



WORLD FILM SALES AGREEMENTS FOR PRODUCERS

Workshop - Vilnius, October 11-12 , 2017

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MMP are quite often requested to create events and workshops outside of Mannheim, especially involving start-up producers.

In this case a workshop on approaches for Producers to World Film Sales Agreements took place in Vilnius at the invitation of Audiovisual works copyright association AVAKA.

Below is a summary of the event, led by Xavier Henry-Rashid – World Sales Agent, Film Republic, London, and Julek Kedzierski, Coordinator MMP.

SUMMARY

The ideal of a workshop on sales agreements for Producers would be to leave participants understanding which parts of a pending international film sales agreement can be changed, which parts can be improved, and – hardest of all – which parts can be used in negotiation – a give and take where the Sales Agent usually has the upper hand simply due to greater everyday proximity to the matters in hand.

Recent checks in 2017 shows that many Sales Agents will offer for a (smaller) film but are prepared to walk away from a more serious negotiation about the agreement they are sending the producer, claiming it would take too much time and effort to argue.

It is always a fine line what to give and what to hold out for in each case, and, failing the availability or funding for an entertainment lawyer, to reach out for experience wherever it might be available.

The Vilnius World Film Sales Agreement workshop covered the points below in a model agreement (fused out of 3 contracts) in some detail – as we summarize here and always remembering that no list is ever perfect and we were not there to write an encyclopaedia!

RELATIONSHIP BETWEEN PRINCIPAL (Rights-owner, Producer) AND AGENT:

Please ask yourself the following:

Is either Party a private person instead of a registered company?

Where are they registered – and is that in line with the national law under which the Agreement is being made?

Who owns each contracting company? Or is it part of another set of companies? If the latter, make sure all sales deals are made at arm's length. While you might want to be able to cancel the agreement if the opposite company is sold or the principals change – when dealing with smaller companies that can make sense for both sides.

Some agreements prepared by Sales Agents might mention 2 equal

partner companies in 2 countries as “Agent” – you should make sure you either reduce this to one or that a lawyer covers all possible negatives ensuing from such a structure in the agreement for you. (Also see “Co-productions” below.)

THE TITLE AND LENGTH (VERSION) OF THE FILM

Film titles can be and should be checked for their presence on the international market – they are not often copyrighted. In any case the Sales Agent will want to have the right to change the title and to pass on that right to sub-distributors in different languages and territories.

The length of the film being sold: the length should be mentioned exactly, remembering that - depending on the media involved - film lengths might differ.

There is also the question of individual countries' legal attitudes – it can sometimes be argued in court that a certain length given in an Agreement as binding does not cover director cuts, TV versions, etc. and that those are subject to separate sales agreements and vice versa – so the role of the length of a work is better put exactly. Thus it should be agreed as to which versions, present and future (re-makes) are in/excluded and under what conditions.

It is not total nonsense to register a work in the US – it doesn't cost very much and helps define the work. The detail included in documentation for local rights societies can also play a positive role.



PRODUCTION DETAIL

If the agreement is a pre-sale, such points as budget detail, confirmed actor and key crew participation, financing in place, etc become critical, especially for Co-productions - which by their nature double or triple the risks for participating producers and agents.

The Nationality of the film is also critical – make sure the Agent has a clear idea which Nationalities are involved (in Co-production). This will influence such factors as access to promotion and distribution support, etc. A good Agent will know and help show a “fresh” producer the ropes, especially if the work is fortunate enough to land at one of the dozen top festivals in the world.

DEFINITIONS

These are normally necessary quite simply for reasons of clarity. What exactly are the different types of Agent costs & when are they allowable, what is the exact term of the agreement = when it starts exactly and when it finishes, what exceptions are there? This section can and should be added to when an agreement is being formulated. Always remember the person you have been talking to might not be there the next day, and build your more specific definitions around that concept as well as knowing that you understand what is formulated.

The Agreement should also carry a set of Rights Definitions that are agreeable to both Parties covering the rights being granted by law. The Sales Agent should provide these, and they should be listed along with the grant of “all rights known in the present and in the future”. Further,

definitions should clearly cover all aspects of “gross”, “net” and all “other receipts”, as well as all forms of income (including “festival income”, etc).

A term not included in the definitions might be defined otherwise by local law.



TERM

There are various periods considered positive for a World Sales Agreement. Around 2 years might be enough for an agreement primarily covering festivals or specific multi-territory deals (such as Netflix). 5 years is minimum standard - then 7 or 10 years, the latter especially when larger deals are suspected. Agents will prefer open-end agreements that allow them to extend the term in annual increments on non-recoupment of costs – as long as the agent shows some effort, especially in later years, and the conditions stay fair, this is not unreasonable, but should be capped. Larger territory deals may extend to longer periods of 10 to 15 years or longer (U.S. 25 years).

Whatever the term agreed, all underlying rights and copyrights have to be cleared for, usually, somewhat longer than the whole period and normally world-wide. (This might mean some changes – e.g. Olympic

TV transmissions are NOT recommended cheap easy clearing.)

A term will normally start on signature with accepted delivery within e.g. 30 calendar days (if working days please make sure they are local). The term start will move forward until full agreed delivery has been accepted (such acceptance itself to be within a period such as 20 local working days.)

Pity the sales agent who takes on the risk, and works on and loses a deal (and market position) because the producer has not been totally honest about rights clearances! (Famous last words: “Oh I’ll do that when its needed...” “Just done it”... “the cheque’s in the mail...”)

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TERRITORY

Usually the world excluding the producer*s home territory. Both parties make sure the interests of any Co-producers are ex/included. For a Sales Agent clarity is important between Co-producers as to what happens with deals covering multiple territories (one example is HBO CE where one of the Co-producer owns all rights in their HBO territory. Other markets might cover certain rights covering Asia or even world-wide – such as Netflix).

You also need to cover Territories that do not exist yet, and who can tell if a deal covering rights for the Palestinian Territory will stay legal in Israel? (Catalonia and Kurdistan certainly spring to mind).

MINIMUM GUARANTEES

These depend on the film and its considered prospects, and will reflect the conditions of cost recoupment and their caps (see below), as well as the immediate history of the film (positive primary festival exposure, offers on the table, etc)

Considering Sales Agents do invest in a title to keep the sales process going, on smaller films it is often fair to offer no guarantee at all. If there is provable short term market interest that situation can change, and, with the right exposure (e.g. top festivals), it can change very quickly.

Also, It is unrealistic to expect Sales Agents to cash-flow an MG at development or script stage on a project that does not have pre-sales value (first feature, art house, small foreign language title) when an equivalent MG could be spend on a near-completed project by a known auteur.

Some Sales Agents are also able to invest significantly in the post production of a film (via an MG for larger films).

Depending on the film's origin, it is possible there are state or continental (e.g. European) subsidies the Agent can tap into. These

include in some cases (rather small) minimum guarantee support, which will pass back into the sales deal if conditions are met.

But if your film IS in e.g. Un Certain Regard that nearly always means a lot on the French market. Distributors and Sales Agents will crowd in and obviously minimum guarantees offered will reflect that. Knowing what to do there will be critical for the producer, and homework done and alliances made on the marketplace will pay out at such moments. Playing then with the idea that international



sales is easy and can be done without a Sales Agent is dangerous to say the least without an experienced top entertainment lawyer or U.S-type Film Agent at your side (the expense for either would be pretty high).

On the other hand some festivals (eg: Sundance, Toronto, SXSW) have automatic deals offered by Netflix/Amazon (circa 150K) which can be very attractive for small films (they can represent 2-3x the average sales value).

In any case advances, and costs, have to be recouped and how that recoupment takes place will also depend on agreed recoupable cost and commission structure for each deal.

SALES AND AGENT OBLIGATIONS

Sales should always be at arm's length, which also excludes sales under market value, sales within the same set of companies, companies owned by relatives, etc., without previous written permission from producer.

Sales packages including the Film should price the film at no lower value than the package (& market) average.

Outright sales need to be to territories or media according to standard industry practise.

Where agreed, Agent shall obtain Producer deal approval in a timely fashion, such approval not to be unreasonably withheld. During key markets such as Berlinale or Cannes, this approval may be limited to only a few hours (where deals are time sensitive) – or deals may be made without pre-approval allowing the minimum sales estimates have been met for the territory.



COMMISSIONS

Commissions levels in distribution divide into theatrical & non-theatrical, tv, video/Dvd at one level, VOD can be slightly higher and festival screening income highest. (A theoretical example: 25%, 35% and 50%)

Commissions in sales can vary, on average, between 15-25%. It's worth remembering that a low commission for the seller will result in less incentive for the agent to work on the film long-term and especially beyond the first year, when sales become more difficult.

Agreement as to the various other incomes (e.g. various types of festival award for director, best film, awards granted in Co-producer territories) or by supra-national funding entities such as Eurimages needs to be worked out to avoid possible squabbles later on.

There is also the question of which incomes provide commissions from gross, and which from net.

With Festivals, the Agent will insist on exclusivity, but of course a good Agent will exploit the producer's previous contacts and any build up, as well as his/her own. Here give and take is needed – especially in the question of festival representation – what happens to the agent's commission/expenses when a festival invites the director but because of that won't pay a screening fee? Such positions can be dealt with constructively for both sides.

In more recent times (2015-17) some sellers are asking for 50% commission in exchange for zero expenses. This means 50% from the first penny (a 50% 'corridor'). To pros and cons of this can be debated.



EXPENSES

Often a sore point for both sides. Reasonable caps for publicity and promotion can and should be set. The more relevant the costs (recognizable director and/or actors, “hot” subject, etc), the more point to the Agent spending more money correctly.

But where are expenses attributable when Agent wants a different trailer to the one provided by Producer? The Agent will want to have such matters stated clearly in their favour – and, if the relationship was concretized at rough cut stage (as is normally recommended) such questions should be easily solvable.

Cap amounts will also depend on the role of office backup (often non-chargeable) and how expenses are allocated – e.g. individually attributable festival expenses for a film, general marketing expenses (stand costs, screenings, promo material etc., e.g. divided by number of films being presented. These should be listed exactly.

The Agent will want to avoid crossing “promotional” and “marketing” expenses – so separate caps will be needed, once workable parameters are set.

Marketing and other professional subsidies can normally be claimed by and for Agent free of any recoupment obligations.

But please think - if average expenses are capped at 20- 25K for films with 250K income value, what should a cap be for films with 50K income value (for example, small Baltic first features)? A proportional campaign should be reasonable, starting with the question does your film need 4-5 market screenings or will an optimal 2 be really enough?



CROSS-COLLATERALIZATION OF COSTS

If the Agent sets up different sets of costs (recoupable advance, festival costs, marketing, further promotional expenses) it is up to each individual case which costs will be cross-collateralized and which won't.

REPORTING & PAYMENT, AUDITING

Various funding sources may demand conscientious reporting from the producer to fulfil obligations, as well as the right to audit. Sales Agent has to agree to respect this, as well as reporting in a timely manner – often a headache with Co-productions.

Reporting should at least be semi-annual for the first two years and annual after that, and should include all sales fully collected by Agent

set against costs including the Agent's commissions, deductible costs as agreed and any local taxes.

Payment will always be on presentation of invoice. If there are Co-producers and the Sales Agency is of suitable format, disbursement among Co-producers can be made by the Agent directly on suitable authorization (thus avoiding another set of potential hassles). It is useful to both sides to have text covering destination of funds in case of changes such as new ownership, company name changes, etc.

Auditing should fit parameters set by any relevant funders (in Europe e.g. Eurimages). It is standard that if more than 5% negative divergence is found, then Agent will pay all costs of the audit. Items should include all income and income sources, and provable costs, unless otherwise agreed.

Both Parties must be prepared to confer constructively (time vs. effort) and execute all double taxation and withholding tax obligations as soon as possible in each separate case.

MATERIALS – ITEMIZATION , LAB ACCESS, AND DELIVERY

Materials delivery will be as specified in the Agreement.

It will include basic and master materials for duplication, and a minimum of promotion and marketing materials, trailers, posters etc.

There are long lists of materials available from Sales Agents that can cost the Producer up to 50,000 euros if fulfilled exactly. One needs to clear with the Agent a certain minimum delivery and a Plan B for dealing with any more specific materials needed by Licensees as sales progress. The lab access letter allows Agent as well as any Co-producers to manufacture materials they are entitled to. Since “possession of materials” is often seen in the film industry as being “nine tenths of the law”, it can become a pawn in Co-producer relations

that the Agent needs to keep clear about to be able to work optimally.

If an Agent is a company backed by bank credit it may well be that the bank will demand “full” materials delivery in the 50,000 euro range to fulfil credit obligations. (In most such cases, unless the Agent is prepared to offer an advance of that size, then choose another Agent).

Materials and materials-related costs generated by either Party should always be invoiced at market rates or lower and materials produced of sufficient quality.

The onus is on Agent to QC all access materials as soon as possible, at charge of Producer.

Occasionally there will be reason to move master materials to another laboratory. Such movement should be strictly regulated and pre-agreed exactly with the labs and with Agent or Co-producers in writing.



The Agreement should require Agent to provide a full list of all materials manufactured (including materials manufactured by Licensees) and allow for Producer's right to their return on availability at the end of the license period. This allows Producer and Agent to at least establish which material exists where in the world (including sub-titles, language versions, etc), thus helping decrease the chance of piracy especially through digital "clutter".

Sales companies may also introduce penalties in the event materials are unnecessarily delayed/restricted and impact on sales, or in the event that rights clearances were not met, so producers should check and be forthright about what they might not have.

WARRANTIES

BOTH Parties shall indemnify and hold EACH OTHER harmless in case of litigation against either (and not just one Party). Both parties also warrant that all their obligations to exploit the agreement are fulfilled.

BANKRUPTCY

Both Parties agree that in the case of bankruptcy of either Party any fully paid up licenses shall terminate unharmed. Any further activity with the title will be dependent on relevant bankruptcy law – which will not always be at variance with a standard condition that rights in such cases automatically revert back – and that any outstanding debt remains the obligation of a new company to pay.

ADDITIONAL TERMS AND OBLIGATIONS

1. Prompt payment is of the essence of the Agreement
2. Agent shall have no right to any disposal of rights other than those mentioned in the Agreement – e.g. they cannot be used as collateral in any way or be otherwise attached except as Licenses for Distribution in direct agency to Producer.

3. Both Parties agree to carry out their obligations as normal to the provision of sound business practise.

APPLICABLE LAW

Usually, the Sales Agent will insist that their local law be applied under jurisdiction of courts near to their place of business. One can argue for a mediation procedure led by the right kind of experts to take place beforehand, though these can be just as expensive, if and when available in a form agreeable to both sides.

CONCLUSION

From the sales agent's point of view, producers need to be realistic, and scale a sales agreement to the size of the film not only in expectations, but also expenses, commission size and sales estimates. Producers should share and compare notes with other producers, and work with a sales company they feel comfortable with for 5-10 years, and whose films and profile match their ambitions.

From a producer's point of view, a sales agent needs to clarify and conduct the process of selling in a way that supports a positive relationship with someone whose main interest is most probably in income to help with their next production. Indeed, building up income is a main joint interest of both parties, both short term and long term, and mutual behaviours and understanding should always support this.

From a mutual point of view, both sides should help each other when it is necessary, and remain fair to each other (which involves good understanding!) – also remembering that in the production process it is usually the producer and in the sales process it is usually the sales agent who seem to be doing all the work....

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