



1901 E. Franklin St., Suite 107
Richmond, VA 23223

PH 804 225 0505
FAX 800 906 7542
www.schroderfidlow.com

Kirk T. Schroder
kschroder@schroderfidlow.com

BASIC BUSINESS & LEGAL ASPECTS OF INDEPENDENT FILMMAKING

*First Annual Nashville Entertainment Law Symposium
American Bar Association Forum on Entertainment & Sports*

*Kirk T. Schroder, Esquire
Schroder Fidlow, PLC
kschroder@schroderfidlow.com*

I. UNDERSTANDING THE PHASES OF FILMMAKING

- A. Development Phase.
- B. Financing Phase.
- C. Distribution Phase.
- D. Exhibition Phase.

II. ROLE OF THE PRODUCER/CLIENT

- A. Balancing Act.
Potential problems with 3 way (sometimes 4 way) negotiations
Lender/Investors/Bond Company/Distributor/Others
- B. Doing Your Homework.
Critical evaluation of your project
- C. Be Creative/Be Wary of the Herd.
- D. Understanding Film Industry Economics.

III. DEVELOPMENT PHASE

- A. Obtaining Underlying Story Rights.
- B. Obtaining Any Other Critical Rights.
- C. Attaching Key Talent And Services To Project.
- D. Screenplay Development.

Types of Agreements:

- 1. Option/Purchase Agreement for Life Story Rights.
- 2. Option/Phase Agreement for Underlying Story.
- 3. Writer/Employment Contracts.
- 4. Writer/Option Contract.
- 5. WGA Issues/Agreement.
- 6. Key Talent Commitments.

IV. FINANCING PHASE

A. Typical Types of Financing.

- 1. Industry Financing.
- 2. Lender Financing.
- 3. Investor Financing.
- 4. Foreign Financing.
- 5. Anything Else/Combinations of Above.

B. Industry Financing.

- 1. Studio Development and In-House Production Deals.
- 2. Studio Production - Financing/Distribution Deal.

3. Independent - Distributor Financing.

C. Lender Financing.

1. Checklist for Initial Approach to Financiers.

- a. The budget, in a standard summary form, including contingency and cost of completion guarantee.
- b. A synopsis of the screenplay (one page maximum).
- c. Details of the main creative elements of the film, including brief career resumes of the director, producer, main stars and other key personnel.
- d. The proposed production schedule (from preparatory work to delivery).
- e. The cash flow schedule based on monthly drawdowns.
- f. Details of the Borrower, usually a limited liability company set up for the single purpose of making the film.
- g. Details of the proposed security package. This will include a summary of the pre-sales made to date, with payment schedules of the minimum guarantees (net of withholding tax, where applicable) from each distributor, the media and territory rights licensed, any particular conditions attached to the sales and details of bank guarantees or letters of credit in support of each contract, where appropriate.
- h. Details of the estimated value of unsold rights (if any) and of the sales agents(s) handling distribution contracts.
- i. Details of the proposed completion guarantee.
- j. Details of the proposed insurance package.
- k. Details of any supplemental sources of finance, such as deferments, equity investment, guarantees, etc.

2. Negative Pickup Deal.

--Commitment made by a distributor to a producer to purchase or license feature film distribution rights from the producer and the distributors guarantee to pay an agreed upon purchase price (pickup price) when the distributor picks up the negative after delivery of the completed picture.

Key Players:

- a. Producer.
- b. Distributor.
- c. Lender.

- d. Completion Guarantor.
- e. Film Laboratory.
- f. Talent Unions (role in subordination of security interests).

3. Presale Financing.

--Advance sales of distribution rights in various media and territories.

--Strategy is to retain as many rights and territories for sales after completion of the motion picture, i.e. presell only as many rights and territories as necessary to cover the production costs of the motion picture.

Key Players:

- a. Sales agent (fee 10-15% - if no financial guarantee—as high as 30% if guarantee or deposit).
- b. Presales purchasing entity.
- c. Lender (decides whether to lend on proposed presale agreement, based on reputation and track record of the presale purchasing agreement entity and proposed terms and conditions).

4. Dealing with Completion Guarantor.

- a. Production Documents.
 - (i) The Shooting Script.
 - (ii) The Production Budget with Detail.
 - (iii) The Shooting Schedule (Production Boards).
 - (iv) Resume of Key Personnel (Line Producer, UPM, Production Accountant, Director, etc.).
 - (v) Projected Cash Flow.
 - (vi) Trial Balance (In the event that money has been advanced prior to closing).
 - (vii) Post-Production Schedule.

b. Legal Documents

- (i) The Production Agreement(s), Financing Agreement(s) and/or Distribution Agreement(s).
- (ii) Director's Agreement between the Production Company and the Director.
- (iii) Producer's Agreement between the Production Company and the Producer.
- (iv) Principal Artist's Contracts. (In the case of a minor, a copy of the court approval).
- (v) Writers' Agreements with respect to the screenplay of the Picture and all agreements relating to the underlying rights of the Picture, together with a Copyright Report.
- (vi) Key Crew Agreements.
- (vii) Location Agreements (Essential Locations).
- (viii) Music Agreements.
- (ix) Sound Laboratory Agreements.
- (x) Film Laboratory Agreements.
- (xi) Special Effects Agreements (if any).
- (xii) Other Agreements.

c. Typical Completion Guarantor Documents Closing List.

- (i) Completion Guarantee Agreement.
- (ii) Producer's Completion Agreement.
- (iii) Production Account Takeover Letter.
- (iv) Laboratory Access Letter/sound and film(if no lab pledgeholder agreement is used).
- (v) Irrevocable Assignment (if no Inter-Party Agreement is used).
- (vi) Distributor's Acceptance (if no Inter-Party Agreement is used).
- (vii) UCC-1(s) (California, New York State and County and production locations).
- (viii) Mortgage of Copyright and Security Agreement.
- (ix) Takeover Agreement.
- (x) Power of Attorney.
- (xi) Inter-Party Agreement (if applicable).

- (xii) Laboratory Pledgeholder Agreement/sound and film (if applicable).
- (xiii) Topsheets to Production Elements. (Final Script, Final Shooting Schedule, Final Budget, Final Cash Flow).
- (xiv) Miscellaneous Side Letter Agreements for the Picture.
- (xv) Director's Inducement Letter.
- (xvi) Screen Actors Guild Subordination Agreement.
- (xvii) Director's Guild of America Subordination Agreement.
- (xviii) Insurance Certificates.
- (xix) Underwriter's Fund Power of Attorney.
- (xx) Underwriter's Legal Opinion Letter.

D. Investor Financing.

1. Active Investor (non-securities offering) Vehicles.
2. Passive Investor (securities offering) Vehicles.
 - a. Regulation D/"Blue Sky" Private Placement Offerings.
3. Other Finance Vehicles.
 - a. Guaranteed Source of Revenue?
4. Choice of Entity Considerations.

E. Foreign Financing.

1. Foreign Tax Shelters and Incentives.
 - Australia, Canada, Sweden, New Zealand, Japan, Germany, Spain, Puerto Rico, Ireland, United Kingdom (limited) to name a few.
 - Tax laws that permit or specifically encourage tax benefit motion picture financing.
2. International Co-productions.
 - Involve international co-production treaties that exist between several countries, including, Australia,

United Kingdom, France, Japan, Germany,
Norway, China, Italy and Canada.

--Must qualify as an international co-production by meeting requirements set out in one or more treaties.

--If qualify, then eligible for various forms of financial assistance including, government loans, government grants/subsidies, tax credits and other arrangements.

--Tax Considerations Important.

V. DISTRIBUTION PHASE

A. Distribution Scenarios.

1. In-house production/distribution.
2. Production financing/distribution.
3. Negative pickup arrangement.
4. Acquisition deal.
5. Rent-a-distributor.

B. Types of Distribution Deals.

1. Gross deals.
2. Modified gross deals.
3. "Costs off top, then split."
 - a. Various net deals, i.e., 70/30 with sliding scale, 50/50 net deal, etc.
4. "Fee first, cost off bottom"
5. Doing comparative analysis.

C. Net Profit System/Profit Participation Issues.

D. Due Diligence on Distributor.

E. Distribution Deal - Key Terms Checklist.

1. Deal memo v. long form agreement.
2. Distribution fee.
3. Gross receipts/definitions.
4. Profit participation/definitions.
5. Advance/minimum guarantee.
6. Distribution expenses.
7. Territory.
8. Term.
9. Ancillary Markets.
10. Interest charges.
11. Creative control issues.
12. Theatrical release commitment.
13. Ownership.
14. Delivery requirements.
15. Warranties.
16. Accountings/audits.

F. Film Festival Circuit.

1. Ten good festivals: IFFM, Sundance, Telluride, New York, Toronto, Seattle, San Francisco, Berlin, Hampton, South by Southwest.
2. Criteria for film festival selections.
 - a. How will festival help theatrical release of film?
 - b. What are they doing for you? i.e., pay rentals, bring you out there, publicity, can you promote your film
 - c. Creating “buzz.”

- d. Getting a full newspaper review.

VI. PRODUCTION/POST-PRODUCTION PHASE

A. Logistics of Film Production.

B. Talent/Crew Issues.

1. Union v. Non-union.

C. Set/Location Issues.

D. Shooting Schedules.

E. Tie-In Issues.

F. Types of Documents.

1. Individual Producer Borrowing Agreement.
2. Director Borrowing Agreement.
3. Deal Player Borrowing Agreement.
4. SAG Daily Contract.
5. SAG Minimum Freelance Contract.
6. SAG Stunt Performers Daily Contract.
7. SAG Stunt Performers Minimum Freelance Weekly Contract.
8. SAG Letter Agreement for Low-Budget Theatrical Motion Pictures.
9. SAG Letter Agreement for Low-Budget Affirmative Action Motion Pictures.
10. Crew Arrangements/Union/Non-Union.
11. Composer Loan Out Agreement.
12. Songwriter Loan Out Agreement.
13. Co-Administration Agreement.
14. Synchronization & Performing License.
15. Motion Picture Master Use License.
16. Soundtrack Album Master Use License.
17. Recording Artist Agreement.
18. Record Producer Agreement
19. Location Agreement (Fee).
20. Location Agreement (No Fee).
21. Errors & Omissions Insurance Application.
22. Clearing Music Rights for Film and Soundtrack Albums.

VII. CONCLUSION