



LAW ADVOCATE GROUP, LLP

9701 Wilshire Blvd. Suite 1000 Beverly Hills, CA 90212

Phone: 310-651-3065 Fax: 310-601-7110

www.LawAdvocateGroup.com

Doron F. Eghbali Entertainment Law

Fundamentals of Negative Pickup Financing Contracts

Tuesday, July 10, 2012 by [Doron F. Eghbali](#)

Negative Pickup Financing accords film producers a medium to procure financing for their motion picture. Unsurprisingly, such method of financing is replete with perils for the unwary and in the process the producer might lose most, not all, of "creative control" and even financial latitude and profitability, if any. Production Companies and Distributors i.e. often, Major Studios enter into a contract to enunciate to the extent possible their respective rights and obligations. This article, to some extent, explores SOME of the provisions in such contracts.

SOME BACKGROUND

Negative Pick Up is a deal involving an independent producer and a distribution company, i.e. major studio in which the major studio agrees to pay a fixed sum at a certain date for the negative of the motion picture. Negative Pick-Up deals also include a lending institution i.e. bank, lender, or private financiers who provide "gap financing" until the major studio, i.e. the distributor, accepts delivery of the negative and pay the sum.

Accordingly, in a Negative Pick-Up Financing transaction, there are 3 parties involved even though the agreement is between the independent producer and the distributor.

Hence, the agreement should be structured and negotiated so that the distributor cannot find a loophole to get out of the deal and thus avoiding the payment. In the latter scenario, the lender is forced to foreclose on the picture, as a collateral, while the independent producer is left with virtually no practical timely recourse.

Furthermore, a Negative Pick Up deal brings to the fore the competing and rather conflicting interests of the independent producer and distributor. As independent producer rightfully seeks to retain creative control over the project. On the other hand, the distributor is concerned with its investment and seeks to ensure the final product it has not yet seen encompasses the creative marketable elements it aspires to.

Accordingly, in approximately most instances, the distributor will not concede in negotiations the



creative control to a rather relatively "inexperienced" independent producer.

1. AREAS DISTRIBUTOR WON'T BUDGE, MOST PROBABLY

It is worth belaboring and further specifying the areas of concern from a distributor's point of view which distributors most probably deem sacrosanct. This category consists of the items the independent producer MUST acquire distributor's approval:

A. CLEAR CHAIN OF TITLE

The independent producer MUST establish to full satisfaction of distributor it has acquired all the rights to MAKE and DISTRIBUTE the motion picture. It is, in fact, independent producer's obligation to acquire CLEAR CHAIN OF TITLE. For instance, the production company MUST acquire a copyright search report from a reputable company.

B. CAST AND CREW

In addition, the independent producer MUST obtain distributor's approval over all "principal participants" involved the motion picture. Principal Participants often include, but not limited to, writer, director, executive producer, and some cast members. This is often the case that the distributor demands pre-approval of the agreements with "profit" participants. "Profit" Participants often overlap with "Principal" Participants in which both categories have direct financial stake in the picture; hence, directly impacting adversely or not the distributor's profitability or lack thereof.

C. CONTRACT

It is possible the distributor demands to preapprove the contracts the distributor is about to sign with participants or even outside vendors. Some pre-approval is predicated on the presumption that since the distributor has to pay these people or entities directly or indirectly, the distributor should know what it is paying for. Hence, such payment by distributor should be intelligent and prudent.

D. THIRD-PARTY CLAIMS

The distributor also demands that the production company secure releases from third parties for any claims or encumbrances.

2. SOME PHYSICAL SPECIFICATIONS DEMANDED BY DISTRIBUTOR

The Distributor besides from demanding creative and financial control over the negative, will further demand physical specifications, more or less typical of motion pictures. These are SOME of the specifications:

- The Motion Picture needs to be in color with a minimum length of 90 minutes and maximum length of 120 minutes PLUS the picture must be in English
- The Motion Picture needs to include a product placement if a commodity or service is provided in the picture otherwise there is real tangible risk of copyright infringement
- Motion Picture should adhere to a particular rating given the particular targeted audience. Such MPAA rating has a direct correlation to the financing of the picture by the distributor



3. PURCHASE PRICE OF THE PICTURE UPON DELIVERY

Purchase price of a motion picture could range from several hundreds of thousands of dollars to millions of dollars. The distributor may provide the production company a bonus if the motion picture is produced under the designated budget.

Often, the production company receives 40%-50% of the net profit of the distributed picture. The production company is liable to pay director, executive directors, stars (profit participants) out of its net profits. Nonetheless, as always, what constitutes "net profits" and "net profits" are defined could be a major negotiating point.

4. DELIVERY OF NEGATIVE TO DISTRIBUTOR

Upon delivery of the negative to the distributor, the distributor becomes the sole owner of the picture, the copyright and obtains any rights imaginable now or later to exploitation of the motion picture. The distributor may retain the following rights, among others:

- The right to change the title of the picture
- The right to edit and further modify the picture to comply with some local censorship rules or regulations
- The right to intersperse the picture with advertisements for TV viewership
- The right to sequels, remakes
- The right to the soundtrack of the picture
- The right to merchandising

DISCLAIMER

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article only provides a rather rudimentary of such esoteric subject matter.

DORON EGHBALI is a Partner at the Beverly Hills Offices of Law Advocate Group, LLP. Doron Primarily Practices Business, Real Estate and Entertainment Law. Doron Can Be Reached at: 310-651-3065. For More information, Please, Visit: HERE.