MOTION PICTURE PRODUCTION AND DISTRIBUTION -- AN OVERVIEW OF THE UNITED STATES PERSPECTIVE[(1)]

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The legal framework for motion picture production and distribution is significantly built from contract law, copyright law, labor law, and competition law. This article is intended to provide an introduction to the types of legal and practical issues faced in the production and distribution of a theatrical feature film in the United States.

BASIC CONTRACT LAW IN THE UNITED STATES

Motion picture agreements in the United States tend to be based both on informal "deal memos" in which an exchange of correspondence may result in a binding contract, and lengthy fully negotiated contracts (often referred to as "long form" agreements) which may or may not become binding or ever finally negotiated and signed. The deal memo, if sufficiently definite and if covering all essential terms can be a binding contract.

Common types of agreements in use in the United States during the process of production and distribution are the following. Option agreements are used to acquire rights to option a literary property. As explained below, they are usually combined with a more detailed literary property acquisition agreement. Agreements are generally made with writers assigned or employed to write. The director will have an agreement with the producer, as will the cinematographer. Agreements are made for the scoring of a motion picture. Various agreements are generally prepared for the financing of a motion picture, depending on the manner of financing. Bank financing may be used and based on the existance of presale contracts for distribution of the film in various territories. Agreements are made for distribution of the motion picture.

The issues involved in motion picture contracts in ways are similar to all contracts if enforced. Some of the many issues to keep in mind include whether the party has capacity to enter into the agreement, whether the subject matter of the agreement is sufficiently definite so that the agreement might become enforceable, and the ability of a defaulting party to respond by way of damages. Unique to the industry are the effect of union and guild agreements on the contract (discussed below), the limiting of remedies to monetary damages (thus preventing injunctive relief which could jeopardize release or distribution of the film), "turnaround" (the ability to reacquire a property that a production entity has decided not to further pursue); windows; delivery dates; profit definitions; specific, defined and often negotiated indemnity provision relating to copyright, privacy and defamation claims; and "cross-collateralization" (a party's ability to offset losses from profits of another film or the same film exploited in different media).

It is common in agreements to exclude the possibility of injunctive relief by the producer against other elements so as not to jeopardize release or distribution of the film. Delivery requirements which are seemingly innocuous, should be discussed with the client. It may be possible for one party to argue that a breach has taken place where the specifics of the delivery requirements are not met. Windows are time frames during which a party who has been licensed exclusive rights in one medium will be able to exploit those rights without competitive interference. Thus, there might be a six month hold back on video rights from the date of initial theatrical release.

The value of a property is significantly based on public perceptions. A film initially shown on some form of television in the United States has limited theatrical appeal. On the other hand, a theatrical release enhances subsequent video sales and television viewership.

Definitions which are thought to be common in the industry do not necessarily have a single interpretation. Thus, where terms appear, it may be advantageous to define such terms.

While each state in the United States has its own statutory and case law which may be followed. For the most part but not always, there is a generally recognized body of case law which is generally applicable. For a contract executed in a particular state, it is recommend to contact counsel in that particular state. California, for example, has a specific unique and currently temporary law permitting California to be stated as a choice of law for contracts involving more than $250,000.

OPTION AGREEMENTS

A common way in which literary rights for motion pictures are acquired is through the option agreement. This gives the producer an opportunity to put the motion picture together without initially committing for a large payment. Particularly when the underlying work is represented by an agency, an initial fee will have to be paid in order to obtain an option for a period of time. Usually, options are in the form of step deals in which the option can be extended for additional time periods for additional sums of money.

Option agreements can be simple but often in the United States, they are as complex as any form of acquisition. The agreements are often in two parts. The first part of the agreement is the option itself which defines matters such as the nature of the option, the terms and payment and manner of exercising the option. The first part, then makes reference to a rights acquisition agreement which comes into force if the option is exercised. Usually, the option agreement or the first part is relatively short, typically less than five pages, but the rights acquisition attached is usually detailed and lengthy.

Some of the issues to consider in drafting an option agreement are the initial and subsequent terms of the option, the events from which the option time periods and any extensions are measured and whether the option agreement is sufficiently complete and clear so as to effectuate a binding contract. What must be done to exercise the option? What constitutes adequate notice? If the option references an attached literary property purchase agreement, are the terms of the purchase agreement defined so that no significant terms are left out? What are the obligations of the parties once the option has been exercised?

U.S. COPYRIGHT LAW

In the United States, a copyright is considered to be an intangible asset which is owned initially by its author. Unlike European countries, the author can just as readily be a corporation or other business entity as an individual. As a result, the transfer, licensing and assignment of rights tends to be simplified from a legal perspective once it is determined just who is the author. Determining who is the author is not always clear. For a screenplay, it is the individual who fixes his or her words to a tangible medium of expression, who is the author of a work. However, there are situations where an individual is given an assignment to write a screenplay by either a producer or a studio.

The determination as to whether the producer of the studio then automatically becomes the author of the screenplay is determined by the general law of agency and employment according to a recent U.S. Supreme Court case of Community for Creative Non-Violence v. Reid, 109 S.Ct. 2166 (1989). In that particular case, the court considered whether a non profit organization owned a sculpture it commissioned an artist to create. The court set out a laundry list of thirteen separate issues to consider in determining whether or not the individual is an employee for hire, in which case the producer employing the individual would become the "author." Those issues are those normally considered in determining whether an employer-employee relationship exists at common law.

The copyright law in the United States has a specific provision as to just what is a work made for hire. Motion pictures are not the type of projects where individuals work on a nine-to-five basis Monday through Friday. They typically involve the intense work of many creative people acting and working sometimes over short periods of time and sometimes over long periods of time, often far away from any studio office and during hours that extend late into the morning. Normally, it would be sometimes difficult to determine whether somebody who is working on a motion picture is actually working as an employee. The United States copyright law provides a way of eliminating that uncertainty by establishing for certain types of works including audio visual works, which of course includes motion pictures, that a work specially commissioned can be considered a work made for hire. However, in order for a work to be a work made for hire, a special document must be signed known as a work for hire agreement. The work for hire agreement should be signed by both parties to the agreement, thus the producer and the employee. Absent a "work made for hire" agreement, one must look to matters such as whether the individual was paid, working hours, whether all appropriate taxes were deducted and employment benefits paid, time and place of employment and other factors.

While copyright in the United States exists as soon as work is fixed in a tangible medium of expression, additional protection can be obtained by registering the work in the United States Copyright Office. Registration provides several functions. It gives the owner of the copyright the opportunity to sue for statutory damages and attorneys' fees in the event of infringement. Unless the work is registered with a copyright office prior to infringement (a three month grace period is given for a published work), the ability to sue for statutory damage and attorneys' fees are lost.

This is of significant importance in many situations in being able to negotiate favorable settlements. Registration of the copyright will require the deposit of one or two prints of the motion picture depending upon where the work is first published, and whether it is unpublished or actually published. When it is desired to register a work that has been published in the United States it is often necessary in some point in time to provide to the Copyright Office and, thus to the Library of Congress of the United States, the best edition of the copyrighted work which is often a first generation archival quality 35mm print of the film. It may be possible to delay providing the print for a period of time generally sufficient to beyond the time when a number of prints are needed for theatrical release.

The copyright laws also provide for recordation of documents pertaining to the title of the motion picture. Thus, for example, copyright mortgages are recordable in the Copyright Office. As a result of a recent case (In re Perigrine), it has been determined that it is generally necessary to record copyright assignments at least in the Copyright Office in order to perfect security interest. The Copyright Office is located in Washington, D.C. and communication with the Copyright Office is virtually always accomplished by correspondence.

In the motion picture area, the United States law does not have statutory protection of moral rights within the copyright laws in connection with audio visual works (though it recently enacted such provisions for works of visual art within the confines of the copyright law). However, other laws have been used on a limited basis to protect the equivalent of moral rights. The federal unfair competition law, Section 43(a) of the Lanham Act has been used to enjoin an edited version of a Monty Python production as a false designation of origin. Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976). Section 43(a) has also been used in connection with the failure to provide credit for star billing. Smith v. Montoro, 648 F.2d 609 (9th Cir. 1981).

CLEARANCES AND ERRORS AND OMISSIONS INSURANCE

The producer will need to obtain errors and omissions insurance at the outset of production. Errors and omissions insurance will generally be required for distribution of the motion picture. Losses covered by the insurance generally includes defamation and privacy claims, copyright claims, and unfair competition claims. In order to obtain coverage, it is necessary for the rights to be examined by counsel. This generally means having the script carefully reviewed and the issues raised by the scripts examined. Potential liability issues in the script must be analyzed and either acceptably explained or rights cleared by obtaining licenses or releases. The underwriter then may either decline to issue an errors or omissions insurance policy in some situations, issue an errors or omissions insurance policy with exclusions, or alternatively charge a higher premium.

Warranties and Representations

The errors and omissions carrier will generally want to see that there have been certain warranties and representations which have been made by the writer of the underlying material or the screenplay. This then backs into the contractual aspects of motion picture production in that the agreement with the writers must contain representations and warranties.

Copyright Clearance

The ownership rights in the literary property must be carefully examined, particularly if it does not involve original source material. A copyright report is obtained and reviewed. Such searches are available from a company known as Thomson and Thomson or from only a handful of attorneys and firms who specialize in copyright research. The search may reveal a chain of title and various rights which have been recorded in the copyright office. Not all underlying properties are recorded in the Copyright Office. One advantage to registration and recordation of assignments is that a subsequent assignee without notice of a prior recordation has prior rights. 17 USC 205(c).

Title Clearance

In selecting a title of a motion picture, consideration must be given as to whether a film is confusingly similar with another film title. If there is confusing similarity, the possibility exists for litigation which may result in enjoining the distribution of the motion picture. Producers errors and omissions insurance covers this problem. However, a search must be conducted to determine whether or not the title will potentially be confusingly similar to an existing title. This includes an analysis of the degree of similarity and extent of public awareness of the existing title, whether from film or another media. One must ask whether the title has acquired

"secondary meaning". Confusion tends to be analyzed on a country by country basis. Titles of films released in the United States are not necessarily the same titles that the films are distributed in other countries for marketing purposes.

Title searching in the United States can be accomplished in several ways. First, there is a company, Thomson & Thomson, which maintains an enormous collection of index cards on existing motion picture and book titles. Thomson & Thomson acquired its materials from a lawfirm in Washington, D.C., Brylawski, Cleary & Leeds, which in turn acquired the materials from an old line New York law firm, Johnson & Tannenbaum. Having visited the firm many years ago when it still existed, though a law firm, it looked more like a library with rows and rows of library card catalogs, with index cards giving references to clippings in the trades, such as the Hollywood Reporter and Daily Variety, going back years and years. Thomson & Thomson now has these card catalogs and can be requested to do a title search which will provide information on usage of similar titles in various media.

The Motion Picture Association of America (MPAA) has a Title Registration Bureau. The major studios belong to the MPAA, and the studios regularly register titles even before a film is made, with the Title Registration Bureau, located in new York (212-840-6161). The studios have agreed among themselves not to use motion picture titles which are confusingly similar to those which are registered. There is a procedure whereby independent producer can, for a fee (currently, $500 will includes registration of 10 titles and include one year subscription), also register titles with the Title Registration Bureau. Adherence to the terms of the MPAA Title Registration Bureau is by contract.

Absent actual usage and secondary meaning, it is usually not possible to obtain meaningful prior rights in connection with a motion picture in the United States. Thus, it may not be generally possible to "reserve" a trademark as the name of a motion picture. However, the United States trademark laws have been amended in 1988 to permit "intent to use" trademark applications. Titles have not been able to be registered in the past unless they are titles for a series. It is not common for a motion picture title to be registered for most motion pictures, absent those that have significant merchandising potential.

Defamation and Privacy Issues

Defamation and privacy issues must be considered at the outset in producing a feature project. Defamatory matter is limited to statements which are untrue. For defamation though not for certain privacy issues, truth is a defense. Not all statements which are untrue are defamatory. The statement in the motion picture must result in certain types of damages to an individual. There are particular types of damages which are automatically or per se considered to be sufficiently harmful to permit the award of damages without additional proof. This type of damage is known as general damages and an example of defamation peculiarly within that area pertain to injury to one's profession or alleging the commission of a crime.

In addition to defamation issues, privacy issues are often significant in dealing with producing motion pictures. If a screenplay is written which portrays an individual in a false light, a claim for invasion of privacy may exist as well as one for defamation. If a highly offensive story is written which intrudes on an individual's privacy or if highly offensive private facts that had been previously known but had been kept out of the public eye for a long period of time, claims for invasion of privacy may be stated.

In both invasion of privacy and defamation matters, a serious concern from the United States perspective is the possibility that should a party who perceives that he or she is wronged by the motion picture bring litigation against the producer, distributor and others the possibility exists for a punitive damage award. Thus, even though the actual proved damages may be only for a limited sum of money, the award for punitive damages could be exceptionally high. Punitive damage awards can run into the millions of dollars. It is a rare situation where punitive damage judgments are actually awarded and generally in order to award punitive damages the acts of the defending producer must usually be particularly egregious. Actual malice may be required. Privacy and defamation litigation tends to be costly.

In order not to impinge on the First Amendment to the U.S. constitution (pertaining to the freedom of speech and the press) which is taken quite seriously, limitations are imposed on the scope of defamation and privacy claims. One area of concern is that of public figures. From a policy perspective there should be free and open discussion concerning pubic figures. Therefore, their rights in a defamation case are more severely limited and the plaintiff must be able to show malice. In the privacy area, the issue often revolves around whether the matter is newsworthy or of legitimate public interest. The timing of a motion picture is quite different than that of a newspaper and while a matter might be newsworthy warranting a breaking news story there may be a different question as to whether the matter may be still portrayed on the screen.

Releases

Whether or not privacy or defamation issues exist, the issues may be bypassed by obtaining appropriate releases. Failure to obtain releases may mean that errors and omissions insurance will not be obtained, deductibles increased or issues excluded. Some of the issues that might be typically be covered in a contract pertaining to right of privacy and defamation are frequently used in so called docudramas. These are motion pictures which may contain a certain amount of fictional material but are generally based to some extent on factual material. They potentially open the door to legal claims after the motion picture is made because their very interest lies in the fact that they portend to be true and factual accounts of real existing situations and people. Some of the clauses that may typically appear in a life story rights agreement may include exclusivity, option amounts, control resting with the producer, windows, and agreements to cooperate in obtaining releases of others.

FORM OF PRODUCTION ENTITY

The form of production entity is often dictated by similar considerations as that involve other types of businesses. The production entity may simply be a corporation, or a limited partnership often in which a corporation is a general partner of the limited partnership. They include considerations of practical conduct, limiting liability and for some, tax consequences tend to be a significant consideration. Often contracts are made with individuals through their "loan out" corporations. A loan out corporation is a personal service corporation that usually has an employment agreement with, for example, an actor or director. The services of the actor or director are then "loaned" to the production company.

MUSIC

While not necessarily the most desirable approach, music is often one of the last elements to be included in a motion picture, created and scored during post production, frequently in less than

a month. An agreement may be reached with one to score a motion picture so that the agreement becomes a work made for hire. Assuming that the person hired to score the work is not a true employee, the agreement should state that the work is a work made for hire and should be signed by both the person creating the work and on behalf of the production company owning the copyright in the motion picture, so as to be clearly in accordance with the statute.

Existing music licenses may be acquired for film. These licenses, known as synchronization licenses ("synch" licenses) may be negotiated with the owner of the copyright in the music, sometimes known as the copyright administrator. One company, known as The Harry Fox Agency in New York will have the right to negotiate synchronization licenses for a large percentage of musical compositions. The Clearing House in Los Angeles can be used to determine ownership rights in musical compositions and in negotiating synchronization licenses. The cost for the music will depend on the particular composition, the length of time the composition is used and the manner and nature of use of the composition. In addition to the "synch" license, performance, manufacturing, and distribution rights may also have to be acquired.

UNIONS AND GUILDS

Motion picture production in the United States is significantly influenced by the unions and guilds. What appears in the contracts are frequently influenced by the minimum basic agreements which the guilds have. For example, a common clause in entertainment industry contracts is that irrespective of what is stated in the contract, the agreement will be said to be subject to the terms of the minimum basic agreement of applicable unions and guilds. Thus, if the film falls within the jurisdiction of the Writers' Guild, there are significant restrictions on the types and abilities of producers or writers and others participating in the film and specifying the screen credit given. For guild films, the type and manner of credit is one of the key areas within the guild jurisdiction.

The primary guilds in the United States affecting motion picture production are the Writers Guild of America (WGA), Screen Actors Guild (SAG), Directors Guild of America (DGA), International Alliance of Theatrical Stage Employees (IATSE) craft guilds, and American Federation of Musicians (AFM), and Screen Extras Guild (SEG). AFTRA primarily relates to televisions production rather than motion picture production. The unions and guilds have collective bargaining agreements which are adhered to by its members and signatory production companies. A member of a guild must generally work only for signatory production companies and in accordance with the guild minimums set out in the collective bargaining agreements, known as "minimum basic agreements". When participants are paid according to the amounts set forth in the agreements, they are said to be paid "scale". Nothing prevents payment in excess of that required in agreements, in which case they are paid above scale.

It is common for agreements pertaining to the motion picture industry to refer to and incorporate by reference applicable union and guild agreements. Thus, you may find a clause which reads, "this agreement shall be subject to applicable collective bargaining agreements" or "notwithstanding any provision of set forth herein, this agreement is subject to the WGA minimum basic agreement in effect at the time this agreement is to be performed". This type of clause may be in effect not only for member companies, but often even for nonmember companies which may try to define the rights and liabilities of the parties according to terms of the agreements. The minimum basic agreements tend to be rather long and complex documents.

The WGA Minimum Basic Agreement of 1988 which is currently in effect, pertaining to television as well as writing for motion pictures is well over 400 pages.

In the area of writing, some key concepts might be kept in mind. Members of the WGA may not write on "spec" or speculation. In other words, a member cannot write a screenplay for a motion picture production subject to the company's ability to raise financing for the motion picture. The writer must be guaranteed payment. On the other hand, nothing prevents a member of the guild to write a screenplay on his or her own, and then sell the rights to a company whether or not the company is a member of the Writers Guild. The key consideration is whether or not the member is an employee or is assigned a writing task. However, in the event of a rewrite, the Guild agreement is then going to be applicable.

Companies who become signatories become obligated to make minimum payments to members for certain types of writing. In addition, the companies become obligated in the future for residual payments for various types of usage of the motion picture. The members and the signatory companies subject themselves to a complex provisions for credit determination. Regulations regarding credit are spelled out in the Minimum Basic Agreement and can have significant consequences on the entire structure of the motion picture. Thus, for example, a contract which specifies certain forms of writing credits without considering the guild requirements, might not be valid under the Minimum Basic Agreement. Credits are considered to be a significant form of compensation to the writer. More writing credits given to others results in a reduced value of a credit to the writer. Therefore the Guild limits the number and type of writing credits that can be given. Before a film is distributed, the signatory company goes through a credit determination procedure in which tentative writing credits are presented to the WGA. The company sends a Notice of Tentative Writing Credits out with the shooting script. Those who have participated in the writing send in what they think the credits are and if there is any dispute, a credit "arbitration" procedure results. The attached case, Ferguson v. Writers Guild of America, gives some flavor of the nature of credit arbitration.

The nature and type of credit given may affect the ability and cost of marketing the film. Credits are often described in relationship to the credits of others, including the type size (e.g. not less than 50% of the director's credit), style, location (beginning of the film or end credits), and whether the credits are required to appear in various advertisements and commercials for the motion picture including newspaper advertisements. Credit determinations tend to be tied in to requirements of the guild agreements and thus, the overriding phrase about being subject to guild agreements is important to consider.

One significant aspect of rights acquisitions to be considered by the producer's counsel and that is the doctrine of "separation of rights". This essentially gives the writer an opportunity to get a second chance at material if the material is used for sequels or in other formats. The writer cannot be simply be mutually bought out of those rights. In some situations, the writer can buy back certain rights if they are not explained.

Guild Jurisdiction

An early question to examine in the context of international coproductions is the potential jurisdiction of any of the U.S. Guild agreements. That question is best examined before any writers or talent are contacted, as certain actions may result in guild jurisdiction depending upon when, where and how that person is initially contacted.

By way of example, the WGA agreement covers writing done outside of the United States for films made outside of the United States if the writer makes a deal in the United States. That is true even if the deal is made by a telephone call from the attorney in United States to an attorney in France. That is still true even if the writer is temporarily abroad when the deal is made. [WGA MBA Art. 5]

For dispute resolution, the guilds have specialized arbitration tribunals which handle various matters. Attached is a court case which shows how the court has treated arbitration tribunals, and how different these arbitrations are from other forms of arbitration.

PROFIT DEFINITIONS

Motion pictures are risky ventures. To share the risk, to use "other peoples money" and to stretch the amount of capital available to make and distribute the motion picture, a variety of types of deferred compensation for the various individuals involved in the motion picture, often referred to as the "elements" has arisen. This can mean a straight deferment in which an individual or entity is promised a fixed amount of money upon the happening of a particular event. The event may be a date, it may be the commencement of principal photography, it may be the film receiving certain revenues.

That compensation may also be in terms of a percentage of something, such as "gross profits" or "net profits". These terms are commonly used, but to be meaningful must be carefully defined. Studios and major distributors have definitions of "net profits" which go on for pages. The definitions will vary from studio to studio. The terms only have meaning in connection with the specific definition. These are essentially contract definitions, not any standard accounting term, and do not by any means indicate that the "profit participant" will indeed see a profit, even if it appears to the public that the film is very successful, and even if the studio appears to have made significant sums of money on the film. In a film in which there are any gross profit participants, it is generally thought that it is virtually impossible for a net profit participant to receive any money. The concept of profit participation has recently been under attack in the United states in a case, Buchwald v. Paramount, involving U.S. humorist Art Buchwald, French producer Alan Bernheim and the Eddie Murphy film, "Coming to America." There, the plaintiffs asserted, among numerous other factors, that the net profit definition of a studio is unconscionable and illusory since it is impossible for a net profit participant to actually make a profit, even in connection with what appears to be a highly successful motion picture. This was despite the fact that the plaintiffs were represented in their negotiations on the contract with an agent and counsel highly sophisticated in the motion picture arena.

It must be always kept in mind that net profits is always based on the specific definition. Nevertheless, certain principles are often used to help visualize common flows of moneys in distribution. Money flows from "exhibitors" to "distributors". Exhibitors show the movies on their screens and receive moneys often referred to as "box office gross". The exhibitors then pay "rentals" to the "distributor" who has licensed the film to the exhibitor. The distributors rentals received from the exhibitors are referred to as "distributors gross". Certain "off the top" expenses may come off of distributors gross to reach "adjusted gross".

In the United States, the arrangements between distributor and exhibitors tends to be a percentage arrangement, with floors and ceilings -- various arrangements to cushion the blow of a film that does not do well, and to take advantage of a film that does well for the exhibitor. There is a symbiotic relationship where the exhibitor needs a constant supply of films for the

theater, yet does not want to be required to exhibit a film that no one is willing to pay to see. As a result, there tends to be a renegotiation in "settling" the arrangement with respect to a particular film, based in part on existing relationships and the consideration that the pipeline for new films is kept open.

Typically, the split between distributor and exhibitor may be up to 90% to the distributor after the exhibitor has taken care of its overhead figure ("nut"). The percentage may initially be much lower. In the United States, the popcorn and snack concession is the profit center for the theater.

AGENCIES

Writers, directors, actors, cinematographers, producers, scorers and certain others are represented by talent agencies. Talent agencies have a "franchised" relationship with the unions and guilds and as a result of that agency, usually take a commission of 10% on funds received as a result of efforts contracted for during the term of the agency relationship, even for funds received long after the agency relationship has terminated.

Major agencies are involved in packaging of properties. Frequently, they will team up several of their clients for a single packaging. A separate packaging commission is charged which varies depending upon the agency.

The benefit to being with a large agency is that the larger agencies may have greater access with the major studios and more a greater ability to get matters accomplished. The downside is that unless your client is either already extremely successful, or headed in that direction quickly, the agency may concentrate their efforts with those that they perceive as being more important. Thus, there is a benefit to matching talent with the agency that will be most enthusiast and help carry out the objectives for the client.

BANKRUPTCY AND INSOLVENCY PROVISIONS

The reality of the motion picture business is that it is volatile and risky. This means that at the outset, it is often desirable to consider the possibility of bankruptcy or insolvency of the production company, distributor or other companies with which one deals. In the United States, a provision, which used to be known as an "ipso facto" clause is no longer effective. The "ipso facto" clause provided that upon insolvency or bankruptcy, the contract would terminate, rights licensed would cease and any thing of value might be retrieved from the failing party. Currently, upon the filing of a bankruptcy petition, these provisions are no longer automatically valid. One must determine whether there is an executory contract at the moment of the filing of bankruptcy. An executory contract is one in which there are still obligations to be performed by both parties to the contract. If an executory contract, the bankrupt or debtor must determine if it elects to continue to enforce the agreement. If it does wish to enforce the agreement, the debtor must make appropriate provisions to live up to its side of the obligations and make appropriate payment. Bankruptcy counsel still recommend that the equivalent of "ipso facto provisions" be included in agreements despite the lack of enforcement for a variety of reasons, however, their limitations should be kept in mind.

Typical reasons for considering the effect of bankruptcy may be, for example, what happens to your client's film if the distributor has an agreement and the distributor files some form of a bankruptcy proceeding? The debtor distributor might have the right to distribute the film,

despite the fact that it may not have significant funds to launch an adequate campaign. The film may become stale during court proceedings while the debtor distributor determines what it wants to do with the film. What happens to the guarantee which was to be paid to the producer? If the sum was payable before the filing of the bankruptcy petition, the bankrupt may have simply been an ordinary unsecured creditor.

AMERICAN FILM MARKETING ASSOCIATION

The American Film Marketing Association (AFMA) is a trade association of film distributors based in Los Angeles for the marketing of films on a world wide basis. It holds a film market once a year now in Santa Monica, California.

Among other member services, AFMA has an international arbitration tribunal for the resolution of disputes with members of the organization. When an agreement is made with an AFMA member, it may contain a clause for AFMA arbitration. Standard AFMA agreements contain the AFMA arbitration clause. AFMA arbitration provides a manner in which disputes regarding film distribution agreements may be resolved, usually in a rather prompt manner. The tribunal is administered out of the AFMA office in Los Angeles. Normally, the venue for disputes is Los Angeles, but where appropriate, the Arbitral Agent can designate a variety of other venues around the world in a number of major cities having a significant connection with the motion picture industry. Tribunal members are experienced lawyers familiar with motion picture distribution.

It has promulgated standard form contracts for its members for film distribution. AFMA has participated in developing a database of film ownership receipts for its members. Often, it is difficult, particularly on an international scale, to follow the rights involved in a particular property. Thus, the copyright to the film may be divided in many ways, by territory, by type of media, and in connection with different rights. There has been no central authority for recording those rights. Thus, AFMA has tried to create a database for its members whereby they can try to determine ownership rights for various motion pictures.

AFMA has also supported a new international treaty for Audio Visual works, developed by WIPO (World Intellectual Property Organization) in Geneva. The treaty, "Treaty on the International Registration of Audiovisual Works" provides for the registration of presumptive ownership rights in motion pictures. It is believed that by creating a standardized format for copyright registration procedures, by standardizing agreement formats and other procedures, it will help encourage lending of money on motion picture distribution rights and thus enhance the available capital for the funding of motion pictures.

Sources of materials

Much material regarding agreements and practices in the motion picture industry is not readily available. Some locations where materials may be obtained are:

Los Angeles County Bar Association, Intellectual Property

and Entertainment Law Section, P.O. Box 55020,

Los Angeles, CA, 90055, 213-627-2727; (request information regarding Intellectual Property and Entertainment Law Section Syllabi).

Beverly Hills Bar Association, 315 S. Beverly Drive, Beverly Hills, California 90212, 213-553-6644.

Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019 (request information on course handbooks in their literary property series).

Entertainment Law Reporter, 2210 Wilshire Boulevard, #311, Santa Monica, California 90403 (monthly publication).

Farber, Entertainment Industry Contracts, Matthew Bender

Lindey, Lindey on Entertainment, Publishing and the Arts, Clark Boardman

Selz & Simensky, Entertainment Law, McGraw Hill

Unions & Guilds

Copies of Minimum Basic Agreements may usually be obtained for a nominal charge.

Writers Guild of America, west, 8955 Beverly Boulevard, West Hollywood, CA 90048, 213-550-1000.

Screen Actors Guild, 7065 Hollywood Boulevard, Hollywood, CA 90028, 213-465-4600.

Directors Guild of America, 7920 Sunset Boulevard, Los Angeles, California 90046, 213-289-2000.

U.S. Copyright Office

General information: 202-479-0700 Forms hotline: 202-707-9100

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Domestic and International Copyright and Trademark Law;
Motion Picture, Television, Publishing, Media and General Entertainment Law;
Multimedia and Internet Law; Licensing;
Related Litigation
