
FILM AND TELEVISION

CONTRACTS AND DRAMATIC

PRODUCTIONS

Film, television, and theatrical producers must draw together many financial and creative elements to put together a finished product. The process of gathering these resources is known as the development stage. One of the first things the producers undertake during development is to obtain control of the rights to the story line. In these industries, producers begin by optioning the rights to buy a particular book, script or treatment from the writer(s). An option gives the producer the exclusive right to shop and develop the work to determine whether there is sufficient financial and creative interest before deciding whether or not to actually purchase the work outright from the author.

If you are offered an option, you will be in effect negotiating two contracts: one (or more) for the length of the option period, including extensions, and the other for the purchase of the work in the event the buyer exercises the option. Film, television, and dramatic options and the purchase agreements that accompany them can be highly complex. This chapter can serve as a starting point to help you understand the basic terms and structure of transactions for films and television (for both book/freelance authors and screenwriters) and for dramatic, i.e., theatrical productions,

but if you are contemplating any such deal, you need to retain an agent or attorney who specializes in the relevant field.¹²²

FILM AND TELEVISION OPTIONS—BOOK AND FREELANCE AUTHORS

The process of turning your story into a motion picture or television program involves: (1) the option, which puts your rights on hold and guarantees the optioning party the right to purchase the rights in the future, and (2) the related purchase agreement, through which the rights to the work are actually transferred. The optioning party usually presents the two contracts to the writer in tandem.

The option secures for a negotiated period of time the exclusive right to purchase the film rights later. Payment for an option is usually much smaller than the payment to be made upon the exercise of the option and actual purchase of the property. The option agreement will attach or include the terms of the purchase agreement, including the price, that the parties will enter if the option is exercised. This practice of negotiating both contracts at the same time is common practice in the industry. Even the development phase of a film or television project can be very expensive, and a would-be purchaser needs to be able to analyze whether a project has potential before deciding to buy the story, and ought to know with some certainty what the story as an element of the project will cost to secure. The option serves these purposes for the buyer. But the option can be negotiated in such a way as to promote the writer's interests, too.

Once you give someone an option on your work, you can neither take it back nor interfere with the optioning party's ability to purchase your work during the option period. A binding option need not be formal; a letter or a simple memo memorializing a deal (often called a "deal memo") can be binding as a "short-form" option contract. Negotiate any such understanding, regardless of its length or informality, with care, even if you agree to enter into a more formal contract later.

¹²² *Dealmaking in the Film and Television Industry* by Mark Litvak (3d ed. 2009) and *Hollywood Dealmaking: Negotiating Talent Agreements* by Dina Appleton and Daniel Yankelevits (2010) are two excellent books for authors by experts in the field that explain the components of these deals in detail.

What follows is a general explanation of terms you will see in option and purchase agreements for film and television productions.

THE GRANT OF RIGHTS

Be aware of the potential scope of what might appear at first glance to be a simple grant of rights. The phrases “all allied” or “ancillary” rights, for example, can be interpreted to include just about anything—not just the right to make a film based on your work, but the right to make sequels, television movies and series, the right to publish a special “movie version” of your book, even merchandising and advertising rights. The seemingly narrower phrase “motion picture and television rights” is in reality similarly broad.

Most option buyers will try to get all of the rights for one price, but sellers with leverage and good representation can retain some rights and negotiate additional royalties for them. For example, you should seek to retain the rights to print and online textual publication, novelizations, author-written sequels, audio rights, live TV and radio, and dramatic stage rights. Be aware that for any rights you reserve, the option purchaser might request a so-called “hold back,” in which you agree not to exploit any of your reserved rights for a specified period of years after the motion-picture release date. The purchaser might also require that you refrain from writing more than one sequel to the story in a particular time period.

In addition to understanding and limiting the scope of your grant, you should explicitly reserve all rights not granted. Also, be aware that granting any of these broad rights can conflict with rights you might have already granted in a publishing contract; again, you should have professional help in negotiating these agreements.

Granting film or television rights will necessitate giving up creative control over the final product. Many writers who licensed their books to be made into films have expressed disappointment or dismay over the end product. If you are also agreeing to write the screenplay, you might have a bit more control, but it is unheard of for all but the most powerful players in a film—the director or a major star—to have final approval over the product. The best you can hope to achieve is the right to remove your name from the billing credits, and possibly to require a change in the film’s title, or a change in the main characters’ names if the film is based on your memoir or a biography.

TERM

The length of an option may vary considerably and is subject to negotiation. Many options range from six to eighteen months, with or without specified renewal terms. To make sure there is no confusion over the exact end date, provide expressly that “the term shall expire at midnight, on [X date] or [X] calendar months after the date of execution of this agreement.” Option terms can be, and frequently are, extended or renewed automatically. Under an automatic renewal, all the purchaser has to do is give you notice and the specified payment in order to extend or renew her option. Understand that if the optioning party has made enough progress in development to want to continue to keep your story on hold, the rights have necessarily grown in value. Therefore, the fee for the second term should be higher than the original amount. By the same logic, it is generally better not to lock yourself into more than one automatic renewal. The purchaser can always come back to you to negotiate a new option term (for more money). As well, renewal periods should be successively shorter than the original. It is also a good idea to keep a flame burning under your purchaser by providing that renewal of the option is contingent on the demonstration of specific steps actually taken toward exercising the option. These steps might include, for example, having secured financing and/or the participation of one or more of the other essential players in creating a film: director, screenwriter, or actors.

THE OPTION PRICE

The odds are against the possibility that your option will ever be exercised, and the option price is therefore likely to be all that you will earn from this industry. It pays to negotiate accordingly. The price of an option is negotiable and will vary according to a number of common-sense factors: your reputation, bargaining power, and the scope of the rights you are granting. The average option fee probably falls somewhere around \$10,000 for the standard term of one year (closer to \$50,000 for authors with powerful representation), but the price of an option can vary enormously, from hundreds of thousands of dollars to almost nothing. A good ballpark figure for an option payment is approximately ten percent of the full purchase price.

Unless the situation dictates otherwise, you should probably push for the largest option price you can get. You might make an exception in cer-

tain cases, for example, where you are dealing in the arena of independent films, so there is less money to be had up front, or you have great confidence that the film will ultimately be made. If the purchaser claims not to be able to pay a large option fee, one way to grant the option but still protect your interests is to ask for what is known as a “lay off” or “set up” bonus. For example, if your purchaser offers \$1,000 instead of the \$10,000 you want, you can grant it for \$1,000, but include a provision that if that purchaser transfers the option to a major party, such as a motion picture studio, the \$1,000 option fee automatically increases (and is immediately due and payable) to \$10,000 (or more) when the purchaser transfers the option. The following language provides another important precaution: “Whether or not notice is ever provided, any commencement of principal photography by the purchaser or its assignees will constitute exercise of the option, and will trigger the obligation to make immediate payment of the specified purchase price.”

Much like an advance against future book royalties, the initial option payment is usually applied against the purchase price should the buyer exercise the option. However, extension or renewal fees are commonly not credited against the purchase price.

Sometimes, an optioning party purchases an option (and several renewals) with no intention of actually exercising it. Purchasers might do this for any number of reasons, including keeping potentially competitive stories or similar ideas from hampering projects they are already developing. Selling your rights without the possibility of developing them might be fine with you; there are more than a few writers earning money by selling options they do not expect to see exercised. Still, unless the option calls for generous renewal payments, it pays to be careful about the ultimate length of time your rights will be tied up. The option should state that if the purchaser fails to exercise the option during the specified time period (including renewals), the agreement will terminate automatically and all rights will revert to you (and all option money is retained by you). Writers with considerable clout are also sometimes able to stipulate that even after the exercise of the option, if the work has not been produced within a specified number of years, the rights will revert to the writer.¹²³

¹²³ Such a reversion clause usually also requires that a lien be placed on the project that any future purchaser must satisfy to repay the amount originally invested in production.

By reclaiming your rights in this way, you improve the odds that a picture will ultimately get made.

THE PURCHASE PRICE

Ideally, you would be able to negotiate the purchase price at the time the purchaser wants to exercise the option. By then, she would have invested considerable time and money in the project and have made enough progress to want to buy the rights outright. She would know what kind of production might be done and have an idea of its budget, and this knowledge would help quantify the value of your rights. It is after she has this information and has made these investments that you are in the best position to negotiate the purchase price. Knowing this, of course, your purchaser is sure to insist on settling both the option and the purchase price up front. Your best alternative is to try to get a sense of the true value of the rights at the option stage. Interview the optioning party at length and research the entities and individuals she mentions as possible participants in development.

If you sense that the planned production is the type that might lend itself to a big budget, the best way to ensure you will partake fairly is to push for a percentage of the budget (3.5 percent is considered favorable), with a fixed floor and ceiling, in lieu of a fixed purchase price. You might begin by asking for a particular percentage of the budget, with a floor in the six figures and no ceiling. When the budget is uncertain and a fair purchase price is difficult to ascertain, the purchaser might be equally interested in a budget percentage-based purchase price, though she will likely insist on a ceiling.

Give no credence to any offer of a share of the film's "net profits." No matter how thrilling it sounds to be offered a percentage of the profits on a film, the movie industry's fantastic method of calculating "net" profits means they will always be less than zero, i.e., worthless. Writers with genuine clout can try—as the producer, director, and stars of the film will—to negotiate for a percentage of the *gross* profits (ideally 5 percent, although 2 or 3 percent is more likely). If a share in gross profits is out of reach, try asking for a percentage of "adjusted gross." It is not "true" gross, but it is better than "net profits." Working closely with an experienced agent or lawyer, your goal is to negotiate a combination of initial option price, renewal price(s), purchase price, bonuses, and a percentage of something real (i.e.,

not net profits). Unless you can get bonuses or a percentage of something real, then the option and purchase prices will constitute your total payment for your work, and you should negotiate accordingly.

WARRANTIES AND REPRESENTATIONS

As in a standard publishing contract, you will be asked to promise that your work does not infringe copyright, defame anyone, or invade anyone's privacy. The same general principles apply here as with book contracts—seek both to qualify your promises realistically and to limit the amount of your financial responsibility should someone bring suit to a percentage of your total payment.

FILM AND TELEVISION OPTIONS—SCREENPLAYS

Writers employed in the creation of television and film scripts usually must join the Writers Guild of America, the screenwriters' union, and there are excellent reasons to do so. The WGA periodically negotiates revisions of its collective bargaining agreement with most of the film and television production companies in the industry. Whether or not you are a member, before submitting a script or treatment to a third party for purposes of optioning it, you would do well to register the work with the WGA.¹²⁴ Before negotiating through your agent or directly with a production company, refer to the WGA's Theatrical and Television Film Basic Agreement, which you may obtain from the union. It provides minimum compensation levels for members of the guild and the producers who have signed the union's collective bargaining agreement, including a current list of scale rates for writers for all kinds of theatrical and film deals. If the producer interested in your work is a signatory to the WGA Agreement, then its minimum terms must govern your contract. Even if the WGA Agreement does not apply, its compensation levels, terms, and conditions are still important guidelines for writers in nonguild arrangements.

In a screenwriter's contract to sell film rights, the grant of rights will usually be quite extensive, but make sure it distinguishes between television and film production rights, which reach different markets. The practice

¹²⁴ See Appendix A to chapter 1 and chapter 7 for a description of the Writers Guild and the benefits of registering your work with the WGA.

with respect to artistic control is quite different from book publishing and dramatic plays and musicals. Screenwriters can expect to have little or no control over changes in the property and the final form it takes. If you wish, seek the right to perform the first and/or subsequent revisions of the script. Also, you will invariably have to give the production company the power to assign your contract to a third party (although the production company may remain liable if the recipient fails to fulfill its obligations), because financing arrangements require this. If you negotiate a share of receipts from the film's distribution, the contract should specify whose receipts you will share, as between the producer or the production company, and, as described above, how "receipts" are defined. Given the number of people and entities involved in creating the end product, be sure to negotiate specifically how you will be credited, and try to get the right to remove your name from the billing credits at your option. The WGA arbitrates disputes over billing credit among members and signatories to its agreement.

One fairly common occurrence is the simultaneous sale of a book to a publishing company and to a film studio, in which the writer's agent or a coagent negotiates screenplay rights with the production company. If the writer is a first-time screenwriter, she will usually be offered WGA scale to produce a first draft, and receive equal amounts for second, third, and final ("polish") drafts. The producer or production company will probably insist on the right to reassign the material to another writer if they deem the first or subsequent drafts unsatisfactory.

DRAMATIC PRODUCTIONS

Before negotiating an agreement for the use of your work in a dramatic (i.e., stage) production, you need to know the theatrical market in which the producer intends to stage the production. The Dramatists Guild provides good resources about particular theater markets and corresponding model contracts for the use of its members. Some of the Dramatists Guild contracts are commonly accepted in certain markets; others are not industry standard but serve as helpful guides. If you are marketing a dramatic play or musical, you should join the Dramatists Guild for all the benefits it offers playwrights.¹²⁵

¹²⁵ You should also read Donald C. Farber's *Producing Theater: A Comprehensive and Legal Guide* (3d ed., 2005) for a comprehensive explanation of how this industry works.

Generally, theaters are classified in one of three markets: Broadway, Off-Broadway, and Off-Off-Broadway. These classifications reflect the overall theater market in New York City and other major cities and are based on the theaters' size, not their geographic location (most "Broadway" theaters, for example, are not actually on Broadway). Broadway theaters, also known as "First Class" theaters, have a seating capacity of five hundred or more. For the Broadway market, the Dramatists Guild and the League of American Theaters and Producers negotiated what is now known as the Approved Production Contract (APC), which many parties use, though it is not legally required. Other First Class producers and writers agree to terms and royalty shares different from what the APC provides.

Off-Broadway theaters (which may stage "Second-Class" productions) include theaters that seat between 99 and 499 people. Off-Off-Broadway theaters are generally those that seat fewer than 100 people, and include for-profit and nonprofit theater organizations. Agreements with smaller and nonprofit theaters can be quite different from those with First- and Second-Class producers. Often, the writer grants only nonexclusive licenses for dramatic productions, which do not include subsidiary rights, to small theaters. In exchange, the writer earns much less money (if any). The Dramatists Guild can give guidance about what is fair with such theaters, but the final terms will reflect what the theater can afford to give and what the writer will accept.

The Dramatists Guild has developed a Dramatists Bill of Rights (at www.dramatistsguild.com/billofrights/) that it recommends be used as a starting point for negotiations with producers of any class, large and small, that wish to produce a writer's work on stage. The bill of rights covers issues such as control over the script and all other theatrical elements ("artistic control"), the right to be present in all readings, rehearsals, and productions, appropriate billing credit, compensation and subsidiary rights shares, and ownership of the final script, including all changes and additions made by others. You should use the bill of rights to guide your contract review and negotiations for any theatrical production.

A producer interested in obtaining a playwright's script will request either an exclusive option or a nonexclusive license to produce the play or musical. The exclusive option is invariably used when the plan is for a First Class production. The option is typically paid for though an advance against future royalties, lasts for anywhere from six months to one year, and

is usually renewable for additional specified terms under certain conditions, such as demonstrated progress in producing the work and/or additional payment.

The issues for negotiation of the option contract are similar to other exclusive licenses of literary property: the scope of rights granted, creative control over the production, royalties, who is entitled to shares of future proceeds and for how long, for example. The same issues arise in a non exclusive agreement with smaller theaters or producers. If you are a member, call on the Dramatists Guild for advice about what it calls standard industry royalties and other contract terms for various levels of production.

Royalties. If a producer successfully previews and opens a First- or Second-Class production before the option expires, the writer's compensation for granting dramatic production rights is often based on a percentage of the box office's weekly receipts ("receipts" are defined in the Dramatists Guild's standard contracts). Some producers have challenged the payment of straight royalties to the playwright because this method does not take into account whether the show is generating a profit for its investors. They have devised a different method based on "points" that ensures no additional royalties to the writer or other collaborators unless the investors are on track to recoup their investments.

For small productions, the Dramatists Guild recommends that playwrights receive royalties if any other participant in the production is receiving compensation or if any admission is charged to see the show. Your royalty might be small for a small- to medium-sized production, but you should receive something, unless no other player is getting paid.

Subsidiary Rights. Many exclusive contracts provide that when a production runs beyond a stipulated number of performances (e.g., twenty-one), additional rights are automatically granted to the producers to reward them for their investment. These might include the right to produce First Class-level tours, make a British production, move from Off-Broadway to Broadway, reopen the show after it has closed, share motion picture rights, and take a portion of proceeds from other subsidiary rights. These additional rights do not give the producers control over these subsidiary rights;

they instead receive a right to share in proceeds from these uses.¹²⁶ But it makes sense to specify that you retain control over the disposition of all other subsidiary rights, which can be quite valuable: worldwide motion picture rights, radio, television, Second-Class touring productions, foreign-language performances, concert tour versions, condensed and tabloid versions, commercial uses, play albums or records, stock and amateur performances, and musicals based on the play. Also, limit the producers' right to a percentage of income from subsidiary rights to a certain period of time after the original production closes. After that time, the right to share in proceeds from subsidiary rights should expire.

¹²⁶ The Dramatists Guild recommends that playwrights be permitted to choose to grant a limited, nonexclusive option to produce another work to the producer instead of giving up shares of subsidiary rights income.