generally, distributors try to obtain long terms (from 15 years to perpetuity) and producers often attempt to negotiate shorter periods. With very few exceptions, distributors are in a strong position to impose terms, and insistence by a producer on a limited number of years carries the risk of the distributor reducing their financial offer commensurately.

In some cases, the term may be variable and linked to certain performance expectations. At its most basic, this means that agreements protect the producer against the distributor making no effort to release or exploit the film in other media, and ensure that the rights revert to them after a period of time in which no exploitation of the rights has taken place. The agreement may also provide for a more sophisticated approach. An example can be found in French film distribution contracts: if, after an initial term of 10 years, the distributor has recovered the advance paid to the producer and the agreed marketing costs, they may be entitled to a series of three-year extensions. However, the producer will have the power to revoke this clause and ensure the rights revert to them.



## Producer's warranties

The distributor is likely to insist on clauses in the agreement stipulating that all IP rights pertaining to the making of the film have been cleared, and that the distributor will face no outstanding clearance charges or liabilities for underlying material for which the producer may have failed to acquire or license the rights. To back up such a warranty, the producer will need to hold the full set of legal agreements and contracts, or chain of title. Together, these constitute legal evidence that the producer has obtained all the necessary consents, licenses or assignments from any IP owner in the development chain and that the titles are legitimate and will stand up in court in the event of litigation. Obtaining chain of title is still too often a neglected aspect of the film production process, especially in countries where written contracts may not yet be the norm. However, the absence of chain of title has negative consequences for the subsequent international career prospects of films: no international distributor will agree to pick up a film unless they are satisfied that the legal documentation is in place. Without this documentation, distributors may not be able to arrange the errors and omissions insurance coverage they need to license the rights pertaining to the film to platforms and other media.

This section presents the main features of distribution contracts, highlighting some of the issues related to bargaining rights that a producer may encounter. The model examined here is based on the still-dominant practice whereby a producer licenses all rights to a distributor for a specific country or region, granting territorial exclusivity and giving the distributor the responsibility to attempt to license those rights to buyers across the various commercial exploitation windows. These can include theatrical exhibition, free television, DVD, TVOD, SVOD and traditional pay-TV. As detailed above, the distributor may agree to give an advance or a minimum guarantee to the producer. Depending on whether this transaction takes place before or after the film's completion, the producer may use this facility to contribute to the production budget or treat it as revenue to be split with the various financiers and equity participants.

In practice, however, not all film projects or finished films are licensed to a single territorial or regional distributor on an "all rights"

basis. Within their own market, the producer may have no choice but to approach the different players in each segment of the film value chain directly in a specific territory, when trying to raise funds for a project in development or pre-production. This would be the case, for instance, with a project seeking pre-sales and finding no takers among local all-rights distributors, who may not be willing to take the risk. Up until recently, linear broadcast television channels were important strategic financiers in the film industry in mature markets such as Europe, Canada, the United States and Japan, being both stable entities (television channels go out of business far less often than film distribution companies) and generally well resourced financially. While these traditional players remain important, the rise of the large global VOD brands (SVOD in particular) has brought about a more complex competitive picture: these platforms have introduced new competition in the market for traditional television rights at the local level, and some of them have also developed a multi-territory global rights acquisition approach that was once the preserve of the Hollywood studios. The next section offers some clues as to how a producer might navigate this complex and rapidly evolving field.

## **The rights jungle thickens – a strategic look at television rights**

In this context, television appears to be the most solid component in the value chain. Despite being challenged by the advent of new media, the attendant scattering of advertising revenues and a relative decline in audience share, both pay-TV and free television continue to represent reliable outlets for rights exploitation. In countries where the commercial television sector has experienced fast growth in the past two decades, relatively new satellite broadcasters such as Sony TV and Zee TV in India have become increasingly competitive in bidding for the rights to commercially appealing films.

In Europe, many countries (e.g., France, Germany, Denmark, the United Kingdom and the Netherlands) have broadcasters who commission television series and single dramas from production companies and co-produce films. In some cases, this is the result of a policy of getting involved with quality projects to showcase to

a national television audience. In the United Kingdom, BBC Films has become a respected entity in the independent filmmaking community over the years, putting money upfront into third-party projects and developing its own projects in-house. In France, all broadcasters are obligated by law to acquire licenses for French-language feature films; independently, all the leading channels have film co-production subsidiaries which invest at risk in third-party projects. In Denmark, broadcasters now also have certain investment and licensing obligations toward films produced by filmmakers in the Danish language. In Colombia in recent years, the commercial broadcaster Caracol TV has grown its presence in the local filmmaking community, partnering successful producers and directors in the financing of local films.

In the United States, the leading pay-TV channels (“premium cable”) have been commercially shrewd patrons of American independent films: before facing stiff competition from the rise of the global SVOD platforms, broadcast market leaders HBO and Showtime were leading players in the co-financing of independent films through their own branded divisions.

Considering all this, it would be tempting to conclude that the picture is very rosy indeed for producers hoping to attract broadcasting finance against licensing of their television rights. In fact, broadcasting rights are a challenging proposition for producers because of several market factors, explained in more detail below.

### **Output deals**

Up until the early 2010s, Hollywood studios had “output deals” with the leading pay-TV and/or free television broadcasters in many countries around the world. These deals involved a studio pledging a certain number of films to the broadcaster annually. Each film had a base price related to its performance in US cinemas (nearly always the film’s first market) and/or in local cinemas in the country where the broadcaster operated. The base price for each film would go up if the theatrical performance went over a pre-set gross box office figure (this practice is referred to as an “escalator” deal). Back then, output deals made good business sense: the studios were able to

plan revenues more safely and accurately and broadcasters got exclusive supply, which made good competitive sense. However, the knock-on effects of these deals for non-studio producers were rarely positive: it left them with fewer slots available for other films in a finite schedule, but rights for films offered to a broadcaster outside of an output deal tended to be acquired for much less, if at all. Today, these types of framework licensing agreements are in a state of flux: the rise of the VOD streamers has introduced new competitive dynamics in a subscription market that was once highly concentrated. However, access for independent films remains problematic in most cases.

### **Television rights and VOD**

Film distributors in the producer's own country will rarely pick up a film for a theatrical release unless they can secure all other rights, especially television rights and VOD. This is perfectly logical, because most films lose money in the cinemas and a distributor's only hope of recouping their investment thereafter is by exploiting the film in the next segments of the IP value chain (see Table 2). In countries where broadcasters are active participants in the financing of films, this presents the producer with a dilemma. On the one hand, they need a distributor to launch the film through a theatrical release and obtain revenue from other ancillary rights. On the other hand, if a broadcaster is making a direct offer to the producer to license transmission rights upfront against a license fee, they know that accepting this agreement will result in either a much lower offer from a local distributor, or no offer for the rest of the rights still available. Taking television off the table early dramatically affects the risk assessment for a film's release from a distributor's perspective, as they will have concerns about making a loss over the course of the film's distribution campaign.

### **Acquiring additional rights**

As co-financiers of feature films, broadcasters generally bring a lot of bargaining power to negotiations with the producer. They will typically attempt to acquire all broadcast rights beyond the primary

transmission rights which fit in with their core business. In some cases, the broadcaster negotiating the acquisition or license may be operating several services, including pay-TV, free television and even pay-per-view and various forms of VOD – e.g., the non-linear “catch-up” television rights (such as BBC iPlayer in the United Kingdom), as well as any standalone commercial VOD service that carries the broadcaster’s brand.

In a climate of intensifying competition from OTT VOD platforms, broadcasters are under unprecedented pressure to own or control as much IP as possible, over and above what they need to run a primary linear broadcast television service. Television negotiators will consider themselves justified in trying to aggregate all these rights to sustain their presence across multiple media. Or the broadcaster might be active in just one segment of the broadcasting value chain, but may still want to buy out the rights to the other segments to prevent its commercial rivals getting the same film either before or after. Meanwhile, the producer will generally want to negotiate for a limited license rather than an assignment of broadcasting rights. If the broadcaster wants to include different types of transmission rights in the same quoted license price, the producer may insist that each use be valued separately and a market rate negotiated for each, to avoid a bundling of the value of IP rights into one bulk quote. If the broadcaster wants to take transmission rights for broadcast services it does not itself own and operate, the producer may negotiate an obligation for the broadcaster to proactively license those additional broadcasting rights to third-party broadcasters and to share revenue with the producer from the licensing of those rights. Also, the agreement may stipulate that in the event that the purchasing broadcaster fails to successfully license or sell those rights on to a third party, the unsold/unlicensed rights will revert to the producer after a pre-agreed period of time. This last clause helps prevent a “warehousing” of the rights by ensuring that there are incentives for the fullest value to be realized across the range of broadcasting IP rights.

In some European countries governments have intervened in rights bargaining between producers and broadcasters, to make the system fairer and ensure that the opportunities for secondary rights are fully exploited in due course. France has specific clauses in

agreements between producers and broadcasters to that effect:

- The broadcaster's initial license is limited to two transmissions over a period of two years. Thereafter, the rights revert to the producer, though the broadcaster has rights of first negotiation if it wishes to exploit the rights further.
- Broadcasters may not make an equity (or co-production) investment in the film through their acquisitions department. These investments may only be made through a wholly owned film production subsidiary, with separate staff, accounts and governance. This measure is designed to prevent bundling of rights licensing and investment by one entity, which the French regulator believes would concentrate bargaining power and enable the broadcaster to take control of all of the revenue upside from the film. Additionally, single investments by a broadcaster's film subsidiary may not exceed 50 percent of the production budget.
- The broadcaster may only take a financial interest in one ancillary market for the film. For example, if the broadcaster takes some control over the video/DVD rights, they will not be able to have any stake in the foreign rights, or vice versa.

The landscape for television rights from a producer's perspective is becoming more complex all the time. This is a result of the creation of new windows and licensing opportunities following the rise of VOD, and especially the larger OTT SVOD platforms in the past decade. These can compete directly with legacy broadcasting rights windows, as is the case with SVOD platforms in the pay-TV space (see Table 1).

Whether or not VOD rights are licensed to a platform on the basis of exclusivity is a prominent factor in setting the license price and related terms. In the pioneering years of VOD, non-exclusive deals were the norm because fledgling platforms did not have sufficient scope and/or financial resources to require that they be the only platform on which a particular film could be found. In France, the bespoke independent film SVOD platform UniversCiné was launched in 2001, when the VOD market was still new. During its first decade, it functioned both as an SVOD outlet for local and foreign independent films and as a cooperative, selling rights to other platforms in the same, as well as other, VOD windows. Building its business model

on non-exclusivity played to its strength. As a specialized brand, it could attract local consumers to its own platform. However, its limited financial resources meant it could not purchase exclusivity initially, and it chose instead to rationalize and maximize VOD rights licensing activities on behalf of small catalogues from a large number of smaller independent companies that could not afford to do this on their own. Nowadays, market leaders in the VOD segment, especially the dominant global SVOD platforms from the United States, are aggressively pursuing exclusive windows. Their ability to offer very competitive license fees reflects their success in raising financing on a vast scale and their strategic determination to be winners in the ongoing global competition between a small number of platforms.

Data play a major part in negotiations with VOD platforms, especially SVOD: complex data analytics are used to determine aggregated viewing hours for a show or film over the course of the license period on a first series or pilot. Comparative data are also used to inform decisions on commissioning new content or buying rights to third-party content. One example is how in 2012, Netflix executives decided to fully finance the first season of its hit series *House of Cards*, based on the sense of security gained from correlating viewing performance (including demographics) for the 1990 British original version of the show (to which Netflix had some VOD rights) and the popularity with its subscribers of films starring the lead actor who was to be cast in the new US version. From data analytics, the big streamers can extrapolate a cost per hour viewed and use such metrics in negotiations, especially for the renewal of licenses on shows that have already had one prior season or more.

It is probable that the different content owners structure their deals differently. The variables at play are not markedly different from those presented earlier in this chapter, where the key features of a distribution contract were examined. However, in certain VOD contexts, the licensor will find negotiations are more complex in relation to the geographic markets that are covered under the license: nowadays, it is common for the larger global VOD streaming platforms to seek rights acquisition for multiple territories. These can range from a few localized countries with a common language to an entire region or the entire world. This is an important negotiating point for independent producers and distributors, who may have

been used to a traditional model in which licensing chiefly occurred on a territory-by-territory basis, with different licensees in each.

Agreeing to a multi-territory license presents certain advantages for the producer and/or their appointed licensor. A guaranteed availability in several countries at once spares the producer the onerous process of pitching the film to a succession of local distributors or local platforms, with no guarantee of success. However, the multi-territory deal also has its disadvantages: industry practitioners generally report that the prices paid for a multi-territory license rarely match the amount that would have been raised from licensing the same film in each of the individual territories. It may also be problematic if the producer has already pre-licensed certain rights in certain territories as pre-sales, to finance making the film in the first place. In this instance, successful negotiations with the multi-territory platform will depend on whether the platform insists on complete exclusivity or can agree to certain holdbacks<sup>9</sup> in the territories where the producer or their representative may already have pledged some rights. This factor in the negotiation will also affect the final license price.

For producers planning on pitching projects to VOD streamers, it is useful to undertake prior research. The business models of the big brands of global VOD are diverse. At the time of writing, Netflix and HBO are single-purpose home entertainment businesses focused exclusively on financing and licensing films and television content direct to the consumer. Meanwhile Amazon Video is powered by the strategic imperative to attract new subscribers to the largest online retail platform in the world, by adding attractive (and preferably exclusive) filmed entertainment to the Amazon Prime value proposition, with its vast choice of Amazon originals and third-party television series and films. As the president and chief executive officer of Amazon Jeff Bezos once quipped: “every time we get a Golden Globe nomination, we sell more shoes.” Hulu began life as a platform for the further exploitation of content made or licensed by parent companies that also exploit other segments of the value chain.<sup>10</sup> Apple, until recently the global market leader in TVOD, entered the SVOD space in 2019. At its core, it remains a business focused on selling attractive, state-of-the-art devices; to a degree, its film and video content strategy remains subservient



to encouraging the purchase of Apple products, some of which will provide exclusive access to their own branded filmed entertainment content (e.g., AppleTV+). Understanding what drives each of these businesses, as well as the type of customers and content acquisition policies they have, is a prerequisite to doing business with them.

As competition between global online platforms has intensified in recent years, and as the Hollywood studios have begun to withdraw their catalogues from VOD platforms to enter the online business directly themselves, the leading players have been using their financial muscle to fully commission single films and television series which they go on to present as originals on their online store platforms. In doing so, they are striving to build brand identities that ensure better recognition by the consumers they seek to attract and differentiate their value proposition from that of their commercial rivals. Although a growing number of single feature films are now commissioned in this way, the trend is particularly significant in the origination of new television series. In this model, the platform offers license fees that cover the full production budget, with an additional sum meant to enable the production company to extract a fee and cover operating costs that may not have been fully included in that budget. This business practice is often referred to as “cost plus.” For US television, there is a contrast with the historic “deficit financing” approach, which was practiced by the traditional linear television broadcasters for decades before the advent of broadband internet. Deficit financing consisted of the purchase of a license by broadcasters for limited broadcasting rights during a set period, against a fee that would only cover a proportion of the production budget required to make the series (typically between 60 and 80 percent of the budget). The producer would retain ownership and control of all or most other rights and cover the budget deficit out of pre-sales to other media markets (e.g., domestic, second-tier local television channels, pay-TV, video rights, foreign television rights).

This approach worked well enough for producers whose series were renewed for several seasons (a fate enjoyed by only a small proportion of all television series), as it generated a back catalogue of sufficient volume to secure significant long-term cash flow from ongoing secondary and tertiary rights exploitation on domestic syndication and foreign television channels. Therefore, in a best-

case scenario, losses on the less successful shows can be offset by the considerable revenues generated by the rare hits.

The choice made by the traditional television networks to avoid covering 100 percent of production budgets was related to the very nature of linear television, which relied on capturing the attention of an audience at specific times, with only a few opportunities for later repeats. By contrast, the cost-plus, wholly financed strategy of some of the leading VOD platforms makes sense in the non-linear ecosystem; rather than having to attract audiences to a specific scheduled time slot, they can create an environment in which the same series or film is available for the consumer to experience at their leisure. For SVOD in particular, the value of a subscription is unlimited access to content that is not subject to the strictures of the old “television by appointment” model.

The cost-plus formula is a powerful business magnet for many production companies that would struggle to achieve sufficient pre-sales to guarantee the coverage of a budget gap and want the cachet of a commission from a successful internet platform. However, this type of deal comes at a cost: a VOD platform covering 100 percent of budget will usually insist on purchasing all rights in the project, including rights other than VOD, leaving the producer with no opportunity to share in the potential financial upside from the exploitation of ancillary rights if the film or series proves successful. For a successful series or film, remake and merchandising rights, for example, can become important sources of additional revenue for a production company. A full assignment of such rights to a VOD platform against a cost-plus deal will normally entail the producers receiving little or no back-end revenue from the exploitation of those rights.

To offset this, some of the VOD platforms may offer reasonably attractive upfront financial bonuses for second and subsequent seasons of a television series. However, as was the case when traditional television broadcasters were dominant, very few first series are ever renewed. And because renewal is the mark of a successful series, the paradox from a producer’s perspective is that they could have earned significantly more had they reserved some strategic rights and been able to exploit them directly. It should be

noted that this renewal logic does not apply to one-off single feature film commissions.

In considering a deal with a VOD platform, a producer should always have a clear understanding of which of the two parties will bear the responsibility for paying royalties and/or residuals to film authors and performers. On US television shows, these payments have increased very steeply in recent years as talent and film workers' unions have sought to ensure that their members receive a fair share of revenues from the fast-growing streaming platforms. The large global streamers from the United States have been developing direct agreements with these unions regarding royalty and residual payment rates on the content they commission. Elsewhere in the world, other arrangements may apply, many of which will be the object of constant renegotiation. However, some VOD platforms may pass on the cost and managerial burden of handling similar liabilities when commissioning films.

Another important consideration for a producer entering into a commissioned deal with a streaming platform is cash flow. It is common practice among many of the streamers to stagger license payments over long periods, sometimes as much as two to three years from initial delivery of the finished film or television series, well into the license term. These practices – which do not necessarily differ from those of traditional television channels in many markets – will often present acute challenges for production companies, most of which do not have sufficient cash reserves to cover such risk upfront. The situation has led to the growth of a range of new bank loan products that are designed specifically to address the content production financing needs of film and television producers to cover cash-flow requirements, pending later payments by the platforms acquiring the content. One of the challenges of offering such loans is the fact that the banking sector still has some concerns about the reliability of the licensing contracts issued by the relatively new businesses that populate the VOD market. However, the fact that the sector is showing very high growth means that opportunities are growing alongside it.

## The role of IP rights in film/television financing – the real stories

### GriGris – a Chadian film made possible by television financing

Made in 2013 by the award-winning Chadian director Mahamat-Saleh Haroun, *GriGris* won the prestigious Palme d’Or at the Cannes International Film Festival in 2013.

The film tells the story of GriGris, a young dancer with a damaged leg, who makes a virtue of his disability by developing a unique dancing style that wins him prestige in the nightclubs of the Chadian capital, N’Djamena.

The film was initially budgeted at EUR 2,567,531,<sup>11</sup> a figure difficult to obtain for most African film projects unless, as was the case here, they can attract partnerships from abroad. *GriGris* was made as a co-production between Chad and France. The Chadian government’s contribution was partly in cash and partly in kind, through the underwriting of local services (*GriGris* was shot in Chad). The European Union’s ACP fund also contributed a grant.

The French contribution represented close to 80 percent of the budget, not counting the producers’ own participation. Although the French share was made up of a combination of state incentives and a small minimum guarantee from a local distributor (for French theatrical and video as well as foreign rights), the contribution of the French broadcasters was the most decisive in getting the film made. There were seven separate license fee agreements, from both free-to-air and pay-TV channels. Put together, these television pre-sales to French television covered 32 percent of the budget. Another 8 percent was covered by an equity investment from the film branch of French regional broadcaster France 3 (additional to its license fee), bringing the total contribution of broadcasters to 40 percent of the budget.

The *GriGris* case study is somewhat uncharacteristic of the way in which most independent films are financed globally, and the role played by legacy broadcasters in their financing: the appetite of French broadcasters for feature film projects is as much the result of

stringent broadcast content regulations as it is an expression of their support for the medium. This contrasts with many other countries where broadcasters are under no obligation to support feature films or other forms of local content and will sometimes rely primarily on programming they themselves have produced, and foreign imports. Nevertheless, *GriGris* is a useful example of the leverage producers can expect in countries where broadcasters are active participants in the acquisition of film rights.

**Table 4: Breakdown of the pre-acquisition of the television rights to GriGris by broadcasters (2012)**

Television channel	Euros (EUR)	%
France 3 (license fee)	250,000	30.4
Canal+ (license fee – pay-TV rights only)	400,000	48.7
Canal+ catch-up (non-linear free VOD)	7,420	0.9
Ciné+ (second pay-TV window – license fee)	100,000	12
Ciné+ catch-up (non-linear – free VOD)	1,050	0.12
Canal+ Horizon (pay-TV license fee for African territories)	3,000	0.36
TV5 Monde (free-to-air license for African territories)	60,000	7.3
Total French television rights (plus free catch-up VOD)	821,470	

## The Collection – an Anglo-French television series

*The Collection* is a high-end television drama series set in the social microcosm of a Parisian haute couture firm, as its gifted and ambitious lead designer sets about restoring the supremacy of French high fashion in the troubled years after the end of the Second World War.

The scripts for the series (eight 52-minute episodes) were developed by an independent UK company, and the series was financed through a collaboration between French and British companies, including the production arm of France Television, the corporation that oversees the public service television channels operating on a

mixture of public license fee and advertising. The series was also an early foray into a high-end European television project by Amazon.

Amazon contributed 50 percent of the EUR 25 million budget for the series against all exclusive rights in all media for the United Kingdom and exclusive SVOD rights for the rest of the world.

France Television's third channel, France 3, contributed a EUR 3.2 million license fee against exclusive rights to linear broadcasting in France. It also contributed a minimum guarantee against rights to other French territories.

BBC Worldwide, one of Europe's largest international sales companies, covered the balance of the budget with a minimum guarantee of EUR 7 million against the value of the linear vision rights in territories other than those of the co-producing partners (the United Kingdom and France).

For the release of the series in their respective countries, the partners agreed on the following exploitation windows and holdbacks:

- In France, the broadcaster France 3 was granted first window, premiering the series on its linear television service. The agreement also allowed France 3 to program the episodes on its non-linear, free catch-up service for a period of 30 days.
- Additionally, France 3 was granted the first commercial SVOD window for a 60-day period.
- After the first France 3 windows closed, the agreement gave Amazon an exclusive one-year SVOD window.
- Beyond the 12 months, both France 3 and Amazon could exploit the series at the same time on a non-exclusive basis.
- In the United Kingdom, the series premiered on the Amazon VOD platform and stayed in that exclusive non-linear home entertainment window.

This chapter has provided a few clues as to how producers can carve a path through the film rights jungle and get their film financed while also retaining a healthy degree of control, or financial interest, over the exploitation of their work. The values of rights are always shifting in this context, in accordance with technological breakthroughs and changes in the tastes and expectations of consumers.

## Notes

- 1 Collection agents are distinct from collective rights management organizations (CMOs). While CMOs are generally non-profit organizations collecting revenues owed to certain categories of right holders in the exercise of statutory rights, collection agents are purely commercial private sector entities managing private contracts and charging commercial rates for their services.
- 2 Mina Fanea-Ivanovici (2019). *Filmmaking and Crowdfunding: A Right Match?* Bucharest University of Economic Studies.
- 3 Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America, in a speech delivered on April 12, 1982 to the Judiciary Committee of the United States Congress.
- 4 OMIDIA – Video Packaging Report 2021 - <https://omidia.tech.informa.com/OM018109/Video-Packaging-Report-2021>  
Data quoted in Wired Magazine, 21.11.2021: <https://www.wired.co.uk/article/dvd-sales-streaming>.
- 5 Motion Picture Association THEME Report 2021 - <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf>.
- 6 Hollywood's Soaring Marketing Cost Dilemma. *Variety*. August 17, 2017. Available at <https://variety.com/2017/biz/news/hollywoods-soaring-marketing-cost-dilemma-1202530305/>.
- 7 The Statistical Relationship between Home Release Window Length and Theatrical sales – an EY Study for the National Association of Theatre Owners. 2020. Available at <https://www.natooonline.org/wp-content/uploads/2020/04/Home-Release-Window-Analysis-Report-April-2020.pdf>.
- 8 Hollywood studios generally offset a substantial proportion of their financial exposure by making use of tax and other incentives available in many countries, and sometimes by licensing distribution rights to certain territories to local independent distributors.
- 9 Holdbacks are a key feature of the legal and business architecture of film distribution. They involve the various parties to the distribution of a film agreeing to a specific pattern of release in which one platform agrees not to show the film or make it available in order to allow another platform (or media outlet) to exploit the film for a mutually agreed period of time. Holdbacks apply to both local and multi-territory distribution.
- 10 Much of the material on cost-plus vs. deficit financing has been culled from "Teasing apart television industry disruption: consequences of meso-level financing practices before and after the US multiplatform era," by Amanda D. Lotz, Queensland University of Technology, in *Media, Culture & Society*, 2019, 41(7).
- 11 The *GriGris* budget figures are sourced from an initial financing plan deposited with the French Centre national du cinema et de l'image animée (CNC) for incentive approval. Although the information is available to consult in the CNC public register, the figures may not accurately reflect the production budget that was finally agreed and the actual expenditure.

# The Talent Maze – Rights and Engagement Terms

A successful feature film brings talent together in a unique way, focusing and coordinating various individuals as they move toward the same creative vision. There are creative contributors in almost every single department of a film production unit. In a contemporary film, these range from makeup artists, costume designers, choreographers and storyboard or animatics artists to special-effects concept artists, art directors and directors of photography, among others.

Many of these artistic contributors must consent to the use of their work, considered independent and copyrighted, as part of the finished film. However, this chapter focuses on the two categories of talent that can make or break a film: the director and the actor. They are almost certainly the most prominent talent on any film set; equally, the IP clearances involved in attaching them to a film are often the most complex and sensitive.

## Actors' rights – an uneven patchwork

Around the world, the legal status of the actor varies considerably from one jurisdiction to the next. Some countries grant actors a comprehensive set of neighboring rights, which include 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 (pay-per-view, VOD, etc.).

Many countries still accord virtually no rights to actors and performers, who are hired on film work as straightforward employees of the production, without the negotiation of any assignment or license. In some countries, notably the United States, while actors are not characterized as neighboring right holders, they benefit from powerful union representation, ensuring that the pay scale for non-stars is sufficient and securing further payments linked to the exploitation of the film. Despite being signed up to productions on a work-for-hire basis, United States screen actors



can benefit from minimum pay and a complex scale of residual payments administered through the film studios (or other signatories to the union agreements) and rigorously policed by their union, the Screen Actors Guild (SAG).

In many other countries, however, the lack of neighboring rights, combined with weak union representation, has left screen actors vulnerable in contractual and economic terms. The International Federation of Actors (FIA) and affiliated organizations worldwide have campaigned to rectify this imbalance by introducing statutory neighboring rights in primary legislation around the world.

In April 2020, the WIPO Beijing Treaty on Audiovisual Performances (Beijing Treaty) entered into force. The Beijing Treaty is an important development for the welfare of screen actors worldwide. For the first time in IP legislation history, the economic and moral rights of screen actors have been enshrined in a global binding norm. The United Nations member states that accede to the Treaty commit to implementing that norm into their national laws. At the time of writing, 32 countries have ratified or acceded to it, with many more expected to join.

The Beijing Treaty also clarifies that signatory states may have dispositions in their national laws to ensure the transfer of a performer's economic rights to the producer. The Treaty is without prejudice to whatever legal traditions, contractual dispositions and/or collective bargaining structures are in place at the national level to deal with such a transfer. It is also non-prescriptive on the modes and methodologies for the remuneration of screen actors, which also defer to any existing or negotiable arrangements at the national level.

In many European jurisdictions, the law also builds in a presumption that these neighboring rights are fully transferable to the film's producer at the point when the actor signs a hire contract. This presumption may be qualified or not: for example, it may be rebuttable, meaning that the presumption is applied unless the performer specifies that they are unwilling to relinquish their rights. 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 remuneration.

In 2019, the European Union updated its Copyright Directive. The new legislation goes into greater detail regarding the legal treatment of creative talent (authors and performers). In particular, the new Directive mandates the obligation to ensure “appropriate and proportionate remuneration.” The legislation leaves it to individual member states to decide what type of mechanism should be in place to deliver this, bearing in mind the need for a “fair balance of rights and interests” and the principle of contractual freedom. The Directive also provides a new right of revocation of a license by a performer or author where there is a demonstrable lack of exploitation.

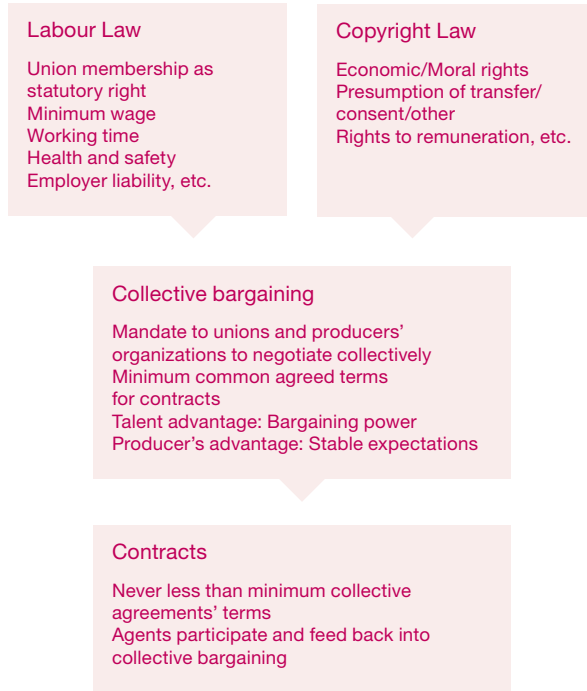
In many developed film and television industries, the legislation (principally copyright and labor laws) has been complemented by detailed collective agreements between actors’ unions and producers (see Table 5). For instance, in the French Intellectual Property Code (L121-4), the condition for the presumption of transfer is that remuneration should be specified in the actor’s contract. The key principles, which are reflected in individual contracts are:

- that the initial performance salary includes the pre-acquisition by the producer of all domestic and foreign exploitation rights in all media; and
- that further remuneration is specified as a share of the producer’s future net exploitation revenues from the finished film.

Consequently, French actors’ contracts, while specifying remuneration against a pre-purchase of all neighboring rights for their entire legal term (50 years from first release), also provide for supplementary remuneration.

As with other jurisdictions (e.g., in Germany, the United Kingdom, the United States, Canada and Japan), French collective agreements ensure that the members of actors’ unions with the weakest bargaining power benefit from minimum protection and income guarantees. Though they generally do not deviate from the overarching principles (pre-acquisition of exploitation rights with a share of the producer’s net income), contracts drawn up for lead actors may contain additional advantages (over and above the sheer size of the performance salary) – for example, the percentages of net revenue share will normally be higher and the actor may negotiate for the producer to commit to a significant upfront advance on such revenues.

Table 5: Film talent contracts: the legal infrastructure



Moral rights are also an issue for actors worldwide, as legislation varies in the extent to which it grants moral rights to creative contributors other than the authors of the film and the underlying works.

The Beijing Treaty contains a broad moral rights provision (Article 5) which recognizes that a performer has the right to be identified as the performer of their performances “except where omission is dictated by the manner of the use of the performance,” and the right to object to “any distortion, mutilation or other modification of the performance that would be prejudicial to [their] performance, taking due account of the nature of audiovisual fixations.” The last part of this quote shows that the legislation takes into account the fact that a film or television programme is the work of many, and that accommodations must be made to avoid impeding the making of a film and its subsequent exploitation. For instance, French legislation

sets out a hierarchy in which the exercising of the moral right of a performer may not contradict or supersede that of a film author (e.g., the director or the author of the screenplay).

Even when working under a jurisdiction which does not grant moral rights to the actor (e.g., in the United States), the actor may still be capable of ensuring the protection of their own image and retaining a degree of approval regarding its use as part of the promotion of the film, by setting out the terms in their contract.

## **Hollywood stars, their agents and inflationary effects**

For film producers living and working in the mainstream Anglo-American film world, the ability to attract movie stars to a project has a significant positive impact on the valuation of the IP rights pertaining to the film by potential buyers. Attracting such actors is therefore an essential part of the producer's strategy when they come to seek financing for their projects.

However, attracting a bankable lead to a low-budget project is becoming increasingly difficult, with one reason being that many actors from countries such as the United Kingdom, Canada or Australia are also pursuing Hollywood careers. Whether they are known or unknown, a growing number of actors from these countries also have agents in Los Angeles and are members of SAG, a powerful union in the United States which insists on extending jurisdiction over its members, even for productions where the hire is taking place outside of the United States.

This relative “Hollywoodization” of Anglo-American actors outside of 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 command fees that are rarely affordable for independent movies with relatively low budgets.

There are two main factors that can help the producer persuade a star to work for a price well below their going rate. The first is the quality of the story and screenplay. The second relates to current shifts in the way leading actors tend to manage their career; there was a time when stars took few risks that might tarnish their image with the public yet would showcase their true range as actors. Today, however, taking such risks is part of most leading actors' strategies to acquire credibility with newer, younger, more discerning audiences, by accepting roles that do not necessarily fit their standard screen persona. Witness Brad Pitt's short cameo as an abolitionist in the award-winning drama *Twelve Years a Slave* (2013), a film he also co-produced. The film was distinctly outside of the blockbuster segment, directed by an auteur filmmaker and with a budget well below the star's usual work template. In this example, Pitt reaped substantial career dividends from laudatory reviews, even if the pay was significantly lower than he would have been used to in more commercial projects.

The case study below shows how producers succeeded in attracting stars to a low-budget project, by negotiating a workable package with them.

## **A real actor's contract story – *Girl with a Pearl Earring* (2003)**

Let us look at a film which came out in 2003, won critical acclaim throughout the world and turned in a very respectable commercial performance in most countries where it was distributed.

*Girl with a Pearl Earring*, based on the acclaimed novel by Tracy Chevalier, is a simmering tale of the erotic tension behind the painting of the eponymous portrait by Johannes Vermeer, perhaps the most celebrated of the 17<sup>th</sup>-century Dutch master painters.

The film was a labor of love for British producer Andy Paterson and his writing partner Olivia Hetreed. The USD 11 million project was many years in development before the cameras finally rolled. Like many ambitious independent film projects, it demanded great vision and tenacity from all involved. However, for Paterson and

his team, the result was worth the wait: when the film finally came together, they managed, after long negotiations with their respective agents, to attract both British star Colin Firth (*Bridget Jones's Diary*, *The King's Speech*, *Kingsman: The Secret Service*) and Scarlett Johansson (*Lost in Translation*, *Captain Marvel*, *Marriage Story*). At that time, Johansson was just on the threshold of stardom.

Both actors accepted the producers' offer to be remunerated for their respective parts on the basis of an upfront payment worth only a fraction of the salary they would have received on a high-budget commercial movie. However, having accepted such a substantially lower offer, the actors also had two important demands:

- that the balance between their upfront remuneration and their quoted price could be earned by them from the time the first revenues started to flow from the commercial exploitation of the film – this practice is called “deferrals” or “deferments”;
- that after revenues had recovered the full costs of the production of the film, they would be entitled to a significant profit participation.

This type of deal structure is relatively common in transactions between producers and lead actors across the independent film community in the Anglo-American system. In insisting on such terms, actors and their agents are aligning with Hollywood practice, albeit with lower figures involved. In essence, against the commitment to take modest fees upfront to facilitate the making of a low-budget film, they insist on becoming investors in the film.

This approach has its ambiguities. It allows small projects to punch above their weight and guarantees a strong opening for the film in the cinemas, due to the presence of popular actors. This is a vital competitive factor for many independent films tackling more difficult subjects and competing for an audience that is used to escapist Hollywood blockbusters.

However, the agents will often insist that the revenue corridor going back to the actors as part of the deferral deal should be calculated from the first dollar of income from commercial exploitation. In the industry's jargon, these types of arrangements are referred to as “gross deals,” because the actor is meant to receive their share from

first dollar instead of having to wait until the full costs of production have been recovered. In fact, deals rarely ever yield revenues to a star from the first gross dollar earned, but rather from the first dollar after the distributor has deducted the costs of film prints and marketing, and before their commission. In the business, this is known as “adjusted gross,” and the basis of calculation for these arrangements is complex and variable. Although this improves the chances of matching the budget with estimated sales values, it is generally still far from optimal from the producer’s point of view.

The difficulty for independent low-budget producers is that they are dependent on international film exporters (known in the business as “sales agents” – see next chapter) to provide realistic forecasts of the total value of the sales of the film’s distribution rights in various countries. In order for the producer to raise the production budget, they must be able to persuade financiers that accumulated sales values will exceed the cost of making the film. The lead actors’ demand for a revenue share-out based on gross income deducts a significant amount upfront from the value of those sales, making it more difficult to recover the investment in the film’s budget and thereby making the risk seem greater for the financiers.

With non-star actors, producers tend to agree deals made up of upfront fees (or salaries) based on published union rates, combined with residual payments calculated either as fixed amounts 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 different countries in that respect. There are also some differences in the share-out of net profit. In some agreements, there is no specific clause providing for a share-out of a film’s net profits in favor of the actors; the negotiation of this aspect of an actor’s remuneration is left to the bargaining power of individual actors and their agents, which is itself predicated on the perceived value of the actors to the project. In practice, this means that if a standard agreement does not have clauses for profit sharing, 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 who is hired on a production may choose to claim a profit share. For

instance, in the United Kingdom, an actor’s collective agreement with independent producers gives the actor a choice between a profit share (2 percent of net profit to be shared out between all), or a royalty based on the value of all sales of the film’s rights, after sales revenues have exceeded 50 percent of the cost of producing the film.

### **In the director’s chair – author vs. technician-for-hire**

While film is a collective enterprise, the director is widely recognized as the key creative contributor. The mystique surrounding the work of world-class directors attests to the powerful influence of a consistent personal vision, which is 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, featuring recurrent themes and concerns.

Under some legal regimes, the director is presumed to have the initial authorship in the film and their contract with the producer is structured around the transfer or licensing of all exploitation rights, against negotiated remuneration and a participation in revenue streams. The contract also defines 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 interlinked 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 upfront 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 payable by the producer against the transfer of the director’s rights and deductible against future film revenues.

The “final cut” refers to the power to decide on the final shape of the film. Under a *droit d’auteur* legal regime, it would be contrary to IP statutes for the director to have this power taken away; it is



considered an important expression of their moral right. The moral right itself cannot be waived, transferred or assigned.

In general, however, a pragmatic approach is taken. 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 foreign versions, despite the fact that these may include cuts made to accommodate censorship requirements in other 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 agreement is also very detailed on the director's further income streams as an author of the film: each market, from theatrical down to small ancillaries such as stage or radio spin-off programs, carries a percentage pegged either on the price paid by the public (gross deal), or the producer's share of net income from exploitation.

In the United States, the director's status recalls that of the actor, in that it is normally a work-for-hire contract involving no characterization of 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 in the United States as a for-hire technician rather than an author does not necessarily mean that their contractual terms will be any worse 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 commercial drawing power of each director.

Although moral rights do not feature in the negotiations as such, a few of the most commercially successful "A-list" directors will insist

on a final cut provision or, at the very least, a joint final cut with the producer. This facility is made somewhat easier by the fact that directors operating at this level in the film industry hierarchy will often be involved as producers as well as directors on their projects. Even for the less powerful directors, union agreements may 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 most 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 above).

In the United Kingdom, a hybrid contractual system prevails. Since it was harmonized in the mid-1990s with the dominant *droit d'auteur* continental system,<sup>1</sup> the Copyright Act has provided that the principal director of a film is its author or one of its authors.<sup>2</sup> Prior to this, British film directors were hired along similar lines to those in the United States, with copyright law establishing 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 in their contractual position. Most director contracts take an assignment of all the director's rights against upfront remuneration. UK producers, like their US counterparts, also insist on a waiver of the director's moral rights. A standard waiver clause will read as follows:

*"[...] 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 grounds 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-American moral rights waivers is that leaving the work open to an author exercising their moral right would be a strong deterrent to most film investors, who want legal certainty before deciding whether or not to take a substantial risk on a film. The argument is that, while customs and practices in the film industries in *droit d'auteur* countries have been adapted over decades to non-waivable moral rights and some risk-minimizing practices have been developed, the only recourse under existing common law involves blunt instruments such as an injunctive relief. The prospect of a film being stopped in its tracks over a moral rights dispute is one that anglophone film industries find difficult to adjust to, given the high-risk nature of the film business and the size of the financial investments required. The issue remains controversial to this day.

## Licensing by numbers – collective management and talent rights

Table 5 highlights the central importance of collective agreements between talent unions and producers' organizations. At the core of these agreements are dispositions enabling the payment of talent fees and additional remuneration (e.g., residuals). Within the framework of collective agreements, the talent is generally remunerated directly by the producers on the basis of the pre-agreed formula present in the collective agreements, which are replicated in most individual contracts.

However, certain rights pertaining to the talent are sometimes not included in the collective bargaining template and do not therefore come under the direct management of the producer or their successor in the chain of title. These are normally limited and specific rights whose exercise requires a collective consent and licensing mechanism rather than individual transactions to make practical sense.

A perfect example of this category of rights can be found in the music industry: it relates to the use of music tracks by radio and television broadcasters, which air a high volume of recorded music across their schedules on an ongoing basis. No such broadcasting service would be remotely viable if individual clearance were required for all such usage.

In this instance, artists' rights are represented through collective management organizations (CMOs), which provide blanket authorizations 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.

In the audiovisual sector, the range of talent rights managed through CMOs varies greatly from country to country. Where industries have developed strong unions and producers' organizations, most primary rights pertaining to the talent (e.g., theatrical, initial broadcast, video sell-through) are not managed by CMOs but directly through individual contracts pre-shaped by collective agreements between the parties. The focus of CMO intervention tends to be limited to secondary rights that would present too great a practical challenge if they were managed on an individual basis.

Currently in Europe, collectively managed rights that are specific to the audiovisual medium consist mainly of cable retransmission rights and home video copying levies. Talent working on a film – screen actors and authors – also enjoy certain statutory rights in some jurisdictions that are directly claimed and managed through their appointed collecting society. In Spain, for example, audiovisual performers mandate their rental and broadcasting rights to their local collecting agencies, which collect revenues directly from relevant commercial video sellers, as well as public and private broadcasters.

The cable retransmission right is exercised at the point when a non-encrypted program-carrying signal from a television broadcaster overflows a country's borders, where it is picked up by a cable company which then redistributes the signal into the homes of its subscribers. In such cases, individual licensing of rights would not be a manageable proposition because the broadcaster's original signal is an ongoing stream of audiovisual content and clearance is required for a considerable volume of works.

In this instance, actors and authors may have assigned the cable retransmission rights to the producer as part of their engagement contracts. The producer may be made responsible for collecting the talent's cable royalties, and then accounting and remitting the amount

back to them. However, the more common agreement structure entails the author or actor either assigning this right independently to their collecting society, or granting a mandate to the collecting society to give consent and collect cable retransmission revenues on their behalf. In this case, the contract with the producer will specify that nothing in the contract will prejudice the actor or author's assignment or the mandating of this right to their collecting society, allowing them to receive revenues accordingly. Moreover, some jurisdictions specify that authors and actors may only be permitted to license their cable retransmission right and collect cable revenue through a collecting society of their choice.

The other main form of collective management concerns private copying for the purpose of home viewing. Dispositions for CMOs to represent and collect private copy levies exist in many countries, including most of Europe and a growing number of African countries. This use is often wrongly characterized as a right, when in fact it is an exception to copyright. Another way of expressing this would be to say that private copying has had to be tolerated because the limits of technology did not permit consent to be given and individual payments to be collected. Under this exception, viewers at home may use recording devices such as VCRs and DVD recorders to make a copy of a film received through free television, strictly for the purpose of viewing the work again for themselves and/or their family. It does not grant the public a right to make further copies and release them outside the home.

Collective compensation for right holders against home copying has been dependent on statutes developed in countries where private copying is formally recognized. In most jurisdictions, collecting societies representing the various sets of right holders (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 each blank video or recordable VCD/DVD unit sold, and the revenue is reapportioned to right holders according to an elaborate weighting system. In some countries, levies also apply to the sale of video and digital video recording equipment.

While collective compensation is usually applied to certain secondary exploitation rights only, in some countries, the role of CMOs can be significantly expanded to include primary rights. This is the case in

some African countries, where screen performers, directors and writers may not have certain exclusive exploitation rights for primary uses. For example, Senegalese copyright law does not require local broadcasters to seek consent from talent for the broadcasting of films; they are merely required to observe a statutory remuneration right. In countries where the audiovisual sector is emergent, collective agreements are also non-existent because the local industry has yet to develop strong unions and producers' organizations. In such cases, collective management effectively makes up for the shortcomings or deficiencies of contracts.

Many African countries also deploy CMOs to construct and operate a licensing architecture for the use of films and videos in a multiplicity of small informal venues such as rural churches and community halls, barber shops, bars and restaurants. This form of use represents a large part of audiovisual consumption in those countries, and the licensing and revenue collection from such environments through individual management would be almost impossible to achieve.

Collective rights management in the audiovisual sector is a complex field and cannot be addressed fully here. There is more detail on the legal aspects and functioning of this category of rights management in the 2014 *WIPO Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector* by Tarja Koskinen-Olsson, a recognized international expert on this important topic.<sup>3</sup>

## Talent maze – the real stories

### A French lead actor contract with remuneration scale

A mid-budget French-language production made in 2019, this film (title withheld) cast two female stars, one of both local and international renown, and the other a younger player with rising popularity in the francophone market.

The younger star's contract settled a EUR 60,000 guaranteed upfront payment, against the transfer of all exploitation rights; 50 percent of this sum was deemed to constitute an upfront performance salary. The balance was ascribed to the worldwide rights pre-purchase,

broken down as follows (from 100 percent of EUR 30,000):

- 37 percent toward the pre-acquisition of theatrical rights;
- 25 percent toward broadcasting rights;
- 10 percent toward online rights (all including TVOD, SVOD, AVOD, etc.);
- 15 percent for physical video rights;
- 13 percent for all other forms of secondary and ancillary exploitations.

The overall EUR 60,000 guarantee was on the basis of weekly payments over the course of the production.

“Complementary remuneration,” defined as a share of the producer’s net income from the exploitation of the film, was also settled. The shares attributed to the actor were as follows:

- 1.15 percent of producer’s net from cinema box office returns;
- 1.15 percent of producer’s net from television revenues;
- 1.15 percent of producer’s net from the exploitation of physical video;
- 1.15 percent of producer’s net for revenues from all other forms of secondary and ancillary exploitation.

Under the terms of the contract, the producer committed to an advance of EUR 60,000 on those speculative revenues, 50 percent of which was payable on completion of the actor’s engagement on the film and the balance on the day of the film’s premiere. In the calculation of the split of exploitation revenues, the producer will recover the amount of the advance before the actor begins to receive additional revenue.

## **A rights and remuneration structure for a mid-range Anglo-American star**

A 2012 psychological thriller (title withheld) was produced independently for a budget of just under USD 17 million, a high figure compared with the average standard for independent films. Through his agent, the male lead negotiated a contract for a guaranteed fee of just over USD 1.7 million. Additionally, the star secured 10 percent of “adjusted gross” receipts from the exploitation of the film in North America (United States and Canada). The

same percentage was applied to his share of revenues from rights exploitation in Canada. The percentages would become payable after revenues from North America had allowed the production to recover the actor's guaranteed fee.

The deal also secured 15 percent of revenues for the star from all exploitation of the film in the rest of the world, after deduction of the cost of production, an international film sales agent's commission of 5 percent and USD 250,000 in distribution costs.

This chapter has given a sense of the basic dynamics of IP rights clearances and attendant negotiations that shape the two most important types of producer/talent relationships. Securing those rights and ensuring that those relationships are balanced and fair is an essential step on the ladder of filmmaking success: without a fluid dialogue between the producer, the director and the leading cast members, the film is less likely to be successful. This issue goes well beyond the matter of understanding the rights and obligations of each party. From the producer's perspective, it requires a willingness to subordinate everything to the overarching goal of making a film that is unforgettable. Intuitive people skills are as much a part of this equation as a firm grasp of copyright law or neighboring rights.

## Notes

- 1 European Union Directive 2006/115/EC of the European Parliament and of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 2006, Article 2.2: "[...] the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors." Available at <http://www.legislation.gov.uk/ukpga/1988/48/part/II/chapter/1/crossheading/authorship-and-ownership-of-copyright>.
- 2 Copyright Designs and Patents Act 1988, Chapter 1, Article 9(2).
- 3 Tarja Koskinen-Olsson (2014). *Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector*. WIPO Committee on Development and Intellectual Property. Available at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=283200](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=283200).



# Managing the Risk of Production

This chapter looks at issues relating to the delivery risk in film production. At first glance, these issues and how they are being addressed in the independent film industry may not appear relevant to a publication concerned with the handling of IP rights in film production. However, it is highly relevant, as discussed below.

## Types of risk

Filmmaking is a hazardous undertaking. Once filming has started, the production is vulnerable to anything from adverse weather conditions to the death or injury of a lead actor or the director, part of the financing failing to materialize due to the bankruptcy of one of the investors, and other potential risks.

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

In the Hollywood system and among the leading global VOD platforms that commission original films today, this type of delivery risk may be assumed entirely by the studio, which has complete ownership of the project and can supervise its production in minute detail, even if the film is made through an independent producer. The studio’s physical production expertise, combined with its extensive supervisory rights, mean that it may be able to anticipate budget over-runs and impose drastic re-scheduling or agree to an extension of the budget, against a re-negotiation of certain terms, for example those governing the share-out of profit with the producer.

In India, historically the risk was also assumed directly by the larger production companies, but the practice of completion bonding has grown alongside the rapid professionalization of the industry in the past two decades. At the lower-budget end, films tend to attract investors who will accept the risk as inherent to the filmmaking process and charge interest rates or premiums that are commensurate with the perceived risk. In Africa, until recently there were no established mechanisms to manage the risk: most films were in the micro-budget bracket and were made using deferred services and small-scale individual investments, which is a more intuitive way of making films happen, even in the absence of a risk management structure. However, completion bonding is an established practice for South African films, and access to local film production tax rebates are in effect conditional to producers arranging this form of insurance.

In the international independent film industry, few entities have the capacity to buy out all rights against 100 percent financing, monitor the production process for an ongoing assessment of the delivery risk and cover this risk by themselves. In spite of the rise of global VOD platforms able to fully finance original films against the acquisition of worldwide rights, most independent films are still being 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 meet the budget necessary to make the film to the agreed standard and with the approved cast and principal artistic and technical contributors. In this situation, no single financier can guarantee the completion of the film in the event of the production over-running or getting into managerial trouble such as going over budget without prior agreement with the financing parties.

## Completion guarantees

It is at this point that the “completion guarantee” generally comes in. This is simply a form of specialized insurance which covers banks and investors in the film against the risk of the production failing to complete owing to factors other than standard risks

already covered by general production insurance. In most cases when the completion guarantee (or completion bond) company intervenes during the production process, it will either advise the producer on putting budgets and schedules back on track to avoid disaster, or it will take over the production entirely and attempt to complete the film one way or another. However, there is also a third scenario, which is relatively uncommon because its consequences are negative for all involved: the completion guarantors take over the production and find the producers are unable to complete the film to the delivery criteria expected by the financiers. In this particular case, the guarantee will be called and the completion company will reimburse the investors for the losses incurred. The completion guarantor will charge a premium for their services, generally equivalent to between 3 and 6 percent of the production budget. Usually, however, a rebate will be offered to the production in the event that the guarantee is not called. As a result, the real cost of the completion bond to most budgets is between 1.5 and 3 percent.

To perform its role satisfactorily, the completion bond company needs a number of tools at its disposal. These include:

- the power to make its own independent assessment of the producer's budget, the production schedule and all documentation relating to the pre-production of the film; if they find these to be unsatisfactory, they may advise the investors, who will request specific changes based on the guarantor's assessment and recommendations, prior to giving the production the green light;
- 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 those 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 has 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, 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, according to its qualified judgement, the film is in clear danger of failing to complete within the parameters agreed with the financiers.

Based on the above, it may be tempting to conclude that the completion bond company, while providing an essential guarantee without which no financier and bank finance may be forthcoming, creates an atmosphere of tension and suspicion on a film set. But in reality the producer's experience with the completion bond company is more complex and mitigates risk: completion guarantors have considerable knowledge of the intricacies of film production and their experience can be a boon to the producer, helping them to anticipate problems and manage the production for the best result.

Most films in the anglophone film industries above the micro-budget level require a bond to clinch a final legal commitment from banks, distributors and other financing parties. And developments in India and South Africa show that this form of insurance is fast becoming a standard global requirement for independent films.

While completion bonding has been increasing steadily over the years as international co-productions have increased in volume, European *droit d'auteur* countries have traditionally been more reluctant to adopt it as a means of easing multi-party 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 author's moral rights, and in particular the right of the director to assert paternity over the work by making decisions on the final shape, form and structure of the film. In practice, the *droit d'auteur* system has yet again been able to demonstrate its adaptability and flexibility by accommodating

the exercise of those rights alongside the completion powers of the guarantor. Though it is still far from being the norm in some countries, an increasing number of films are resorting to the guarantee to close their financing.

It is very difficult for most film producers with international ambitions to embark on the adventure of co-production and foreign pre-sales without some understanding of 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.

# Crossing Borders – the Art of Pre-Selling and Co-Producing

This chapter further examines the strategic role of foreign distribution rights in the making of films. There are two main methods a producer can use to bring financing to their film through negotiating foreign rights. The first method consists of pre-selling the film's rights to distributors abroad. The foreign buyer may then have a degree of approval on the completed script and the choice of principal cast, director and so on, if their contribution is substantive. However, the buyer will not have any responsibility for the production itself and will not participate in it fully, either technically or creatively.

In the second method, the producer co-produces the film with production partners in one or several foreign countries. In a co-production, the foreign partner will generally be responsible not only for pre-selling the film to local distributors, but also for organizing the part of the filming and/or post-production that will take place in their own country. Generally, international co-production demands fully fledged creative and technical cooperation between the producer and partners, whereas pre-sales are mostly limited to the licensing of certain rights to the foreign distributor against an advance.

The distinction made here between the two approaches is for clarity only. In reality, many films get made through a complex combination of both methods.

## The patchwork of international pre-sales

There are currently an estimated 3,000 international film festivals in the world, many of which also boast a film market. These range from the basic to the sophisticated, and international film export companies will prioritize one over another depending on the status of their catalogue of films, the time of year, the size of their annual sales and marketing budgets, and the festival or market environment best suited to the genre and style of the film or the market(s) at which it is aimed. Additionally, there is an unrecorded number of international film markets.

These markets and festivals mainly provide opportunities for companies to sell the rights to finished films. In this book, our analysis is focused on the pre-sales market, i.e., sales effected before completion of the film, allowing the producer to cash flow all or part of the value of the sales (either through advances or bank discounting) to complete production of the film.

Foreign pre-sales are very often an essential strategy for the producer trying to make certain kinds of films. Although it is changing, with a new emphasis on direct-to-consumer online services, the entire Hollywood business model has historically been reliant on the ability of studios to distribute films theatrically on a worldwide basis, with initial saturation releases in many cinemas at once. In many instances, the studios self-distribute through subsidiaries across the world. In other cases, however, they will choose to reduce their worldwide distribution risk by laying off the rights to some of their films to third-party distributors in some territories, against a minimum guarantee and revenue sharing.

In Europe and the United States, most independent films with a budget of over USD 5 million will generally need to pre-sell some foreign rights to close their production financing, as they may not collect enough value from the licensing of local rights and local incentives. Most of the high-budget Chinese “crossover” films – i.e., films made for an international as well as a local audience – find considerable demand from foreign buyers at the pre-sales stage, as do a growing number of Korean films and films from Latin America’s leading production countries (Mexico, Argentina, Brazil, Chile, Colombia).

Meanwhile, India has a vast worldwide diaspora (estimated at just under 18 million in 2020) as well as rising levels of demand for Indian films from non-expatriates. Although the Indian cinema pre-sales market still provides only a fraction of the production financing available in India, it is a very fast-growing segment of the Indian film economy, with established companies now based in the Persian Gulf, the United Kingdom and the United States as the three leading markets for non-resident Indians, and offering substantial advances to producers against rights to those territories.

## The world is not enough – the role of the sales company

There are few producers capable of setting up their own international pre-sales alongside dealing with all the other demands of film development and production. Those that can are senior producers with track records, access to the best talent and a history of working with established rights buyers in foreign countries. For most, pre-sales are set up through an agreement with a company that specializes in exporting films to the worldwide market, or raising pre-sales for them when they are still in development or production. In the film industry, these entities are referred to as sales companies, or sales agents. The terminology is generic and does not do justice to the range and complexity of what these companies may offer the producer. Broadly speaking, there are three types of sales agent, with each corresponding to different positions in the market and degrees of power in raising finance.

### Agents for small and low-budget films

At one end of the market, sales agents are small, are not capitalized and generally specialize in smaller auteur films corresponding to the more upscale, cultivated end of the international film market, or in low-budget genre films (e.g., horror) that are attractive to very specific segments of the marketplace. 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 typically do is offer the producer a minimum guarantee on the sales of the anticipated value of the film's rights in foreign territories: the risk is simply too great, and the capacity of those sales agents to advance any money against the value of the rights is too limited. However, what these companies do offer is the ability to maximize the film's foreign sales potential after its completion. In this instance, the producer enters into a straightforward agency agreement whereby the sales agents are handed the exclusive right to commercialize the film in pre-defined foreign territories;



### **Agents for the middle of the market**

At the middle of the market, some sales agents have the capacity to offer the producer a minimum guarantee against future sales/licensing of relevant rights to foreign buyers. The minimum guarantee (see Chapter 2) is an amount of income from anticipated future sales that is guaranteed to the producer, whether or not the agent reaches its sales targets. It therefore involves companies with sufficient selling power and strong cash flow, because it represents a risk. In this instance, the producer may be offered an advance against the value of the minimum guarantee, which is transferred as cash flow before or during production (typically at 10 percent). The balance is generally paid after the producer has satisfied the delivery requirement of the sales agent. In the interim, producers will seek to raise bank finance, using the pre-sales contract as security.

### **Agents for the top end of the market**

At the high end of the market, some sales companies act a little bit like film studios. They may become involved financially and creatively at script development stage, they sometimes have the capacity to attract star talent and, more importantly, they are capable in some cases of guaranteeing a significant proportion of the film's budget (if their own creative requirements have been satisfied) without having yet pre-sold the project internationally. Some of these companies may have output deals with powerful distributors or broadcasters in a whole range of countries, and may be confident that they can obtain the right value out of the marketplace to cover their risk. They also have relationships with banks or gap financiers who are prepared to back up their risk based on estimated values of future sales. Evidently, in such agreements, the sales company may take a full assignment (or long license) of foreign rights and may also negotiate to be included in the recovery of income from the country in which the film is being made. These entities fulfill a role more akin to that of an executive producer than that of a conventional sales agent. The number of films financed in this way remains relatively small and tends to be limited to high-budget international films featuring star actors.

One very important strategic role played by the sales agent at the development stage of a project is to give feedback to the producer on the figures the project may expect to raise in the marketplace. This takes into account its subject, genre, any lead actors and/ or director that may already have become attached to the project, whether the project is an adaptation from a successful book or a renowned life story, and the extent to which it captures the current cultural mood. If the sales agent can take a “package,” i.e., a project at a relatively advanced stage of development (with some talent attached) to festivals and film markets and test the level of interest from distributors in foreign territories, the data they gather can show the feasibility of the project and the budget it should expect to raise.

Globally, independent producers still tend to work disconnected from the interface of the marketplace and so they tend to pitch projects at unrealistic budget levels or with insufficient elements already in place. Developing relationships with reliable sales agents can be key to a producer’s development strategy and can help guide how to pitch the film to increase the likelihood of success in raising production finance and achieving pre-sales.

However, there is also a risk involved in exposing a project to the marketplace before it is sufficiently mature. If a package goes out too early and gets lukewarm responses from distributors, it may be more difficult to have a second pass. Producers should take advice from sales agents on when a project is deemed ready for such exposure.

Since the mid-2010s, the profound restructuring of the worldwide industry, with the rapid shift of long-established media conglomerates from wholesale models of distribution to a direct-to-consumer VOD home entertainment focus, has generated unprecedented challenges for the existing international film sales business models. As both Silicon Valley tech companies and rapidly restructuring old media are now jostling for position in delivering on-demand screen entertainment to consumers worldwide, the trend is moving toward the concentration of IP ownership on a global basis. The model of larger global VOD streamers having pre-purchasing rights for multiple territories all at once – often for the entire world – and skipping theatrical releases altogether leaves many sales agents

with fewer opportunities to play their traditional role of supporting the financing of independent films through territory-by-territory all-rights sales.

To adapt to this new reality, the sales agency sector is adopting a range of new and different strategies. Some sales agencies are consolidating upstream in the acquisition of film projects at development stage and becoming IP owners and co-owners to ensure they can participate in any future financial returns, rather than staying reliant on sales commissions. Others are aligning with talent agencies or larger independent production companies with a critical mass of film projects, to secure access to new products. Smaller agents are tightening their belts, cutting down on sales overhead costs and being more selective when it comes to the projects they take to market.

While the future for sales agents is unpredictable, there are still rich opportunities ahead for those who can successfully adapt to a more competitive environment and the global trend toward the dominance of the VOD-driven home entertainment market.

## The producer/sales agent agreement

All international rights entrusted to a sales company are backed up by a legally binding agreement. There are a few salient points to which both parties should pay particular attention:

- The agreement will specify the rights which the agent is licensed to sell and the designated territories. These definitions are important, as some of these rights may already have been assigned to a distributor in a relevant territory, against a share-out of exploitation revenues, or to a local producer as part of a co-production deal, or they may have been entirely pledged to a single all-rights buyer for a specific territory.
- The term of licensing is also an important aspect. Agency terms granted to a sales company can vary from a very short fixed initial term of 1 to 25 years, to in perpetuity (more rarely, and specifically if the sales agent has also put up most of the value of the budget as a guarantee). Separately, the parties will also negotiate maximum terms for the rights to be licensed by

the sales agent to distributors and other media buyers in the territories designated in the agreement.

- Contracts will normally contain a termination clause, i.e., the right of the producer to terminate the agreement without notice if sales revenues fail to meet a pre-agreed minimum target, or if the sales company goes into receivership.
- As with the distributor's agreement (see Chapter 2), expenses required to market and promote the film at international events (festivals, film markets, etc.) will be specified within the agreement and initially capped at a mutually agreed level. If the sales agent wishes to spend over the cap, they will have to seek permission from the producer. This is a strategic matter for producers, because those costs are deducted "off the top" from the value of rights licensing deals in the relevant territories. Therefore, the higher the expenses, the less likely it is that the producer will receive any overages from those sales.
- A similar negotiation occurs over the commission charged by the sales agent for their work. Typically, commission rates vary from 5 percent of the value of each sale to between 25 and 30 percent. Commissions are higher in the case of successful pre-sales of an unfinished film, because the revenue from this type of rights licensing is more strategic to the producer, who may be able to discount its value with a bank. The commission charges will also vary according to the perceived difficulty of specific territories.

## Through the pain barrier – international co-productions

The second method a producer may use to bring foreign rights into the equation of financing a film is international co-production.

In its purest form, a co-production takes place 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 on a pro rata basis in relation to their respective contributions.

There are essentially two approaches to co-production. The first entails qualifying the film project as an official co-production under one or several bilateral co-production treaties. There are many such treaties available for film producers, serving to connect a significant number of countries. The advantage of a co-production treaty is that a qualifying film is legally treated as a national film in each of the countries of the co-production partners. As such, the producers can access valuable public sector incentives such as tax rebates and conditionally repayable loans in each of the participating countries. Official co-productions can be bilateral or multilateral. Multilateral co-productions involve setting in motion several bilateral treaties, making the legal structure of the production and official compliance requirements even more complex.

An alternative for film producers is to use the Council of Europe Convention on Cinematographic Co-production, which allows for (and slightly simplifies) the task of co-producing with more than two partner countries. Although it started life in 1994 as a legal template available almost exclusively to Council of Europe member countries, since 2018 the Convention has been open to many third-country signatories, including those in other continents. Many of the newer signatories have few bilateral co-production treaties and, in some cases, none at all.

The second approach to co-production uses purely private contracts and approaches incentives in a different way. The producers for these projects have often been able to envisage closing their finance plan without relying on a large percentage of state incentives, for various reasons.

Other than access to such incentives, the strategic rationale behind co-production may vary: the principal motivation may be that the story requires it. An example would be a script developed in the United Kingdom by a British producer and set in the days of the Indian Raj, with a mix of characters and narrative developments that require the film to be shot in both countries with a mixed cast of British and Indian actors. In this instance, a co-production structure should theoretically enable the producer developing the script to find a partner able to:

- access key Indian cast members;
- raise joint finance in India for the project; and

- hire elements of local crew who offer the advantage of high-level skills, prior knowledge of locations and local regulations, and competitive wages, thereby helping to reduce costs.

The rationale behind co-production can also be exclusively financial or technical. 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. Their activities are limited to the arrangement of financing from their country, where generally very little of the film is shot. Co-production that is only financial in nature differs from a pre-sale in that a producer is involved, and they may ensure the production meets the qualifying criteria to be granted nationality status in their country. If that is the case, the co-producer may then raise public sector subsidies or other benefits available for film production locally. When a co-production is exclusively financial, the foreign co-producer may be unable to contribute significant financing, but may be working in a country where the technical labor pool and film industry services are competitive, which may in turn induce the lead producer to locate the majority of the production there to keep the budget down. In this case, the co-producer plays an important role in selecting local crew and services and organizing production at the local level.

Co-production is currently most common in Europe. The domestic markets in many of the smaller European countries are too small 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 and 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 uphold the standard of French culture and the French language in Europe. German is spoken outside of Germany in some Eastern European countries as well as Austria and Switzerland, which are natural partners for co-productions in that language. Meanwhile, United Kingdom producers rely on European audiences being accustomed to watching films in the English language in the cinema, and the worldwide popularity of some British stars.

## A closer look at official co-productions

Co-production treaties are legally binding bilateral agreements between two states. Many such treaties link European countries. Other bilateral treaties cover co-production relationships between a European country and an extra-European country. For example, France has bilateral treaties with over 50 countries, including many outside Europe, including Canada and India. Although these treaties vary in their expectations and demands, they all broadly operate to 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 countries; they do not look favorably on exclusively financial co-productions, as these tend not to bring broader benefits in the shape of increased economic activity.
- Treaties therefore encourage co-producing partners to ensure that a balance is struck between their respective financial contributions, as far as possible.
- Treaties also require that co-producing partners should strive to make their artistic and technical contribution to the film proportional to their financial contribution to the film's budget.
- Each bilateral co-production treaty specifies the minimum financial contribution required from each of the partners, typically between 30 and 40 percent. However, when a co-producer in a third country is involved (through the interplay of other bilateral treaties, or the use of the Council of Europe Convention on Cinematographic Co-production), this minimum percentage may be as low as 20 or 10 percent.
- It is important to note that the Council of Europe Convention on Cinematographic Co-production is a helpful alternative in cases of multilateral co-productions, enabling the participation of producers from countries without the requisite bilateral co-production treaties. Since its review in 2018, the Convention has lowered the minimum percentage of budget contribution from any participant in an official co-production from 10 to 5 percent, a decision that made it easier for producers from emergent countries with low incentives to form partnerships with producers in countries with high incentives, including European member states.

If the conditions listed above are fulfilled, the production may qualify for national status in the co-producing countries, opening the door to national and regional/local production incentives that may help finance a significant proportion of the budget.

The co-production agreement between the parties involved is generally a complex and detailed document. Below are the main issues surrounding the transaction of 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 the lead producer has the necessary consents and assignments or licenses to make the film without any obstacles.
- **Underlying rights** – The most standard agreement will ensure that the producer (or producers) responsible for the initial purchase of the underlying rights agrees on the means to recover those costs pro rata from other co-producers (either upfront or via an agreement for them to recover those costs from the budget or income of the film, in first position before their colleagues). Thereafter, the rights to the underlying materials may be assigned to a “special purpose vehicle,” i.e., a company 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 of their contribution to the film. Copyright in these materials may be held by the principal producer with consent from their co-producers: this is more expedient for the purpose of setting up bank financing of the distribution and sales agreements, because banks will require a charge 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 from sales (“overages”) split between the co-production partners pro



rata of 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 of the co-producers, who may require it to apply for approval of tax incentive funding in their territory.

- **Soundtrack** – All music used in the film must be cleared for the co-production territories (and preferably worldwide, to allow for international sales), and cue sheets must be supplied for use by the local distributor in the co-production country (or countries).
- **Completion guarantor rights** – Although the rights of the completion bond company are not strictly IP rights, their full exercise 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 afterwards to ensure completion, cost recovery and assignment of rights for security.

## Pre-sales and co-production – the real stories

### Russian Dolls – a case study in European co-production

UK producer Matthew Justice had already made two French/UK co-productions with French producer Bruno Levy when, in 2004, Levy approached him with the proposal to make a sequel to the outstanding French hit *Pot Luck* (or *The Spanish Apartment*) by French writer/director Cédric Klapisch. Justice invited Klapisch on an extended exploration of unusual London locations with a view to persuading him to set key sections of the story in the United Kingdom. The contrasting atmospheres and social contexts Klapisch observed in London persuaded him to adapt storylines involving the lead characters to fit with those locations.

*Russian Dolls* took the characters established in *Pot Luck* and imagined their lives five years on. Given the success of the original

film in France and the casting of, among others, French female star Audrey Tautou (Amélie Poulain), many options were presented to the producers. Eventually a structure to finance the EUR 10 million budget evolved, establishing the following key points:

- Levy and Klapisch's French company, *Ce qui me meut*, entered into an official French/UK co-production with Matthew Justice's Lunar Films, using the bilateral France/United Kingdom official co-production treaty. Under the terms of the treaty, once the production had complied with eligibility criteria and received certification, it would be treated as a national film in each country, so would be able to attract local incentives to support its financing.
- Studio Canal, the film production subsidiary of the leading French pay-TV broadcaster, provided the bulk of the financing via a minimum guarantee against the pre-purchase of rights that included pay-TV and free television in France. Studio Canal also put in an equity investment as a co-producer. The company Mars Distribution, which also handled *Pot Luck*, distributed the film to cinemas in France. To balance the UK/French co-production, Studio Canal's minimum guarantee and equity investment were apportioned between the British and French co-producers. Lunar Films provided the United Kingdom with sale and leaseback financing, which helped close the budget.

As is customary in official co-productions, each co-producer controlled their own territory and split revenue (overages) from worldwide exploitation in proportion to their country's investment in the film. The film was a great critical success and went on to achieve more than three million admissions in France.

This chapter has aimed to provide newcomers to the business of film production with basic guidelines on how to navigate the complex array of opportunities in the international film market, and how to utilize their IP rights strategically in this regard. Today, these rights are usually still negotiated for use in a value chain that has varied little over the past 20 years. The conclusions that follow explore how the advent of the internet and digital distribution networks are redefining this old order and challenging filmmakers to invent new models for realizing the full value of IP rights.

# Conclusion

As the 21<sup>st</sup> century enters its third decade, the future of the scripted feature-length narrative film form, the main focus of this publication, appears to be both more precarious and more open to new opportunities than ever. On the one hand, long-form television series have been increasingly driving audience demand, and the primary focus of the global streaming platforms on commissioning such content has proven to be an important factor in their success. On the other hand, there has been a remarkable rise in short-form video content, which both drives and accommodates changing patterns of audiovisual media consumption. YouTube's new high-earning video stars and their hugely popular branded channels attest to this trend.

Today, entire new ecosystems of audiovisual works have emerged that do not belong either in the "user-generated content" category or the traditional professional content space. In 2021, many of YouTube's top earners were either champion gamers, reviewers of consumer products such as toys, or makers of short comedy skits. Like the traditional film industry, these new cultures have their own stars, as well as vast cohorts of hopefuls sharing a thin thread of income from online ad revenue.

In the pioneering years of broadband internet, the optimistic theory of the "long tail" held that in the new digital technology paradigm, with virtually unlimited storage, even the most marginal content would eventually aggregate some viewership. However, for filmmakers and producers, the theory has proven to be a false dawn: while storage may be becoming unlimited, consumer attention remains a scarce commodity, and in today's online-dominated environment audiences continue to be concentrated primarily on a smaller number of branded films and television shows. As a result, the discoverability of audiovisual works has become one of the biggest challenges for independent films competing for attention on VOD streaming platforms and digital channels. Discoverability also has a literal price: in this day and age, paying a premium is necessary for good placement.

As the home entertainment market continues to shift toward on-demand patterns, traditional linear television will likely continue to decrease in value, despite its remarkable resilience, as a once-pivotal rights market for independent film. The continuation of television investment in local audiovisual content in many countries will largely depend on the survival of public broadcasting channels – an issue that will be shaped as much by national politics as by market forces.

The rapid decline of packaged video (DVD and Blu-ray) has not led to an impoverishment of options in the home entertainment environment. In fact, aggregators working in that space can license to a multiplicity of platforms, with complex window and holdback structures, many of which are on non-exclusive terms, across a variety of business models (TVOD, SVOD, AVOD, linear TV ‘catch-up’, etc.) and price points.

However, the revenue returning to film distributors, producers, authors and performers from the new online video entertainment rights exploitation still does not compare with the revenue brought home by the DVD in its heyday. The so-called “value gap” issue raises questions on the sustainability of the industry, with most films in danger of being priced like a metered utility such as water or electricity.

Another myth is that distribution online is dramatically less costly than it was in a market dominated by analogue technologies. While it is undoubtedly true that some costs have dropped dramatically (e.g., the real economy from no longer having to strike 35 mm celluloid prints for cinema releases), the overall costs of reaching a more complex and segmented market than ever before are still a significant hurdle. The costs incurred for “onboarding” content to online platforms, some of which have very high standards regarding sound and picture quality and metadata, are high and rising; these costs are often compounded by the absence of common encoding standards in the VOD space, which result in sales agents and distributors often obliged to incur new encoding costs for each new platform they license to, preventing the aggregator or sales agent from achieving economies of scale. For independent film content aggregators working in the highly competitive VOD marketplace

in the United States, preparing a film for packaging to the various platforms can cost well over USD 100,000 per unit. As in the past, marketing remains a significant component of this cost structure: at a time when product differentiation is becoming increasingly difficult to achieve, strong trailers, a social media campaign and other marketing tools are more necessary than ever.

For feature-length movies, it is likely that the future will be a hybrid ecosystem. The traditional forms of financing, based on the licensing of rights in a project to multiple licensees on a media-by-media and/or territory-by-territory basis, are likely to survive and adapt. Alongside this legacy model, concentration in the global VOD space will see the continuous growth of single multi-territory rights acquisitions for commissioned originals or content from third parties.

With the rise of “day and date” release strategies (the simultaneous rollout of a new film in the cinemas and on home entertainment platforms), and with the growing number of feature films skipping theatrical release altogether and opening in home entertainment windows directly, a new paradox has arisen. It is becoming increasingly difficult and onerous for independent films to secure a cinema release in countries where films once relied entirely on this strategy. At the same time, financiers of independent films often insist on there being a guaranteed theatrical release before considering taking a risk on projects over a certain budget level. And recent research from the National Association of Theatre Owners (NATO) suggests the cinema is still an effective launch pad for films, generally raising their economic performance prospects in subsequent rights markets<sup>1</sup>.

The prospects for the cinema as a primary rights market differ depending on location. While some countries in Africa may elect to bypass the development (or redevelopment) of a theatrical infrastructure and focus resources on the nascent potential of online distribution, others have undertaken ambitious programs of state-of-the-art multiplex construction. While South Africa has benefited from quality theatrical infrastructure for several decades, Nigeria’s boom is more recent; though its cinemas have mostly attracted foreign blockbusters, it has also become a primary market for a rising number of local Nollywood films.

The second edition of this book concludes at a time of seismic change in terms of consumer behavior, technology and business models which affect the entire IP rights value chain and the industry practices that evolved around it. Changes to the film exploitation windows system (see Table 1) may accelerate noticeably with the impact of the COVID-19 crisis that began in 2020, and its aftermath – a situation that saw the mass closure of cinemas and a momentous increase in online consumption of filmed entertainment worldwide.

Despite all the disruption and uncertainty, the legal copyright infrastructure for the industry is likely to remain constant in its key tenets. Moreover, the professional tools used by the film producer to license their IP rights remain remarkably similar to those in the traditional value chain. As expressed throughout this publication, IP rights are not a theoretical proposition for the creative film entrepreneur. Rather, they are the living material on which their occupation depends, the dynamic currency that leads them toward the fulfillment and expression of a collaborative creative vision.

I hope that this brief introduction to IP and the filmmaking process sheds some light on the complexities of IP in relation to filmmaking at all levels. The presentation of the considerable challenges involved in the enterprise of film production in this publication is designed to help readers take a realistic approach to working in the industry, while nourishing their creative ambitions.

## Notes

- 1 *The statistical relationship between home release window length and movie sales*, Ernst & Young, 2020. Available at <https://www.natoonline.org/wp-content/uploads/2020/04/Home-Release-Window-Analysis-Report-April-2020.pdf>.



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