



**How to Produce and Perform:
A Guide to Audio-Visual and Live Stage Licensing and Acquisition**



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An economy receptive to the opportunities offered by creative endeavors such as film, theater, music and publishing (all part of the so-called “core copyright industries”), yields benefits of both a tangible and intangible nature. Participation “in the cultural life of the community” and enjoyment of the arts was included in the 1948 Universal Declaration of Human Rights and, by virtue of its inclusion, part of “the foundation of freedom, justice and peace in the world.”¹ Creative activity can galvanize the political will for freedom of expression and association that is required for a cultural community to flourish, resulting in a more open and diverse society for all.

More recent analysis has highlighted the social and psychological benefits of a robust arts culture. A landmark RAND Corporation study charted both the instrumental and intrinsic benefits of the arts in America, noting that people are drawn to the arts “because the arts can provide them with meaning and with a distinctive type of pleasure and emotional stimulation.”² These experiences in turn yield benefits of “expanded capacity for empathy,” “creation of social bonds” and “expression of communal meaning.”³ Other studies have articulated certain desirable values – such as meritocracy, diversity and openness – associated with a “creative class” of individuals.⁴ Creative pursuits have sustained culture despite tyranny, celebrated collective rapture and articulated profound sorrow.

And then there is the money. The film industry leaves perhaps the most significant financial footprint of the core copyright industries (excluding sectors such as computer software, which has myriad applications outside the entertainment industry). Box office grosses in the United States reached nearly \$9.5 billion in 2006 while during the same period worldwide box office clocked in at \$25.92 billion; worldwide admissions surpassed 7.8 billion movie tickets, with the Asia-Pacific region leading the charge with 4.81 billion tickets sold.⁵ Broadway, Hollywood’s poor cousin by most accounts and continually the subject of speculation about its imminent demise, nevertheless managed to pull in nearly one billion dollars worth of ticket revenue from 12.3 million tickets sold during the 2006-2007 season.⁶ The vast and diverse not-for-profit theater industry in the United States, which includes the nation’s largest performing arts institutions, flush (comparatively) with corporate and foundation funds, as well as grass-root innovators working on shoestring budgets, generated over \$1.7 billion in contributed and earned income and paid out more than \$1.67 billion for goods, services and salaries in 2006.⁷

But the economic impact extends beyond direct revenue generated from ticket sales. The creative industries employ artists, managers, technicians and skilled labor. Communities

¹ G.A. Res. 217A, art. 27 UN GAOR 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

² Kevin F. McCarthy, Elizabeth Heneghan Ondaatje, Laura Zakaras & Arthur Brooks, GIFTS OF THE MUSE: REFRAMING THE DEBATE ABOUT THE BENEFITS OF THE ARTS xv (RAND Corporation 2004).

³ *Id.* at 4.

⁴ FLORIDA, RICHARD, THE RISE OF THE CREATIVE CLASS 78-79 (Perseus Books Group 2002).

⁵ Available at www.mpa.com.

⁶ League of American Theatres and Producers, 2006-2007 Season Statistics, available at <http://www.livebroadway.com>.

⁷ ZANNIE GIRAUD VOSS ET AL., THEATRE FACTS 2006: A REPORT ON PRACTICES IN THE AMERICAN NOT-FOR-PROFIT THEATRE (Theatre Communications Group 2007) at 2.

see increases in hotel stays and restaurant patronage. In 2005, the value added to the US economy from core copyright industries was estimated to be \$819 billion dollars, or 6.56% of US gross domestic product (“GDP”).⁸ The contribution of the core copyright industries trumped other major US global industries such as medicinal and pharmaceutical products, motor vehicles, primary and fabricated metal products, and food and live animals in terms of dollars in foreign sales and exports.⁹ Numerous studies have documented the direct economic benefits of arts activity,¹⁰ including employment, generation of tax revenues, and stimulation of spending in local communities that supply goods and services, such as food, lodging and parking, to arts organizations and patrons.¹¹

In the United States, salaries in core copyright industries frequently are at a premium when compared with average per employee compensation generally; by one estimate, the premium amounted to \$20,000 per employee per year.¹² The variety and volume of employment is also impressive. The Motion Picture Association of America estimates that in 2006, the US film industry provided over 358,000 jobs in the areas of production, services, theaters and video rental, and other related areas. According to Theatre Communications Group, the nonprofit theater sector offered 113,000 paid positions in artistic, administrative and technical areas. The advocacy and research organization Americans for the Arts estimated that in 2005, direct expenditures by arts organizations resulting in 1.3 million jobs, representing 1.01% of the United States workforce; for comparison, the study noted that the number of individuals employed across the various nonprofit arts sectors was greater than the number employed as either lawyers, police officers or computer programmers.¹³ Many of these jobs are of the nature that will attract and retain a class of skilled individuals who infuse a regional economy with innovation, quality of life, and growth opportunity.¹⁴

⁸ SIWEK, STEPHEN, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT at 9.

⁹ *Id.* at 5.

¹⁰ *For representative samples at a national and state level, see Arts & Economic Prosperity III, AMERICANS FOR THE ARTS, available at www.artusa.org; Arts As an Industry, ALLIANCE FOR THE ARTS, available at www.allianceforarts.org; Economic Benefits of Michigan’s Arts and Cultural Activities, MICHIGAN NONPROFIT ASSOCIATION, available at www.mnaonline.org; The Arts: A Driving Force in Minnesota’s Economy, MINNESOTA CITIZENS FOR THE ARTS AND THE FORUM OF REGIONAL ARTS COUNCILS OF MINNESOTA, available at www.mncitizensforthearts.org. The RAND study suggested that economic effects of the arts should not be the primary emphasis of those seeking to articulate the benefits of arts involvement. However, as the RAND study itself notes, economic arguments can be a useful starting ground since “few people will dispute that something which promotes economic growth has clear public benefits.” To the extent that part of the challenge of developing and sustaining an arts infrastructure in developing countries is only one of multiple competing needs to which governments and/or other leadership of these countries must attend, the economic argument is a helpful in demonstrating that arts involvement has a tangible and real effect on economic well-being.*

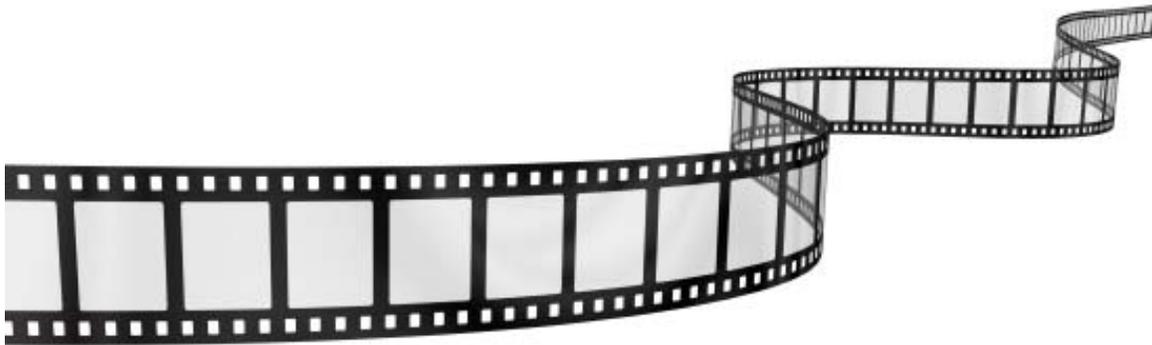
¹¹ MCCARTHY ET AL., *supra* note 2 at 17; Arts & Economic Prosperity III, *supra* note 10, at 3.

¹² Available at www.mpaa.com. This statistic should not minimize the genuine financial struggles many artists experience in launching or maintaining careers; but for those artists and other individuals in related industries who do find an economic foothold, the particular skill and talent required for such employment frequently results in higher compensation.

¹³ Arts & Economic Prosperity, *supra* note 10, at 13.

¹⁴ FLORIDA, *supra* note 4, at 249.

Although the experience of the arts does not require any particular business or legal infrastructure, achieving the widest dissemination of its benefits arguably does. The statement of principles of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions emphasizes “the need to incorporate culture as a strategic element in national and international development policies.”¹⁵ Core copyright industries in developing countries offer intrinsic benefits to communities across the world. As Nigerian actress Genevieve Nnaji recently explained to *WIPO Magazine*, the busy Nigerian film industry offers special benefits to Africans, “We tell our own stories....That’s why a lot of Africans can relate to it, and understand and laugh about it and learn lessons.”¹⁶



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But in many instances, there is a barrier preventing the capture and control of the benefits, both intrinsic and economic, that flow from the results and proceeds – the films, plays, and music – of arts endeavors in developing countries. Intellectual property rights and, more particularly, the business of acquiring and/or licensing creative properties for production and distribution, can be a complex and daunting landscape.¹⁷ Indeed, one statistic not readily available about the US entertainment industry is the amount of legal fees generated from various rights holders and would-be transferees negotiating and documenting their various agreements for exploitation of creative properties.

Creative pursuits are an important economic and socio-cultural activity in Africa, Asia and other key areas of the developing world. In fact, India’s film industry produces more

¹⁵ Statement of Principles of the Convention of the Protection and Promotion of the Diversity of Cultural Expressions, United Nations Educational, Scientific and Cultural Organization, General Conference, 33rd Sess. (2005).

¹⁶ *The Nollywood Phenomenon*, WIPO MAGAZINE, June 2007 at 8.

¹⁷ The broader IP environment in which licenses and acquisition deals are negotiated is also of serious concern, though not discussed in this analysis. Arguably, piracy represents perhaps the greatest impediment to the growth of the creative industries and the spread of benefits to creators. For analysis and review of the impact of piracy on the development of cultural infrastructure, see Frank Ahrens, *With Video, Music Piracy on the Rise, NBC Chief Calls for Tougher Penalties*, WASH. POST., Oct. 3, 2007, at D1; *Camera, Action, Copyright*, WIPO MAGAZINE, June 2007.

films than Hollywood – 877 in India to 473 in the United States in the year 2003.¹⁸ As part of its call to encourage creativity and strengthen production capacity in developing countries, UNESCO has directed parties to the Convention on the Diversity of Cultural Expression to exchange best practices, reinforce partnerships and encourage co-production and distribution agreements.¹⁹ A 2004 UNESCO report, entitled *Keys to Successful Cultural Enterprise Development in Developing Countries*, noted the importance of understanding how to exploit intellectual property, especially because the “[l]icensing of IPRs [intellectual property rights] gives cultural entrepreneurs the opportunity to create new revenue streams from their own creative output.”²⁰

At the same time, there is a bona fide concern about the relative bargaining power between parties. As Professor Madhavi Sunder noted, the real issue in capturing and securing intellectual property benefits is frequently “the poor’s lack of knowledge of their rights, and their diminished capacity to strike fair bargains.”²¹ This article is positioned to both elucidate common practices of licensing and acquiring rights in copyrighted works and to serve as a basic resource for artists and producers seeking to parlay that increased understanding of industry practice into more comprehensive and effective negotiating strategies. Although there are myriad variations and customizations depending on the parties and the nature of the creative properties involved, a familiarity with the building blocks of these contracts will assist cultural entrepreneurs in developing countries to assume greater control in the negotiation process.

Specifically, this article will compare and contrast the practice in the theater industry of optioning and licensing plays for performance on the live stage with the practice in the film industry of optioning and acquiring screenplays for distribution through audio-visual media. Although many agreements related to intellectual property rights will be negotiated during various stages of development and production of a play or film, the scope of this article is confined to the initial agreement to acquire rights from the author of the core work (*i.e.* the underlying work, screenplay or the play that is the subject of interest to a producer). In the theater industry, this contract usually comes in the form of a production contract, namely a license from the playwright to the producer that permits the producer to present the play in certain venues and during a specified time period. In the film industry, this contract usually comes in the form of an acquisition agreement, pursuant to which the film producer will acquire the right to develop the subject screenplay or other literary material into an audio-visual work. This article explains the identity and function of key parties in these rights agreements, explores differences in copyright ownership practices as between the theater and film industries and highlights the major provisions of a typical production or acquisition agreement.

The contract models frequently used in the United States entertainment industry are not without flaws, particularly in the application of certain terms and provisions to works that

¹⁸ Central Board of Film Certification (India), U.S. Theatrical Market Statistics Report at 10

¹⁹ UNESCO Convention, *supra* note 15, at Article 12.

²⁰ Kamara, Yarri, *Keys to Successful Cultural Enterprise Development in Developing Countries*, UNESCO Arts and Cultural Enterprise Division, Dec. 2004 at 29-30.

²¹ Sunder, Madhavi, IP3, 59 STAN. L. REV. 257, 273 (2006).

may be of interest in developing countries. For example, the cultural properties of interest may involve oral traditions and expressions as well as performing arts such as dance and theater. These works are classified as “intangible cultural heritage” and require consideration of the values of indigenous peoples inherent in such intangible cultural heritage, as well as to whom appropriate compensation may be due.²² In addition, the notion of “community” authorship may make identification of the proper party(ies) to a license or acquisition agreement difficult, though certainly not impossible. The Australian Film Commission, which promulgated an issues paper directed at filmmakers working with indigenous communities, observed that “indigenous knowledge is collectively owned, and in order to obtain informed consent it may be necessary to consult and obtain permission from a number of levels of authority.”²³ On the other hand, as Professor Sunder has noted, assumptions that “traditional knowledge is the work of anonymous authors working in communities may also erroneously assume that such knowledge is considered static over the millennia.”²⁴ There may well be contemporary expressions of traditional folklore or performance art that are appropriately the subject of third party copyright protection.²⁵



Drummers in Benin, © istockphoto / Peeter Viisimaa, 2007

²² UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, October 17, 2003 at Article 2. Chander, Anupam and Sunder, Madhavi, *The Romance of the Public Domain*, CAL. L. REV. 1331, 1336 (2004).

²³ AUSTRALIAN FILM COMMISSION, ISSUES PAPER: TOWARDS A PROTOCOL FOR FILMMAKERS WORKING WITH INDIGENOUS CONTENT AND INDIGENOUS COMMUNITIES (2003).

²⁴ Sunder, *supra* note 21, at 329.

²⁵ Stories from Europe have their own history of cultural appropriation, such as Disney’s sweetened adaptations of public domain fairy tales. The popular animated motion pictures omit or change elements of the original tales, such as Cinderella’s stepsisters slicing off bits of their feet in order to fit into the glass slipper, or ending the mermaid’s journey with a happy wedding rather than her transformation into a tragic bit of sea foam after being rejected by her prince. This is not to suggest that what Disney did with the Brothers Grimm and Hans Christian Anderson should work for the rest of the world, but to acknowledge that folklore from all cultures has proved fodder for subsequent exploitation by the commercial copyright industries.

Cultural entrepreneurs will have to carefully navigate decisions regarding whether works based on intangible cultural heritage are part of the public domain or whether it is more appropriate to enter into a license or other cooperation agreement with the identified owner or owners. The topic of cultural appropriation is a sensitive one, and touches upon not only economic remuneration but also credit, creative approval and participation in the development process. Each situation requires an approach tailored to the respective identities of producer and author and the nature of the particular creative property.

Iconic cultural works and traditional cultural practices have long been a source of creative and commercial inspiration. In India, for example, director Bobby Bedi is adapting the epic poem *Mahabharata* into three motion pictures, including plans for extensive ancillary uses in mobile and PC gaming, action figures and possibly a live theme park experience.²⁶ In the Asia-Pacific region, the popularity of the land-diving ceremony of the indigenous population of the island of Vanuatu threatened to transform a culturally significant ceremony traditionally performed only once or twice a year into a weekend tourist spectacle replete with commercial film crews and tour operators (the ceremony has been cited as the inspiration for bungee jumping).²⁷

And in Africa, Nigerian film maker Madu Chikwendu collected oral stories from his village and then dramatized these narratives for a children's television program.²⁸ The legitimacy of adapting or commercializing these various cultural resources has many perspectives. For example, Mr. Chikwendu's perceived authority to adapt narratives from his own village may be deemed more legitimate than that of a foreign visitor who arrived in the village, recorded the stories of elders and then produced a film or play based on such stories without remuneration or consent of the storytellers, and without any genuine tie to the community.

It is beyond the scope of this article to comprehensively explore the many variables that determine whether rights in intangible cultural heritage or traditional knowledge should be included in any particular agreement for use in connection with a film or theater project. But the issue nevertheless merits mention in the context of negotiating the production of films and plays derived from the culture of indigenous people.

²⁶ *Making Movies*, WIPO MAGAZINE, June 2007 at 7.

²⁷ Malia Talakia, *Intellectual Property and Safeguarding Cultural Heritage: A Survey of Practices and Protocols in the South Pacific* (2007), 61 – 64, http://www.wipo.int/tk/en/folklore/culturalheritage/casestudies/talakai_report.pdf.

²⁸ Bayo Adetu & Lois Okereke, *Interview with Madu Chikwendu*, The News, June 17, 2004, available at <http://www.thenewsng.com/modules/zmagazine/article.php?articleid=2078>.

Protection of Intangible Cultural Heritage – A Multilateral Effort

The Creative Heritage Project of the World Intellectual Property Organization is a multi-faceted undertaking that seeks to articulate best practices and guidelines for managing intellectual property issues that arise when “recording, digitizing, and disseminating intangible cultural heritage.” Through case studies, surveys, a searchable database and a collection of articles, protocols and legislative materials, the project both encourages the use of digital technologies to promote, preserve and revitalize the cultural heritage of indigenous communities and promulgates protocols to prevent the use of technology to misappropriate and exploit intangible cultural heritage.

See <http://www.wipo.int/tk/en/folklore/culturalheritage/>

It is also open for debate whether the contract models and standard terms used in the copyright industries in the United States are the best fit for jurisdictions with less robust intellectual property enforcement regimes, where the relationships between artists and producers may be less formalized. At an African film summit in 2006, there was a constant refrain that the African film industry – from filmmakers to audiences, and from broadcasters to government agencies – must be adapted and suited to telling the stories of Africans. To this end, many noted the detrimental, or at least unhelpful, reliance on external resources. The Deputy Minister in Information and Communication in Kenya noted that Hollywood films produced in Kenya, such as *Out of Africa* and *The Constant Gardner* offered little improvement for Kenya’s domestic filmmaking infrastructure.²⁹ Simply serving as a staging ground for works produced by the United States may not yield lasting benefits to infrastructure and industry vitality.

But recent ventures of major US media companies in India and in Abu Dhabi indicate that increasingly, US companies will seek to partner with or invest in local players in developing countries.³⁰ In negotiating the terms of similar ventures and partnerships, it is likely that models and standard terms used by the US entertainment industry will at a minimum serve as starting points for negotiation and, to the extent that cooperation and co-production opportunities arise between the US entertainment industry and artists and producers in developing countries, may also set expectations for such relationships going forward.

The Parties

A contract begins with the relationship between the parties. When copyrighted works are involved, the party of first instance is the author. As discussed above, in connection with

²⁹ Daily Narrative Summaries, African Film Summit, hosted by the Department of Arts & Culture and the National Film and Video Foundation of South Africa in association with the Pan-African Federation of Filmmakers, April 3 – 6, 2006 in Tshwane, South Africa.

³⁰ Patrick Frater, *India Gets Hollywood Spice*, VARIETY, Aug. 21, 2007; Ali Jaafar, Dade Hayes, *Abu Dhabi, WB Ink Multi-Media Deal*, VARIETY, Sept. 26, 2007.

intangible cultural heritage, it may be particularly challenging to determine from whom permission should be obtained. But assuming a producer decides that an agreement to develop and produce the work should be entered into, “authors” take many forms; the author may be a playwright, a screenwriter, a choreographer, or a novelist whose story is being adapted for a movie or a play. In legal parlance, a party who makes a copyrightable contribution to the resulting work may be considered an “author” and thus vested with copyright ownership in the work as a result of such contribution.³¹



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In many cases, the particular copyrighted work may involve more than one authorial interest. For example, a musical play based on a novel has several “authors,” including the original author who wrote the novel (in this context, such novel is called the “underlying work”) and the “adapting authors,” namely, a composer, a lyricist and a bookwriter who adapted the novel into a dramatico-musical play (by way of example, the novel titled *Wicked* is the underlying work that formed the basis for the musical play of the same name; Gregory Maguire is the author of the novel, and Stephen Schwartz and Winnie Holzman are the authors of the play). Similarly, a film may be based on an underlying work such as a comic book, toy, or novel. The comic books of Stan Lee became the basis for the *Spiderman* film franchise; a 1980s toy evolved into the *Transformers* special effects motion picture blockbuster, and the *Lord of the Rings* trilogy was based on the novels of the same name by J.R.R. Tolkien; a license was required in each instance to adapt the underlying copyrighted work for use as the basis of the screenplay.

For purposes of this discussion, reference to an “author” generally means the playwright or screenwriter, but also, in some instances, underlying rights holders. If underlying

³¹ Under the United States Copyright Act of 1976, an independently copyrightable contribution alone is not sufficient to give rise to joint authorship (and therefore joint ownership); the parties must intend both to be joint authors and that their respective contributions “be merged into inseparable or interdependent parts of a unitary whole”. 17 U.S.C. §101. See also *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 1999); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); but see *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

works are involved in the particular project at hand, it is important that rights to adapt such work be obtained (else creation and exploitation of the resulting film or play constitutes copyright infringement) and that the ongoing involvement, if any, of the underlying rights holder be set out in any such agreement. The agreement to acquire underlying rights may be between the producer and the underlying rights holder or, if such playwright or screenwriter began work on the project without the involvement of a producer, directly between the playwright or screenwriter and the underlying rights holder. Frequently, an underlying rights holder may have expectations about creative involvement in the project going forward; if the producer or adapting authors have a different idea about the underlying rights holder's role in the creative process, this relationship can become difficult. For this reason, agreements with underlying rights holders should clearly set out the parameters for any approvals or consultation over such things as the storyline, script, creative team and/or cast, as well as other involvement, such as attendance at rehearsals or presence on the set, that may be accorded to the underlying rights holder.

In most instances, the producer is the party who acquires rights from the author. As the UNESCO *Keys to a Successful Cultural Enterprise* study noted, the key activity of a "cultural enterprise" is connecting the creator to a market and consumers for the cultural property.³² In many respects, the producer is the person who facilitates this connection. The producer typically provides or arranges the financing, assembles the creative team for the project as a whole and frequently oversees the marketing and advertising campaigns. The producer will also generally be responsible for booking venues for performance (in connection with a live stage property such as a play or dance performance) or arrange for distribution of the work (in connection with an audio-visual work such as a film). In addition, it is usually pursuant to the terms of the agreement between the author and producer that the author will be paid for exploitation of the granted rights.

The key parties involved in developing and licensing a film or play are thus the author, the producer, and, if there is an underlying work, the underlying rights holder.

Copyright Ownership Models

In the United States, a fundamental difference in the practice of acquiring rights for film versus acquiring rights for the theater is that playwrights and other authors for the live stage retain ownership of the copyright in their work. The relationship between author and producer in the theater is defined by the playwright's ownership of copyright. In addition to the right to approve certain creative team members (for example, the director and designers), the playwright will have an ongoing creative role in the development of the work; changes to the work cannot be made without the playwright's approval and any such approved changes become property of the playwright (even if the playwright did not suggest or draft the particular revision). In addition, when the rights granted to the initial producer expire, all rights in and to the play revert to the playwright. This means that the playwright will control any subsequent disposition of rights in the play, whether that be

³² Kamara, *supra* note 20, at 8.

authorizing a future live stage production, authorizing print publication of the play or granting the rights to a film producer who wants to make a motion picture based on the play. Although the original producer may in some instances be entitled to a share of the author's income for such dispositions (discussed further below), the producer will not be able to negotiate or approve the terms of any such deal.



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The film industry, by contrast, employs a much different copyright ownership model. A film producer typically expects to acquire the entirety of the author's interest in a screenplay (whether by outright assignment or as a work made for hire), subject to the reservation by the author of certain non-film related activities (such as dramatic adaptation for the live stage), though even such unrelated activity may be restricted for a certain period of time.³³ This means that deal making in the film industry is heavily focused on securing for the author ongoing financial participation in the myriad different revenue streams of the resulting film, including receipts from theatrical, home video, and/or DVD distribution, merchandising, and ancillary uses such as video games or mobile phone content. In addition, the author will negotiate for the right to be involved in subsequent projects that are derived from the initial film, such as sequels, prequels and remakes.³⁴ Because the author has otherwise assigned his or her copyright in the

³³ In both film and theater, if the producer is acquiring an underlying work that he or she wishes to adapt into a film or play, the author of the underlying work (for example a novel) will continue to own the copyright in the novel, but will not have any ownership in the resulting screenplay or dramatic play. In connection with a dramatic play, however, in many current deals an underlying rights holder will have the opportunity to recapture the work if a minimum amount of income is not generated. This is a process called "de-merger" and it allows the underlying rights holder to authorize a new dramatic adaptation of the underlying work (though in such instances, the playwright will continue to own the copyright in the first adaptation). Essentially, de-merger makes the grant to the initial adapting author nonexclusive. There is usually no such opportunity to recapture these rights in a film deal; once the film has been produced and distributed, the producer and/or the producer's licensees will customarily have a perpetual right to distribute the film, notwithstanding poor economic performance.

³⁴ The Writers Guild of America, the professional collective bargaining association for the motion picture and television industries, defines a sequel as a "new theatrical motion picture in which the principal characters of the first theatrical motion picture participate in an entirely new and different story" (a prequel

resulting film to the producer, and thus unlike a playwright will not exercise any rights as a copyright owner of the actual film, the author must contractually secure such rights of subsequent involvement and/or payment.

The practice in the film industry of assigning the author's copyright interest has frustrated many screenwriters, who feel that because they often have little creative control after their screenplay or literary material has been acquired by a producer, their work is frequently compromised by Hollywood's sometimes notorious rewrite and polish process. The justification for such assignment is usually the substantial up front fees. Authors in countries with a more nascent film industry, where substantial writer fees are not standard, may have the opportunity to bargain for a more meaningful creative role and the reservation of an expanded package of rights.

Keep Your Copyrights!

Artists and scholars in the United States have become increasingly vocal about alternatives to the assignment and/or work for hire regime. A new website created by Columbia Law School, www.KeepYourCopyrights.org, encourages a more proactive attitude towards copyright management on the part of authors, and suggests strategies for authors to negotiate more favorable contract provisions, reserving or granting back to the author rights following the initial exploitation. In addition to sample contract clauses (with designations as to whether the particular provision is author-friendly, "could be worse" or "incredibly overreaching"), the website also offers links to other creator advocacy groups in the publishing, music, illustration, journalism and photography industries.

See www.KeepYourCopyrights.org

is included in this definition, the distinction being simply that the new motion picture takes place at a chronologically earlier point in time than the first motion picture). WRITERS GUILD OF AMERICA, BASIC AGREEMENT, Art. 16(A)(1)(c) (2004). A remake is the same core story and characters, but with a new spin or context, or sometimes simply with new actors and an updated script.

Major Provisions of Production and Acquisition Agreements

The Option

Agreements to acquire rights in a film, play or other literary property frequently include an option period. During the option period, although the producer has not definitively acquired the rights to the work, he or she will have a limited license to engage in certain developmental activities, such as fundraising and negotiating agreements with other key creative parties like the director or principal cast members. If the optioned work is a play, the producer may also have the right to produce a developmental or workshop production. During such option period, the author agrees not to license or sell the rights to any third party. The purpose of an option is to give assurance that the play or screenplay will not be shopped to other producers while the current producer is securing financing and developing the property. On the other hand, if at some point during the option period the producer decides to abandon the project, he or she is free to do so with no further obligation to the author other than what has been paid pursuant to the terms of the option.

A producer would be hard pressed to invest her own money, or to ask others to do so, if the producer cannot guarantee that a competing production will not appear on the market, thus decreasing demand and diminishing the likelihood of recouping the investment. For this reason, most producers will require – and authors are accustomed to giving – an option for an exclusive license or right to produce the film or play. Exclusivity is a key term in license agreements. It is a risk for the author because if the author is unhappy with the results of the producer's work, the author cannot license the rights to any other party (absent a breach that would allow the author to terminate the agreement; dissatisfaction without more, however, does not usually give rise to a claim for breach). In return for such risk, the author customarily receives higher compensation for an exclusive grant of rights than for a non-exclusive grant.

Typically, an option period will run anywhere between one and four years, structured as an initial period of one to two years that may be extended for an additional one to two years upon further payment to the author. Prior to the expiration of this period (including any extensions), in order for the producer's rights to continue, the option must be "exercised." An option is exercised upon the occurrence of a certain event. For a live stage property, this event is usually the first paid public performance of the play in a specified type of venue; the terms will state whether the option is exercisable, for example, only by a Broadway performance, or whether an off-Broadway performance will also suffice (Broadway performances being much more high profile from the author's point of view, and thus more desirable, but much more expensive from the producer's perspective, and thus riskier). In the film industry, the option is exercised by payment of an additional sum, called the "purchase price," to definitively acquire the rights necessary to produce and distribute the eventual film. The purchase price for a screenplay may be based on a percentage of the budget (usually between 2 – 4%, with a cap on the amount of the purchase price at a negotiated number), but may also simply be

a flat fee. If an option lapses, *i.e.* is not exercised, the agreement should provide that all rights revert free and clear to the author. An author should avoid an agreement that encumbers the property (*i.e.* grants the producer any financial participation in, or opportunity to produce, subsequent exploitations) even if the option was not exercised.



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An option is not a guarantee that the play or film will be produced. An author, however, may not wish to refrain from exploiting his or her rights in the optioned work unless the producer has serious intentions. Thus, the terms of an option for a live stage property typically contain “milestones” or “progress to production” requirements, such as entering into an agreement with the director or principal cast members, or producing a developmental or workshop production of the play. These milestones must occur within a specified timeframe, for example, by the end of the third year of a four year option period. If the producer has not complied with such milestone requirement, then the producer loses the ability to extend the option.

Unlike an option for a live stage play, the exercise of which requires a paid public performance and thus gives the author the benefit of a fully mounted production, exercise of an option in connection with a film agreement usually means simply that the producer has paid the purchase price to definitively acquire the rights. However, there is still no guarantee that the film will be produced. Some film agreements may include progress to production requirements similar to what is found in a standard live stage option, including a clause stating that failure to achieve such progress results in reversion of the rights to the author. Sometimes, because a film deal often involves a transfer of copyright ownership, once the option is exercised and the rights acquired, the author has neither the ability to compel production nor the opportunity to recapture the rights except under certain circumstances.³⁵ Because film industries in less developed countries may

³⁵ When the rights have been acquired but the producer has ceased development, the project may go into what is called “turnaround”, whereby the project is sold to a new producer and the first producer is

not have as powerful a representative as the various authors' guilds in the United States, an author should push for an agreement that does not allow a producer to acquire the rights permanently without some clear progress to production requirement, failing which, all rights should revert to the author.

Just as an option does not require the producer to produce the film or play, an option does not require that the producer make any extension payments. The essence of an option is as the name implies – it is at the producer's sole discretion to opt to produce the film or play, but there is no contractual obligation to do so. The producer may elect to let the option lapse, and in such event, similar to what happens when a producer fails to meet milestones or progress to production, all rights revert to the author. An author should not rely on receiving the full amount of the potential payments under an option agreement; the only amount that is guaranteed is the amount due up front and upon execution.

Scope of Rights Granted

At a minimum, a producer will need the right to develop, produce, distribute, advertise and promote the play or film. In general, the key provisions will set forth the producer's rights in specified territories, mediums of distribution and subsequent productions. A producer will typically seek a grant of rights that is as broad as possible, giving her the most opportunity to exploit the play or film (i.e. any time, any place, any medium) and thus maximize the chances of recouping the original investment. An author, however, may not wish to give such a broad grant of rights. If, for example, the initial exploitation is a success, the author may want to negotiate additional payment for subsequent exploitation in different mediums or territories. Conversely, if the initial exploitation is a flop, the author may want the opportunity to grant any subsequent rights to someone other than the initial producer.

Territory

Territory refers to the geographical region in which the producer can mount productions of the play or distribute the film. A live stage agreement typically grants rights in an initial territory; in the United States, a Broadway or so-called "first class" producer usually is granted a license for the United States and Canada.³⁶ Provided the play is produced in the initial territory, the producer typically has the option to acquire rights in other territories, subject to the obligation to make an additional payment to the author for each such territory in which the producer desires to acquire the rights. Frequently, these

reimbursed for the cost of development prior to sale. Although turnaround projects may end up being very successful (the films *Home Alone* and *E.T.* are frequently cited as projects that ended up in turnaround only to become huge hits), it can be frustrating for an author waiting to see his or her film produced to have no firm timeline for production. Authors who are members of the Writers Guild of America may also be able to recapture certain rights; such reacquisition right is part of what are called "separated rights". For more information, see WRITERS GUILD OF AMERICA, UNDERSTANDING SEPARATED RIGHTS (2000); *Addendum to Understanding Separated Rights* (2007), http://www.wga.org/subpage_writersresources.aspx?id=2466 (updating certain provisions of the earlier pamphlet publication).

³⁶ In the United States' not-for-profit theater sector, the territory is generally limited to a radius of between 50 to 100 miles of the city and/or county in which the particular theater is located.

payments are as high or higher than the option payment for the initial territory because the assumption is that if the play has been successful in its first iteration, remounting the production elsewhere is less risky and the playwright should benefit from the earlier success. It would be very unusual for an author to grant worldwide rights to a live stage producer for just a single option payment. Film agreements, however, typically do grant worldwide rights to the producer. In turn, the producer is likely to enter into agreements with distributors in various territories for exhibition and/or distribution of the film. Although payments by the distributor to the producer count towards the producer's "gross receipts" (the calculation of which determines if and when the author will receive contingent compensation, as discussed below), the author usually does not receive a specific payment in connection with the producer's territorial distribution deals.

Distribution

Distribution refers to the medium, or "channels," through which the film or play is exhibited or performed. In connection with live stage agreements, the grant of rights clause typically limits the producer's rights to a "live stage production on the speaking stage," thereby prohibiting the producer from exploiting the play through other media, notably audio-visual media.³⁷ In film agreements, the channels of distribution are specifically set out; for example, most agreements will allow theatrical (meaning movie houses) and/or direct-to-video distribution, and may also allow free television, cable television and internet distribution.

Overcoming Distribution Dilemmas

Finding distribution outlets has been an issue for many cultural entrepreneurs in regions like Africa, where the commercial infrastructure may not lend itself to distribution arrangements typical in US entertainment deals. In Ghana and Nigeria, for example, "video films" shot with ordinary VHS cameras allowed would-be filmmakers to circumvent high production and distribution barriers, spurring the development of an active and burgeoning video film industry. These films were frequently shot only based on a script outline, utilizing both professional and amateur actors, and screened in local venues. In Ghana, the success of the video filmmakers led a state-owned agency, then called Ghana Film Industry Corporation, to offer editing services and other forms of assistance to filmmakers and, eventually, give rise to nascent production networks and systems of distribution. Now, digital technology is making rapid inroads into the African film industry, making relatively sophisticated post-production editing available to those with personal computers and making the distribution of high quality copies much less cumbersome (though bringing also the increased risk of piracy).

³⁷ The producer is typically granted the right to advertise the play in audio-visual media, primarily television commercials and web clips, for a limited duration (usually between three to seven minutes) and, in the case of a musical play, to exploit the work in an audio-only format, namely, the cast album.

See Birgit Meyer, *Ghanaian Popular Cinema and the Magic in and of Film*, <http://www.africanfilmny.org/network/news/Fmeyer.html>; Kaine Agary, *The Distribution Front*, <http://www.africanfilmny.org/network/news/Aagary.html>.

Monies received by the producer in connection with these various distribution channels count as “gross receipts,” though it is not always the case that one hundred percent of the producer’s receipts will be included in such calculation. For example, one contentious issue in Hollywood in recent years was DVD income; typically, only twenty percent of the revenue to the producer from the sale of home video cassettes and disks would be credited as gross receipts and thus included in the author’s contingent compensation calculation. The subsequent DVD-buying boom of the last five years yielded a windfall of sorts for producers but left authors feeling that they got the short end of the deal because eighty percent of the income to the producer from such DVD sales was not shared with the author.³⁸ This illustrates that when negotiating channels of distribution for a film deal, an author will want to know whether and in what percentage the monies received from such various channels will count towards the definition of gross receipts. As discussed later, this is a key factor affecting the value of the author’s contingent compensation.



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³⁸ Ross Johnson, *Getting a Piece of a DVD Windfall*, N.Y. TIMES, December 13, 2004 at C1

Strategic Partnerships and Distribution Solutions

As the film industry in Africa has continued to mature, distribution deals are now being arranged between strategic partners. Film festivals have become an important opportunity for African filmmakers to expand their reach. In 2001, for example, the African Film Festival in New York reported an agreement reached between two distribution and production companies, Mainframe Productions, a production company headed by Nigerian cinematographer Tunde Kelani, and Media for Development International (MFDI), a 501(c)(3) organization based in the United States with sister organizations in Zimbabwe and Tanzania, to distribute each other's films in various parts of Africa. As Mr. Kelani summarized, "For us, this is the beginning of the true African cinema – where African filmmakers can interact by making their films available to audiences other than those in their own country."

See Birgit Meyer, *Ghanaian Popular Cinema and the Magic in and of Film*, <http://www.africanfilmny.org/network/news/Fmeyer.html>; Kaine Agary, *The Distribution Front*, <http://www.africanfilmny.org/network/news/Agary.html>.

Subsequent Productions

Producers are frequently interested in obtaining rights to subsequent productions and/or derivative works; if the initial play or film was successful, the opportunity to exploit or participate in other productions of, or works based on, the original can be very lucrative.

In the theater, because the playwright retains her copyright in the play, the producer cannot authorize subsequent productions of the play after the close of the producer's production (other than as may be expressly permitted in the grant of rights) nor can the producer authorize the creation of derivative works based on the play. Once the producer's rights expire, all that remains is the possibility of financial participation in future dispositions that the author, in her discretion, may choose to make. In the context of a Broadway production, the producer's participation in the author's income from the disposition of so-called "subsidiary rights" is frequently very straightforward. Provided the particular production runs a minimum of sixty-four performances, the Approved Production Contract ("APC") promulgated by the Dramatists Guild sets out both the duration and amount of the producer's participation in income from certain defined categories of subsidiary rights, including media productions, stock and ancillary performances, amateur performances, revival performances and commercial use products such as branded t-shirts, mugs and hats. The duration and percentage of the producer's participation varies depending on the nature of the right and which of several designated "alternatives" the producer selects from three choices set out in the APC, but the percentage ranges from twenty to fifty percent, and the duration from five years to perpetuity.

Outside the Broadway context, many live stage producers have little or no participation in subsequent productions of the play, although some of the major non-profit producing institutions in New York City do negotiate for participation in the author's income from subsidiary rights participation, albeit for a more limited period of years and a lesser percentage than a Broadway producer. Outside the New York theatre industry, the practice is less common. If a non-profit regional theater has played a particularly significant role in the development of a new play – perhaps producing a workshop or premiere of the play – the theater may ask for a limited participation in the box office receipts of subsequent live stage productions, averaging from one to two percent of such receipts for productions occurring within the next two to five years, or for a very small percentage (usually no more than five percent) from the proceeds of subsidiary rights dispositions.

In the film industry, “subsequent productions” usually means sequels, prequels and remakes of the initial film. An author should always carefully review whether the contract is a “one picture deal” or if, in the alternative, the author is granting the producer the right to produce multiple pictures derived from the initial film. If the latter, the author will want to ensure that additional compensation is paid in connection with each such subsequent motion picture or audio-visual property (the subsequent production may not always be another feature-length film; sometimes, for example, a producer may have the right to create a television series based on the film). In many instances, the author will also want the opportunity to provide services in connection with the subsequent production, such as a contractual provision that allows the author the first opportunity to write the screenplay.

Particularly in an untested author-producer relationship, granting rights to make subsequent films can be risky; if the author is ultimately dissatisfied with the initial film, she may be unable to seek a new deal for sequels or remakes with a new producer. Or, the author may be enthusiastic about pursuing a subsequent production, but the producer is unable to secure financing or unwilling to pursue the project at that time, and thus the rights will lie fallow. If a producer is particularly insistent on acquiring rights to do a sequel, prequel or remake, the author can minimize the risk by requiring that after a specified period of time, if principal photography has not commenced in connection with a sequel or remake, such rights revert to the author.

Rights of First Refusal/Rights of First Negotiation

In many instances, the specific financial and creative details applicable to subsequent productions are not negotiated at the same time as terms for the initial production. Frequently, the producer is instead given a “right of first negotiation” and/or a “right of first refusal” (called a “ROFN” or a “ROFR,” respectively). In the live stage context, if the producer has particular expertise in both film and theater, the producer may ask for a refusal or negotiation right in connection with the right to adapt the play into a film, television program or other audio-visual production. In the film industry, rights to make

sequels, prequels and remakes are frequently the subject of a refusal or negotiation right.³⁹

If the producer has a right of first negotiation, it means that prior to disposition of the subject right (such as the making of a sequel film), the author must negotiate in good faith to reach terms on which the producer may be granted such right. If the author and the producer cannot agree on terms, or if the producer declines the opportunity to negotiate, the author may dispose of the right to a third party. A right of first refusal, on the other hand, will give the producer the opportunity to meet the terms of a third party offer for disposition of the subject right, *i.e.* the producer will have the first opportunity to “refuse” to acquire the particular right once a third party has made an offer. A ROFR is more favorable to the producer than a ROFN, primarily because so long as the producer agrees to match or improve upon (depending on the requirements of the ROFR) the third party offer, the author may not dispose of the right to such third party. If the producer has only a ROFN and the author and producer fail to reach an agreement, the author may go seek third party deals without having to go back to the producer. ROFRs and ROFNs can also be coupled with each other, so that the producer will have the opportunity both to negotiate for the right initially and to match any third party offer if the producer and the author fail to reach agreement in that initial negotiation.



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From the author’s perspective, it is preferable not to grant either a ROFR or a ROFN. Both are considered an encumbrance on the property, limiting the ability of the author to make a subsequent disposition. However, if a producer is insistent on acquiring rights in subsequent productions, ROFRs and ROFNs can be a convenient way for the parties to

³⁹ Although outside the focus of this analysis, ROFRs and ROFNs are also frequently used by actors, writers and directors to secure an opportunity to perform services for subsequent productions.

agree that a producer will have the opportunity to acquire rights in connection with a particular subsequent production while still allowing the author to seek the best possible deal at the time negotiations commence. Ostensibly, the new deal will reflect the performance of the prior work, so the author will be in a better bargaining position to translate previous success into improved terms.

Duration of Rights

Most contracts for a live stage production grant rights for a limited time. For example, in the not-for-profit theater context, the playwright will give a particular theater company the right to produce the play for a negotiated period of time (which may run from one week to several months or more). Productions on Broadway, however, and many touring productions that traverse the United States and Canada, use a model based on what are called “continuous production rights.” So long as the producer’s production of the play is running,⁴⁰ the producer will retain his or her rights, subject to the obligation to pay royalties to the playwright. This means that the producer may retain the rights for many years (the current Broadway production of *The Phantom of the Opera* opened January 26, 1988 and has run to date for over 8,000 performances). During the period that the producer controls the rights, there may be restrictions on the playwright’s ability to license the play to other live stage producers. In addition, there is usually what is called a “holdback” on the playwright’s ability to authorize the creation of certain derivative works, such as the making of a movie based on the play (in most instances, the holdback will not endure for the full duration of the producer’s rights to produce the play if such period extends longer than four or five years).⁴¹

The different copyright ownership model in the film industry means that in several respects, the duration of certain of the producer’s rights is coterminous with the duration of the copyright in the film; the film producer’s rights do not end if, for example, the film is no longer exhibited in movie houses. Having acquired outright the author’s copyright in and to the underlying screenplay, the producer also typically controls the copyright in the resulting motion picture. The right to distribute or authorize others to distribute the initial film generally does not revert back to the author. However, even if an author cannot recapture rights in the original screenplay,⁴² an author can seek to limit the time period that certain derivative rights are available to the producer. For example, the producer’s option to produce a sequel may have to be exercised within a specified number of years after release of the initial motion picture; a producer’s right of first refusal may be limited only to dispositions by the author occurring within a specified number of years following release of the initial motion picture.

⁴⁰ In such agreements granting continuous production rights, the producer is allowed to take a hiatus of no more than four and a half months. This is to allow the producer to do things like change venues or, in some cases, shut the production down for additional rehearsals or revisions, without triggering a loss of rights by the producer.

⁴¹ A holdback is a provision in a license agreement where the author retains a particular right but agrees not to dispose of such right for a specified period of time. Holdbacks allow a producer to maximize return from interest in the initial production before facing a competitive derivative of the play or film.

⁴² *But see* note 36, *supra*, regarding separated rights.

Compensation Structure

The option payment previously discussed is one aspect of the compensation structure in both theater and film deals. But the other common element of payment to authors is contingent compensation, frequently also called a “royalty.” Contingent compensation to the author is structured as a percentage of the revenue received by the producer from exploitation of the play or film. There are several points to keep in mind when negotiating a contingent compensation arrangement. The first is to clearly define what “pot” of money or income stream will be the basis for the royalty calculation. The second is to determine what amounts, if any, may be deducted “off the top” of such income stream prior to calculating the amount due to the participating author. Third and finally, it is important that the author receive a right to audit – essentially a right to inspect and copy – the books and records related to the film.

In a typical live stage deal, prior to the producer’s recoupment of the initial capitalization, the author will receive between four and one-half and five percent (depending on whether the play is a musical play or a so-called “straight” play) of the gross weekly box office receipts (“GWBOR”);⁴³ essentially, this means that the author gets a percentage of the ticket income from performances of the play. Despite being called “gross” weekly box office receipts, there are certain standard deductions that producers are permitted to take off the top, including such things as credit card fees, group sales commissions, and taxes. In some instances, the author’s royalty will be calculated on the amount of money remaining after the producer has deducted what are called “weekly running expenses” (meaning the cost to the producer of keeping the play running for one week, including cast and crew salaries, theater rent and other operating expenses); this remaining amount is frequently referred to as the “net operating profits.” This is an acceptable method of calculating royalties, but because the “pot” of money in which the author shares is smaller, it is important to negotiate a larger percentage participation for the author.⁴⁴ In addition, in many instances, the author can negotiate a so-called “bump” in the percentage royalty paid after the producer has recouped the cost of the initial capitalization; in such instances, the royalty for a musical usually increases to six percent of GWBOR, and the royalty for a play usually increases to ten percent of GWBOR.

In the film industry, the key bargaining point is whether the royalty will be paid on the “gross” or “net” box office receipts. Getting paid “on the gross” means that the author will receive a percent of every dollar that is received by the producer (calculated based on the income streams to the producer from various distribution channels and ancillary exploitations),⁴⁵ even if the producer has not yet recouped the cost of the initial

⁴³ In connection with a musical play, the royalty is split between the book, music and lyrics, with each “element” typically receiving a royalty of between 1.5% - 2%, adding up to between 4.5% - 6% in the aggregate.

⁴⁴ For a typical Broadway musical, weekly running expenses can average between \$400,000 and \$500,000, against weekly box office receipts that range from \$700,000 to just north of \$1,000,000. In the Broadway standard deal based on net profits (also called a “royalty pool” deal), an author typically receives no less than 15.56% of the net operating profits.

⁴⁵ There are many variables in this calculation, including provisions setting forth at what “level” the income is attributed to the producer. For example, the “gross receipts” typically do not include all box office

production. So-called “first dollar” participation is usually reserved for star directors and actors, but screenwriters, increasingly frustrated with complicated definitions of net profits that rarely yield significant participation, are exploring new deal structures that include paying the screenwriter’s royalty on the gross.⁴⁶ If an author only receives a percentage of the net profits, the producer will be allowed to recoup production, distribution, advertising and publicity and other miscellaneous costs prior to sharing any of the proceeds with the author. Definitions of “net profits” in the film industry are widely criticized for dense legal drafting and are subject to almost invariable suspicion of a producer-friendly slant.

Fee for Service

Although contingent compensation in some form or another is nearly ubiquitous in US deals, this is not the case worldwide. As Mildred Okwo, a Nigerian writer, director and producer (and Los Angeles-based attorney) noted, “Nollywood is a tough arena for producers. Nigerians want their money and they want it now. There is nothing like backend deals [i.e. contingent compensation] so as a producer, you have to have real cash to get your movie done.”

Interview with Mildred Okwo, <http://www.nathanielturner.com/mildredokwouchenworah.htm>

An author should contractually require that a producer keep accurate books and records of both income and expenses of the play or film. It is also important that the author be entitled to inspect and copy these books and records. This is called an audit right, and it is a key enforcement tool for the author. Omission of these clauses in an agreement means the author may be without recourse to prove that she has been underpaid. Producers are sensitive to audit rights, however, and will typically require some constraints on the author’s ability to exercise this right; these include limitations on the number of times per year the books may be audited (once per year is usually acceptable to both sides) as well as the number of years of financial information the producer must provide (two to three years is common for this look back period). In most instances, the audit is undertaken at the author’s expense. However, it is also possible to include a term requiring the producer to cover the cost of the audit if a discrepancy of greater than a specified percentage (usually between three and five percent) in the amount due to the author is discovered during the audit.

income collected by the movie house owner, but rather only the portion of such box office income that is actually paid to the producer.

⁴⁶Michael Fleming, *Fox Scribe Tribe*, Daily VARIETY, Aug. 15, 2007 at News 1.



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Contingent compensation is a flexible and popular method of paying authors in the film and theater industries. It allows the producer to minimize the risk of upfront investment by postponing certain compensation to the author until the time the film or play begins to generate income. For a financially successful project, contingent compensation can allow the author to share in a fantastic and long-running upside. As UNESCO's *Keys to a Successful Cultural Enterprise* report noted, "[intellectual property rights] make it possible for artists to earn money in a secure way, in a number of different ways and for a longer period of time...[and thus] have great investment return potential."⁴⁷ Rather than receive a one-time payment (which may not be reflective of the actual future success of the play or film), the author will continue to receive income so long as the play or film generates revenue. However,

given the economic uncertainty of many creative endeavors, an author should not rely solely on contingent compensation for remuneration; option payments, minimum guarantees and healthy purchase prices are a vital part of ensuring fair compensation for authors, who are frequently in a more vulnerable financial position and sometimes so eager to see their work produced that they do not drive hard bargains at the negotiating table.

⁴⁷ Kamara, *supra* note 20, at 30.

Star Power Protest

A group of marketers and producers in Nigeria took an unusual approach to containing film production costs when in 2004, the group placed a twelve month ban on approximately ten actors and a director as a result of what were felt to be excessive fee demands, lack of respect for the “producers, directors and marketers who made them in the first place” and out of concern that other up and coming artists were not receiving enough opportunity to advance. A newspaper article reporting the ban noted that the marketers wished to peg artist fees at 500,000 NGN [approximately \$4,200 USD] so that “movie producers can afford to pay other members of a production crew like [the] make-up artiste, costumiers, set designers and others.”

See Seni Durojaiye, *Banned RMD, Genevieve, Omotola, Ramsey, Jim Iyke and six others*, Daily Independent Online, <http://www.odili.net/news/sources/2004/Oct/9/17.html>

Representations and Warranties; Indemnification

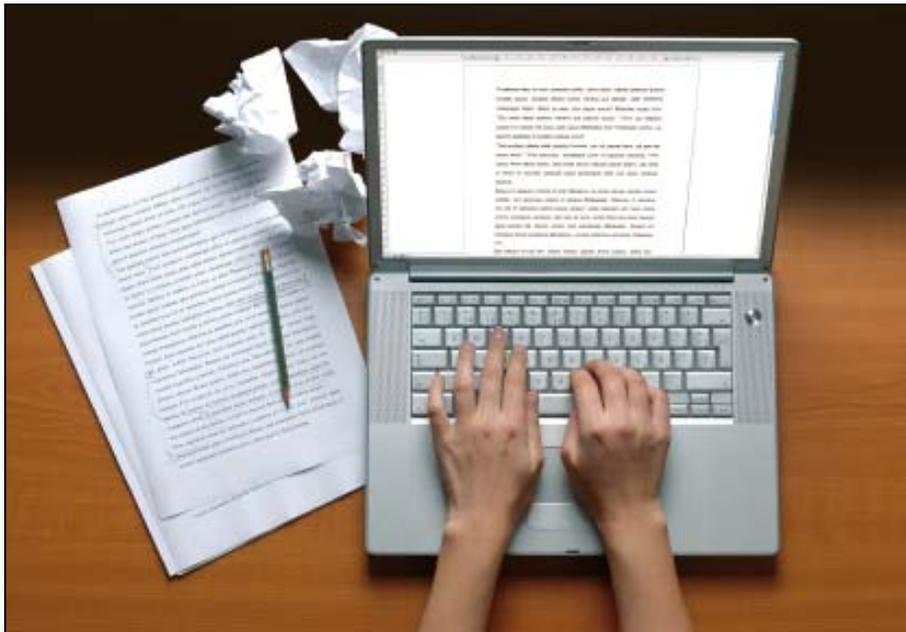
Authors are typically required to make representations and warranties regarding chain of title to the particular creative property at issue. The producer needs assurances that the author owns or controls the property and has not made any conflicting grants. The author should be able to state the she has all the necessary rights to grant for purposes of producing the play or film, and that no payments need be made to, or permission sought from, third parties. Additionally, the author will typically be asked to represent and warrant that there are no pending or threatened claims challenging the validity of the author’s rights in and to the work.

For the most part, these representations are standard and expected. However, chain of title representations may be complicated when the work in question is based on material from the public domain or, perhaps particularly relevant in developing countries, based on stories and events that are part of oral tradition and/or presented as factual histories of an indigenous population. In some cases, this can be addressed by simply carving out from the author’s representations and warranties any material that is in the public domain. The producer must understand that any third party is free to use and adapt such material, and the risk of competing works is one that must be assumed if a work is based primarily on public domain material.

In addition, many works in developing economies may be created collaboratively by directors, actors and producers (sometimes with one individual filling multiple roles), without clarifying the status of each such participant’s respective intellectual property rights. Authors and producers who are asked to make representations and warranties about chain of title should be attuned to the possibility that, absent written agreements

setting forth the extent of an individual’s intellectual property interest, a participant may emerge with a claim of copyright ownership.⁴⁸

Ensuring appropriate carve outs from the representations and warranties is particularly important because if the author’s representations and warranties are found to be untrue, or “breached,” the producer is likely to seek indemnification from the author. This means, for example, the author can be held accountable for monetary damages suffered by the producer as a result of claims by third parties alleging copyright infringement. Significantly, in many instances, the recovery by the producer will also include legal fees, which can be a sizeable figure on top of damages. The author can bargain for certain points that make the obligation less onerous; for example requiring that the claim be “finally adjudicated” before the producer can seek indemnification. This not only allows the author more time to accrue funds to satisfy the obligation but also requires the dispute be firmly settled. In addition, the author can require that the terms of any settlement by the producer of a claim alleging copyright infringement require consent of the author, thus avoiding a situation in which the producer either admits liability or agrees to a high settlement amount simply to put an end to the dispute, assuming that in any event it is the author who must pay pursuant to the indemnification clause. Finally, the author can seek to limit the indemnification obligation to the amounts paid under the agreement between the producer and the author.



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⁴⁸ *But see* *Aalmuhammad v. Lee*, 202 F.3d 1227 (9th Cir. 2000) (concluding that plaintiff consultant engaged in connection with the film *Malcolm X* had made independently copyrightable contributions, but was nevertheless not an “author” of the motion picture as a joint work, noting that if such contribution were to give rise to joint authorship, “Spike Lee could not consult a scholarly Muslim to make a movie about a religious conversion to Islam, and the arts would be poorer for that.”).

Although most production contracts drafted by a producer's representative do not contain indemnification of the author by the producer, the author should always seek such protection. The standard turn of phrase is that the author should be indemnified against any claims "arising out of or caused by producer's production" of the particular film or play at issue.

Moral Rights and Creative Control

Much of what has been reviewed thus far relates to economic rights of authors and producers. For many authors, however, creative control is a critical element of the producing relationship. Creative control has several facets, and may include giving the author approval of key creative team and cast members, as well as approval of changes to the script of the play or screenplay. Disputes over approvals can be among the most bitter and hard-fought; the link between artistic creation and identity comes to the forefront in creative control.

Creative control is related to, but not a perfect overlap with, what are called "moral rights" in copyright law circles, namely, rights of attribution and integrity. Article 6*bis* of the Berne Convention requires that, independent of economic rights, the author shall have "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." The United States, in the Berne Convention Implementation Act of 1988, took the position that, viewed as a whole, common law rights of privacy and publicity, unfair competition, defamation and principles of contract interpretation generally served to provide protection for the author comparable to that accorded under Article 6*bis*, and thus expressly did not adopt this particular provision in the implementation legislation.⁴⁹ The practical result is that the default status in the United States is that an author must secure by contract any creative approvals she feels are necessary to protect the integrity of the work, and must also negotiate whether and in what form she will receive credit.

From a negotiating perspective, credit is theoretically less controversial than creative approvals.⁵⁰ It is standard in film and theater for the author of the play or screenplay to receive credit, though there will be negotiation over the size, placement and prominence of the credit. In addition, many authors negotiate the frequency with which the credit appears; for example, whether the credit will appear in all paid advertisements. The key issues in credit negotiations tend to be tying the size and placement of the credit to the size of the title and to credit accorded to other actors or individuals associated with the play or film.

⁴⁹ Congress later enacted the Visual Artists Rights Act (VARA), providing express rights of attribution and integrity to works of visual art in certain circumstances. VARA is of limited application generally speaking, and is of little consequence to the issues discussed herein.

⁵⁰ Although it is standard practice for a writer to receive credit, the position and prominence of that credit, particularly in relationship to the director with the rise of the so-called "possessory" credit in film, has been the source of controversy.

Many author agreements in the theatre require that no name shall be larger than that of the authors and that, with few exceptions, no other name shall appear above the title of the play. In film, on the other hand, a writer is rarely given above the title credit (which usually goes to directors and star actors). A film author will negotiate where in the opening and end credit sequences of the film his or her credit appears and whether or not the credit will appear on a “separate card” (meaning no other credits shall appear on the screen other than the writer’s credit). Trickier issues arise when an author seeks to disclaim credit. Because authors in the film industry frequently do not have approval over changes to the script after the producer acquires the rights, an author may find herself credited on a film with which she no longer desires to be associated.



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The Writers Guild of America has a provision by which a writer may receive credit under a pseudonym. In the absence of an author availing herself of this right, particularly if the producer of the film feels that the author’s name is an important marketing tool, the author may have a difficult time preventing attribution of the film.⁵¹

With respect to creative approvals, again we see the effect of the different copyright ownership models. Playwrights in the theater typically receive approval (or at a minimum mutual approval with the producer) of cast members, directors, designers and choreographers. Significantly, changes to the script may be made only with the author’s approval and, if so approved, will be owned by the author going forward. In film, however, the outright acquisition of the material means that the producer, or subsequent authors hired by the producer, are free to revise or change the script, even make radical departures from the original. This is reflected in a typical grant clause in an acquisition

⁵¹ Stephen King battled New Line Cinema, among other producers and distributors, over the distribution of the film *Lawnmower Man*, which loosely incorporated elements of King’s short story of the same name. When King sued to prevent distribution of the film under the title “Stephen King’s *Lawnmower Man*”, claiming that the so-called “possessory credit” misled consumers into thinking the story told by the film was in fact King’s story, the defendants’ lax compliance with the settlement decree requiring removal of the possessory credit prompted two contempt of court orders (though the second was later vacated for being based entirely on the first such order). See *King v. Innovation Books*, 976 F.2d 824 (2d Cir. 1994); *King v. Allied Vision*, 65 F.3d 1051 (2d Cir. 1995).

agreement, which customarily includes language permitting the producer to “add to, interpolate in and subtract or omit from the work, plot, subplots, themes, situations, action, titles, songs, music and lyrics, dialogue and choreography.”

Not surprisingly, many such acquisition agreements also require that the author expressly waive any claim based on moral rights, including any claims for defamation or mutilation. Although in some cases a film author may also approve or, more frequently, “consult” (which gives the author input, but not final say) on decisions regarding creative staff hires and the development of the picture, the broad sweep of typical acquisition language gives the author little recourse if she is unhappy with the resulting film.

In many instances, because the author does not own either the screenplay or the resulting film and has no ability to prevent distribution, there is no further opportunity to seek a more satisfactory film version. Even if a holdback and/or any right of the first producer in connection with sequels or remakes would not prevent the author of any underlying work from trying to license a new version, subsequent producers may be concerned that the market for a new work would be saturated or damaged as a result of the first film, at least until a number of years have passed.

Moral rights and creative control can have particular sensitivity in the context of intangible cultural heritage. Even though a film or play may be adapted from narratives or performance art that is arguably in the public domain, there may still be a strong identification with the underlying work within a particular indigenous community. As Lenore Keeshig-Tobias noted in an essay on cultural appropriation, upbraiding contemporary Canadian filmmakers who based movies on traditional narratives without involvement of native people in the creative aspects of the film, “[s]tories are power. They reflect the deepest, the most intimate perceptions, relationships and attitudes of a people. Stories show how a people, a culture, thinks.”⁵²

Creative Commons, which has promulgated the popular “some rights reserved” license, initially began developing a cultural heritage license based on the idea that such a license could strike a balance between wholesale appropriation and a restrictive licensing scheme. The project has since been abandoned, but it sparked some early commentary calling for terms requiring a licensee to maintain the integrity of the original work, including a prohibition on changes that are “inconsistent with the values of the culture from which it came,” and to identify, whenever possible, “the complete cultural origins” of the licensed work.⁵³

⁵² Lenore Keeshig-Tobias, *Stop Stealing Native Stories*, BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 71 (Rutgers University Press 1997).

⁵³ Eric C. Kansa, Jason Schultz and Ahrash N. Bissell, *Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a “Some Rights Reserved” Model*, 12 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 285 (Aug. 2005).

Consultation Protocols

The Australian Film Commission solicited insight from filmmakers who worked with indigenous content and indigenous communities, seeking to promote protocols in light of the increasing popularity of creating films drawing upon “[o]ral stories, traditional knowledge, images, photographs, language words and histories.” In particular, the Commission recommended that when making a film based on “an Indigenous topic,” a filmmaker should involve indigenous people in the project at various stages in the process, including consultation regarding script development, dramatization of real-life events, adaptations of existing material, pre-production and post-production, and editing.

See http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/afc_protocol_filmmakers.pdf

There is some disconnect between requiring preservation of the integrity of the original work and at the same time encouraging contemporary commentary on cultural heritage and mores. “Integrity” may have a slippery meaning in a world where evolving ideas about the role of women, education and tolerance may be at odds with what some consider traditional values entwined in a cultural narrative. On balance, though, the concern for many is as Professor Sunder has expressed, in a paraphrase of Salman Rushdie, that “[p]ower derives from the ability to shape and influence culture.”⁵⁴ To the extent that producers profit from the distribution of works based on intangible cultural heritage without benefit or credit to, and commentary from, the indigenous people with whom such work originates, there is a sense not only of economic injustice, but psychological and social as well.

Conclusion

The encouragement of a financially viable and culturally significant performing arts and entertainment sector is an important element of multi-lateral, regional and national development agendas. The collective benefits are paralleled by the individual satisfaction and inspiration unique to creative pursuits. As global cooperation in the entertainment and copyright industries evolves, producers, authors and other cultural entrepreneurs can prepare themselves to strategically negotiate partnerships that will offer tangible economic benefits to the surrounding community while sustaining and encouraging the artistic spirit.

⁵⁴ Sunder, *supra* note 21, at 267.