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Option and "shopping" agreements for film and TV

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A short note explaining option and "shopping" agreements for film and TV projects. An option agreement is made between a writer and a producer and grants the producer an exclusive option to buy the rights in the writer's work. A "shopping" agreement allows the producer to represent the work but gives the producer fewer rights than an option and typically lasts for a shorter period.

Scope of this note

This note discusses option and "shopping" agreements for TV and film projects:

- A film or TV option agreement is made between a writer and a producer and grants the producer an exclusive option to buy the rights in the writer's work. The option period in an option agreement gives the producer time to develop a film or TV programme based on the writer's work, with the assurance that no one else is developing the same rights simultaneously. If the producer decides to proceed with the project, it will exercise the option and purchase the rights in the work.
- A "shopping" agreement is an alternative to an option agreement. It allows the producer to represent the work but gives the producer fewer rights than an option over the work and typically lasts for a shorter period than an option agreement.

When to consider an agreement

There are three main starting points for a scripted film, TV programme or TV series:

- **Developing an existing screenplay.** A writer has written an original screenplay. A production company wants time to see whether it can develop the screenplay into a film, TV programme or TV series. In this instance the production company may want to take out an option or enter into a shopping agreement in respect of the screenplay.
- **Developing an existing work still in copyright.** A production company wants to make a film, a TV programme or a series based on an existing work, such as a book or play, that is still in copyright. In this instance it may also want to take out an option on the existing work. (In this instance, an option rather than a shopping agreement is more likely.) The production company will appoint a writer or team of writers to help develop and write the screenplay.
- **Commissioning a screenplay.** A production company wants to commission an original screenplay not based on any underlying work or that is based on a work that is no longer in copyright, such as a 19th century novel. In this instance there will be no underlying copyright to acquire. The production company will most likely appoint a writer or team of writers to develop the idea and write the screenplay. Neither an option agreement nor a shopping agreement will be necessary as the production company will usually own the copyright from inception, pursuant to the commissioning agreement.

If an original screenplay is itself based on an underlying work that is still in copyright, the producer will need to ensure that the underlying rights have been cleared. Usually, it should ensure that it has a signed agreement from the holder of rights in the underlying work as it will not be able to exploit the screenplay without the necessary rights from the owner of the underlying work. At the very least, if the screenplay is being optioned rather than commissioned by the producer, the option agreement and grant of rights should include warranties from the writer that all rights have been cleared, there has been no prior grant or assignment of these rights to another party (except as disclosed) and that the screenplay does not infringe any intellectual property rights in third-party works, in order to understand whether an option over an underlying work is needed.

Main types of agreement

There are two main types of types of agreement to use in developing a scripted film, TV programme or TV series:

- A traditional option agreement, which gives a production company an exclusive right to develop an underlying copyright work (see Option agreement).
- A "shopping" agreement, which gives a producer an exclusive or non-exclusive period to try to attract funding from a studio, network or co-producer (see Shopping agreement).

Option agreement

A traditional option agreement gives a production company an exclusive right to develop an underlying copyright work (including an already written screenplay). It is acquired from the owner of the underlying work (or via their agent) for a fee. It is likely to last between 18 months and three years and may be renewable (for an additional fee). The producer is unlikely to be able to get third-party finance from a studio or network or appoint a co-producer unless it has an option on the rights.

The option fee is payable to the rights owner on signature and is usually offset against the price for the rights if the option is exercised. The fee for extending the option cannot usually be offset.

An assignment or licence of rights in the underlying work and all other key terms of the exercise of the option should be included in the option agreement (as in Standard document, Film option agreement) or appended to the option as a separate agreement and left unsigned when the option is taken out, in which case it will need signing the option is "exercised". In the latter case, it would be advisable to include a power of attorney in the option for the producer to sign if the rights owner fails to do so.

The option agreement should include a predetermined level of remuneration to be paid to the rights owner on exercise of the option.

The details of what rights might be included in the assignment or licence, including rights for sequels, remakes and adaptations, are beyond the scope of this note, but should be agreed at the time of entry into the option agreement, to create certainty on exercise of the option. For more information, see the drafting notes to Standard document, Film option agreement.

Exercising the option

To exercise the option, the producer will need to pay the exercise price which was agreed when the option was originally entered into. Usually, the initial option fee is 10% of the purchase price but may be less for independently produced projects or more for a "hot property".

If the licence or assignment was included in a separate agreement from the option, it must be signed.

The option or purchase agreement may contain a reversion period, likely to be five to seven years from exercising the option, when rights could revert to the owner if filming has not commenced. This is something for a producer to keep in mind.

Shopping agreement

Instead of an option agreement, a producer may enter into a more informal "shopping" agreement (also known as a "producer attachment agreement" or a "producer representation agreement") with a writer or other rights owner. This gives a producer a period of time to try to attract funding from a studio, network or co-producer (shop the proposal around). This is usually a shorter period than under an option, such as six to 12 months, and often for little or no payment to the rights owner. The benefits to the rights owner are the producer's experience and connections. What is being shopped may include the underlying work or a treatment prepared by the writer (it is less likely that it will include a full script unless the writer has written it speculatively).

A shopping agreement is a services agreement with no licence or assignment of rights attached (unlike an option agreement). If funding is secured, the rights owner will negotiate a licence or assignment of the rights to the work either with the production company or with the financier (usually where the financier is also a studio, or broadcaster or streamer), and the production company will negotiate its own attachment to the project.

A shopping agreement can be exclusive or non-exclusive. If it is exclusive, the rights owner may be more likely to want to keep the term short. If it is non-exclusive, the rights owner can pursue other avenues at the same time as the producer is shopping the project around.

Because the term of a shopping agreement is likely to be short, a producer will want a provision in the agreement to ensure that the term of the agreement automatically extends if it is in negotiations with a prospective buyer at the end of the term, although the rights owner will want the extension to be capped so that negotiations cannot be strung out too long.

A producer will also want the agreement to contain a term to prevent a rights owner completing a deal with a potential buyer originally found by the producer during the shopping period, but with whom an agreement was not concluded. This would require careful description to precisely delineate the project and the terms on which the rights owner is compelled to attach the producer to the project or pay a "kill fee" to the producer.

Choosing between an option or shopping agreement

The appropriate choice of one type of agreement over another will depend on the specific project and the priorities and negotiating positions of the parties.

The parties can choose to use one or the other, or to employ a shopping agreement to start with and then, once a buyer has expressed interest, enter into an option agreement with the buyer.

Shopping agreements are less common than option agreements.

Some of the key considerations for producers and writers in choosing between the two types of agreement are set out below.

Considerations for producers

Shopping agreement: pros and cons

The **advantage** of a shopping agreement for a producer is involvement with a project at little or no cost. If it takes out an option, it will have to pay an option fee to the rights owner.

The main **disadvantages** of a shopping agreement for a producer are:

- It does not include the acquisition of, or the entitlement to acquire, any rights to the intellectual property in the underlying work. If the rights owner sold the rights separately in breach of the shopping agreement, the producer's recourse would be limited to a claim for breach of contract and it would not be able to sue for infringement of intellectual property rights.
- The producer is likely to be more restricted as to who it can sell to, as the rights owner is more likely to require approval rights over the buyer than under an option agreement.

Option agreement: pros and cons

The main **advantage** under an option agreement is that the producer is likely to have acquired (on exercise of the option) extensive rights both to develop the project and also to make sequels, TV shows, merchandising and advertising. A shopping agreement does not give the producer any intellectual property rights.

The main **disadvantage** is that, if the producer is not able to secure a buyer, then the producer will not receive any compensation for its efforts.

Considerations for writers

Shopping agreement: pros and cons

Key **advantages** of a shopping agreement for rights owners are:

- They retain more control over their rights and can usually veto an offer brought to them by the producer or (if the rights owners are writers) insist that they or their agent or one of their representatives attend the pitch meetings.
- Because no fee for the rights has been negotiated at the outset, rights owners may be able to make more money on the sale of the rights if the project gains traction as it is being shopped around.
- The short term means that they are not tied into an option for a long period.
- If they enter into a non-exclusive agreement, they can shop the project around themselves at the same time.
- A shopping agreement is usually less complex than an option agreement: option agreements necessitate the negotiation of:
  - Terms (including the purchase price, option period, option fee and certain conditions precedent).
  - The terms applicable once exercised (such as credits, bonuses and contingent participation, credits and the like).

The main **disadvantages** of a shopping agreement for rights owners are:

- Because the producer has little invested in the project financially, it may not make much effort to sell it.
- The rights owner may be pressured to enter into a shopping agreement for little or no money when an option agreement would be fairer. They may also be pressured into entering into an oral agreement. Writers in particular should always require that a shopping agreement be in writing and signed.
- If there is little interest in the project, the rights owner may end up receiving nothing for the project, but if they had entered into an option agreement, they would at least have received the option fee even if the option was not exercised.
- A writer in particular may find that, even if there is interest from a big investor, the writer is in a weak negotiating position (for example, in terms of payment or credits) and may even be unable to retain the integrity of an existing screenplay.

Option agreement: pros and cons

The main **advantage** of an option agreement for a rights owner is that they are paid for the option. An option agreement may also better suit a rights owner who has little interest in being heavily involved in a film or TV exploitation.

The main **disadvantages** are the flip side of the advantages of a shopping agreement, that is, in particular, that the rights owner retains less control over the development process and will not be able to shop the project around themselves during an exclusive option period.