# Breakdown and Summary of Literary Option Agreement

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With the speculative, costly and long-term nature of developing various literary properties (i.e., books graphic novels, etc.) for screen (i.e., film, TV, etc.), producers require an effective mechanism to secure rights for a limited time (without having to spend exorbitant sums for a project that may never secure the financing or other elements necessary to actually enter production). Hence, option agreements are designed to give producers a window to assemble financing and other elements, without having to commit monies to purchase screen rights immediately.

During the option period, the producer is granted a time limited, exclusive right to produce the screen version of the underlying optioned work. Also during that period, the producer will attempt to secure capital, attachments, and other key elements that would justify committing to “purchasing” the option.

Purchasing the option involves providing the optioning party a more substantial cash payment and other “contingent” compensation promises (e.g., points off the receipts from the movie) for perpetual rights. At that juncture, a purchase agreement will likely supplant the option agreement (though such agreement will likely carry many of the provisions originally captured in the option agreement), granting the producer the rights to produce and commercially exploit the motion picture, TV program, etc., in perpetuity.

## Certain salient terms of both the option agreement and an attendant purchase agreement are described below:

**Property:** Nearly all option agreements begin with a basic recitation of what the underlying copyrighted literary work is, inclusive of copyright registration, publication history, etc.

**Purchaser and Owner:** Typically, option agreements are phrased in terms of "Purchasers" and "Owners" or "Buyers" and "Sellers." Purchaser or buyer refers to the producer who is optioning the rights, whereas seller or owner refers to the optioning party (usually the individual author, a publishing house, or some other rights holder.)

**Relationship:** Nearly all option agreements carry a provision that makes clear that the relationship between the optioning party and the producer is one of independent contractors that does not give rise to joint authorship or a partnership.

**Option Period:** All option agreements lay out producer’s temporary exclusive rights to exploit and develop the underlying literary property for screen. During this timeframe, the producer typically will seek performer attachments and/or investor capital, and may commission the writing and/or polishing of screenplays. However, the producer is not obligated to maintain nor exploit such rights and may abandon the project at the expiration of the Option Period.

Renewal/Extended Period: Nearly all option agreements carry multiple timeframes, beginning with the initial Option Period. Following the expiration of the initial timeframe, many option agreements permit the producer to provide additional consideration to the optioning party for extra time. A classic scenario can involve an initial term of twelve to eighteen months, with one or two renewal(s)/extension(s) of one year each.

Purchase Price: This refers to the cash or consideration that producer will provide for perpetual (with some exclusions) rights to produce the motion picture, TV program, etc., following the Option Period. Purchase prices vary wildly and are a function of the market and brand cachet of the underwriting literary work, against several factors (e.g., age of the property, circulation of the property, brand value of the property, etc.). Secondly, in certain instances, the option price that was paid for the Option Period may be "applicable" towards the purchase price, meaning the purchase price is reduced by what was already paid for the option period.

Notice of Exercise: The written notification whereby the producer gives notice to the optioning party that it will renew the Option Period, extend the Option Period, or purchase the rights in perpetuity. This is a formal process that usually requires, at a minimum, a clear and express written intention to exercise, coupled with a record of transmission.

Rights: This portion of the agreement is critical and sets forth the metes and bounds of what the producer actually gets to do with the underlying work. Extreme care should be taken to assure that the rights provisions are reasonably broad and as expansive as possible. While the core right to produce the screen version is usually set forth, there are a variety of other related rights that need to be properly reflected. For example, the option agreement should make clear that the producer not only has the right to make the movie, TV program, etc., but also has the opportunity to write copy in connection with the promotion of the finished product, as well as commercially exploit and distribute or exploit the finished product across a variety of mediums (including those that may not exist yet). Furthermore, the producer may seek to have the right to make prequels or sequels based on the finished product (subject to additional fees to be paid to the optioning party). Again, these rights are temporary, until they are "purchased" in perpetuity.

Representations and Warranties: These core provisions provide representations and warranties on the part of the optioning party that the literary property is free and clear of liens, encumbrances, or other obligations that may hinder the producer from properly exploiting the motion picture, TV program, etc. Moreover, there is typically a representation and warranty that the underlying literary property does not infringe on third-party works and is solely the work product of the optioning party (or that the optioning party has rights to be the optioning party vis-à-vis others, for example, joint authors).

**Indemnification:** The representations and warranties section is typically paired with an indemnification provision. This clause allows the producer to bring the optioning party into a legal proceeding and/or have the optioning party reimburse the producer for damages suffered in that proceeding, in the event that any of the representations and warranties prove to be false. This is especially important when third-parties claim that the underlying property infringes some other work.

**Credit:** A set of provisions that sets forth how the author(s) shall receive on-screen, paid ad, and/or other credit in connection with the completed movie, TV program, etc.

**Assignment:** Producers should make sure that the option agreement carries a robust assignment provision, allowing them to transfer rights from their own production company (or whomever optioned the rights from the optioning party) to a "single-purpose vehicle" entity or other third-party (either without consent, or limited consent from the optioning party). Without such a provision, the producer may foreclose to opportunity to sell rights to or position rights in an entity that will produce the screen version and/or seek investment capital.

**Force Majeure:** This provision absolves either party of liability for breach caused by Acts of God and other calamities outside the control of the parties that would make it extremely burdensome or impossible to carry out the obligations in the agreement.

**Arbitration:** When resolving disputes arising from entertainment contracts, arbitration is often a good alternative to using the court system, as a result of its streamlined process, knowledgeable arbiters, and frequently lower costs. Some option agreements call for arbitration before entertainment arbitration boards that have experience with these types of arrangements.

**Droit Moral:** Option agreements typically carry provisions whereby the optioning party expressly waives rights to affect the exploitation of the finished product based on the concept of "Droit Moral." Droit Moral, also known as a "moral rights" clause, refers to the author's right to prevent alteration of the creative work, irrespective of a transfer of ownership. This right is recognized primarily in European countries.

**Waiver:** This provision makes clear that any waiver that either party expresses due to a breach by the other party is not a permanent waiver, but rather a waiver for that instance alone, thus protecting the waiving party and allowing that party to seek remedies for any future breaches.

**Severability:** In the event that any provisions are found to be unenforceable, this provision allows the parties to enforce the remaining portion of their agreement.