

THE LITERARY OPTION & PURCHASE AGREEMENT

by
Dinah Perez

Introduction

The literary option and purchase agreement (the “Agreement”) gives a producer, production company or studio the right to shop, package, set up, or produce a film based upon the screenplay or book (the “literary property”) that is the subject matter of the Agreement. As such, the Agreement is one of the most crucial legal documents associated with the production of a film. If the producer does not acquire all of the rights necessary, then the producer may find it impossible to secure, among other things, production financing and distribution. For the writer, the Agreement determines payment, credit, and future rights where the literary property is concerned.

This article highlights the most important aspects of the Agreement so that both producers and writers know what to expect of each other and their respective attorneys or agents when dealing with such agreements.

The Contract

Oral contracts, which are common in the entertainment industry, are not advisable where options and purchases of literary properties are concerned. Copyright law requires a written document where an assignment of rights is concerned. Regardless, it’s best to negotiate all the deal points and to memorialize them in a written document, which can serve as evidence of the Agreement and its terms. Furthermore, most producers will find that a written document is always ultimately required: financiers, banks, studios, production companies, sales agents, distributors, completion bond¹ companies, and the Writers Guild of America² (the “WGA”), all require a “writing,” to prove that the producer, producing entity or studio acquired the right to produce and exploit the film.

I strongly recommend, since so much tends to be at risk, that producers and writers negotiate the Agreement with the representation of an agent or attorney. From the producer’s perspective, hiring an attorney to negotiate and draft the Agreement will cost on average from \$1,000 to \$2,000 (depends on the attorney’s hourly fee). It should cost the writer less, since the writer’s attorney will only have to negotiate and revise the agreement rather than draft it. From experience, it is not wise to economize on an endeavor in which millions of dollars will be invested, or where one’s rights to a literary property will potentially be sold. In other words, the cost of hiring an attorney to negotiate and draft the Agreement is well worth it.

The Option

A producer reads a literary property and decides he/she would like to produce a film based upon it. It is unnecessary for the producer to actually purchase the literary property prior to knowing that there is an actual market for it, so instead the producer “options” it. To “option” means to lease with an option to buy, so to speak. The producer negotiates an option³ with the writer so that the producer can solicit interest in the production of a film, for a determined period of time, based upon the literary

¹The completion bond companies issue insurance policies guaranteeing completion and delivery of the film. They require chain of title documents, which include the literary option and purchase agreement.

²The Writers Guild of America is the union to which writers belong. A written agreement is only technically necessary when the producer, production entity or studio is a signatory to the collective bargaining agreement. A non-signatory company is one which has not signed the collective bargaining agreement. WGA members may not option or sell screenplays to non-signatory companies.

³The option usually includes an initial and a subsequent renewal option period.

property. If the producer is successful in securing production financing, then the producer “exercises”⁴ the option and buys the literary property. If the producer is not successful, then the producer walks away having lost nothing more than the option monies and legal fees paid in the process.

The Term

Writers are usually concerned with tying up their literary properties for long periods of time, but the fact of the matter is that producers need that time. Producing is a long and arduous process. The writer has to give the producer the time necessary to get the job done, while at the same time not giving the producer time to dawdle.

It is less likely that producers will waste time if they have paid an option fee and, therefore, have money invested in the outcome of the venture. This is not to say that a writer should never option a literary property for free. It just means that if the writer is forced to option for free, because the producer will not option otherwise, it becomes necessary for the writer to approach the decision intelligently. In this case, the writer should only option for free if the producer has a track record, important contacts, and the ability to set up or finance production of the literary property. The writer should keep the option periods short, i.e., 3 to 6 months maximum, if the writer is unsure of the producer's abilities and the option is fee. If you have confidence in the producer and/or the producer is paying an option fee, then it is likely that the producer will require a 12 - 18 month option with an automatic renewal period, usually equal to the initial option.

The Option Fee

The producer, production entity or studio pays an option fee in order to secure the option during the initial option period, and then again, renewal option period. There is usually a direct correlation because the option fee and the purchase price. If you are dealing with a studio, producer with a studio deal or wealthy producer, attempt to secure an option fee equal to 10% of the literary property's purchase price. You can't expect this from a producer that lacks development financing.

It is easy to determine the option fee when the literary property's purchase price is a determined sum. It gets a little tricky when the purchase price is expressed as a percent of the production budget.

Purchase Price

Producers should always negotiate the literary property's option and purchase simultaneously. The producer takes a big risk if the producer waits until the financing is in place, in order to negotiate the purchase price. For example, the writer and producer might not be able to come to a decision on a purchase price that is agreeable to both, or the writer may attempt hold the literary property ransom if the writer knows that there is great demand for the literary property.

Outside of the WGA's schedule of minimums, there is no such thing as a standard literary property purchase price. Instead, purchase prices are influenced by the writer's previous credits, the demand for the script, and the production budget. WGA minimum⁵ for a feature ranges between \$ 54,854 (low budget) to \$102,980 (high budget), and a writer with any sort of credits or acclaim is likely to require a purchase price well beyond that sum.

___It is typical for a writer's attorney to attempt to negotiate the purchase price as a percentage of the production budget, or on a sliding scale basis, when the budget and the producer's intentions, in that regard, are unknown. Expressing the purchase price as described above protects the writer because

⁴The option is exercised by providing the writer notice, as per the terms of the Agreement, that the producer is purchasing the literary property. Payment is may be lump sum or in installments, and due as per the terms of the Agreement.

⁵These minimums are effective from November 2005 through October 2006. They increase to \$56,500-\$106,070 on November 2006 and are good for one year.

the literary property might be worth one sum if it is being made as an independent film, and a much higher sum if it being financed by a large production entity or studio. If the purchase price is described as a percentage of the production budget, then the attorney will negotiate a purchase price that is between 2.5% to 5% of the production budget with a floor and, sometimes, upon the insistence of the producer, a ceiling, i.e., 2.5% of the production budget, but no less than WGA minimum or greater than \$250,000. If the attorney negotiates a purchase price on a sliding scale basis, then the price will be a floor price with incremental increases if the budget is above a specified range, i.e., \$50,000 if the picture is produced for \$1,000,000 or less, with an additional \$10,000 for every \$1,000,000 increase in the production budget.

The writer's purchase price may be reduced if the writer has to share the writing credit. This issue arises when a different writer is hired to rewrite the literary property.

Contingent Compensation

This remuneration, which is commonly known as profit participation, contingent compensation or back-end points, is not due until the film is in a profit position. Contingent compensation is not required by the WGA, but it is considered standard to give a writer 2.5% - 5% of the picture's net profits. Producers and writers have to be careful not to confuse the "picture's net profits" with "producer's net profits." The former entitles the writer to a percent of 100% of the film's net profits, and the latter entitles the writer to 5% of the producer's net profits, which is a percent of the producer's share of net profits. Contingent compensation based on producer's net profits is often substantially less than contingent compensation based on the picture's net profits.

The writer's contingent compensation may be reduced if the writer has to share the writing credit. The writer should attempt to negotiate for no reductions in his/her contingent compensation, and in no event less than 2.5%.

Credit

The writer wants to negotiate a "Written by or Screenplay by" credit. The writer's credit should appear in the main credits of the film, on a single card, in a size and type equal to the size and type of the director's credit. The credit should also appear in all screen and paid ads if the director, producer, and any other writer receives credit. If the writer is not the only writer, as happens so often in the industry, then the writer will have to share the writing credit on the same card.

The WGA has a credit determination process which decides who gets credits and how, if there is a dispute. If the production company is non-signatory, then the writer, who cannot be a WGA member, should negotiate for a term in the Agreement which provides for determination by an independent arbitrator in case of a dispute. Or can insist that the producer use the WGA's rules for credit determination even though it is a non-WGA production with a non-WGA writer.

Warranties

The producer needs for the writer to make certain representations and warranties in regards to the originality of the literary property and the writer's ability to convey it. The producer needs this warranty even if a copyright search conclusively determines that the literary property is registered in the writer's name. The writer must warrant that the writer is the sole and exclusive proprietor of the literary property, that any material which is not original to the writer came from the public domain,⁶ and that the material which is not original to the writer is included in the literary property with the permission of the original material's author.

The warranty also includes an indemnification clause whereby the writer agrees to reimburse the producer, production entity or studio for all costs associated with defending a claim, or a judgment, due to breach of the writer's warranty.

⁶ Material that is in the public domain is not protected by copyright law and, hence, is available to anyone who wants to use it.

Rights Sold

The writer sells exclusively and forever all rights associated with the literary property. If the writer wants to reserve any rights, then the writer has to negotiate for those specific rights. In general, the producer acquires any and all rights to the literary property for the purpose of producing and exploiting a motion picture based upon the literary property. This includes prequels, sequels, remake rights, television movies, television series, videos, cable, CD Rom, DVD, etc. In other words, unless the writer reserves any rights, the producer acquires the right to use the literary property in any and all formats and mediums whether now in existence or yet to be invented for exploitation anywhere in the universe. Most producers, and certainly the studios, will not allow writers to reserve any rights.

Option Reversion and Turnaround Right

The option automatically ends with all rights reverting to the writer if the producer does not renew or exercise the option and pay the purchase price in a timely fashion. Should this be the case, the writer gets to keep all sums paid including any and all option⁷ and writing fees.

The writer also has the turnaround right if the option is timely exercised and the purchase price is paid, but a film is not produced within the time specified in the Agreement — usually 5 - 8 years. The “turnaround right” means that the writer has the right to reacquire the literary property when the writer reimburses the producer’s direct out-of-pocket development costs. The rights to the property are transferred back to the writer when he/she pays the aforementioned sum. The writer has the freedom to option and sell the literary property to another producer, production entity or studio once the interest in the literary property reverts or to him/her. The turnaround right is important because it gives the writer the ability reacquire the literary property if he/she believes that there is an opportunity for it to be produced elsewhere. Writers may like having their screenplays purchased, but they like having them produced more.

Copyright Search

The producer should, prior to coming to an agreement with a writer, hire an attorney to do a copyright search. A copyright search will inform the producer as to whether the literary property has been registered for copyright, whether the producer needs to seek the agreement of any additional writer, and whether any of the rights in which the producer is interested, have been transferred to any party. The findings of a copyright search are not always conclusive. The producer can proceed once the copyright search is done and his/her attorney is satisfied with the results. The cost of a copyright search is approximately \$400.

Conclusion

It is impossible to discuss every aspect of the Agreement within the confines of this article. The most important areas have been discussed, but there are others which are significant, as well. Producers and writers should seek the assistance of a competent entertainment attorney prior to embarking on this very complicated and important endeavor.

This article is not a complete review of the subject matter and, as such, the reader should not make decisions on the basis of the above without consulting with an attorney.

⁷Option fees do not have to be reimbursed if “non-returnable” fees are negotiated.