

Pre-Contract Phase between a Producer and a Distributor in the Film Industry¹

By Amy Nguyen

ABSTRACT

An incomplete distribution agreement between a producer or filmmaker and a distributor often leads to legal issues and courts that are time and cost consuming. On the contrary, a well documented and understood agreement can encourage distributors and producers to go beyond the business expectation and fully respect the contract and the work of each others. Focusing on the legal terms and conditions on a distribution agreement in the film industry, the paper aims to advise the main conditions in a contract that must be mastered and discussed before signing any deal. The conclusion of the paper suggests that the agreement must be properly documented with explicit legal rights ownership and a common strategy decided between the producer and the distributor.

KEY WORDS: Entertainment, Film Distribution, Project Management, Pre-Contract Phase, Rights

INTRODUCTION

About 5,000 independent films are made every year. However, “less than 5% of all these movies end up in distribution”². And this is not because the movies, the scripts or the plots do not deserve to be distributed. It seems like filmmakers are unprepared and not enough aware of the requirements of a proper contract regarding legal issues. It took them efforts to realize their work and produce a movie. Then, to establish a distribution deal is essential to show publicly their hard work and recover their expenses. Producers and distributors must master and understand the deal involved before signing a contract, particularly in this moving industry in which digital distribution lead to new strategies. A contract between a producer and a distributor should be thought carefully and strategically and need all documents and requirements to be valid without future legal issues.

¹ Editor's note: Student papers are authored by graduate or undergraduate students based on coursework at accredited universities or training programs. This paper was prepared as a deliverable for the course “International Contract Management” facilitated by Dr Paul D. Giammalvo of PT Mitratata Citragraha, Jakarta, Indonesia as an Adjunct Professor under contract to SKEMA Business School for the program Master of Science in Project and Programme Management and Business Development. <http://www.skema.edu/programmes/masters-of-science>. For more information on this global program (Lille and Paris in France; Belo Horizonte in Brazil), contact Dr Paul Gardiner, Global Programme Director paul.gardiner@skema.edu.

² *The Secret to Distribution*, Jerome Courshon, 2016

The aim of this paper is to advise the best practices required in order to fully sign a well documented contract in the film distribution industry. It represents a key point to help the filmmaker's and distributor's contract to succeed. It will provide an understanding of the main contentious point in the relationship between producers and distributors.

To summarize, this paper has been designed to answer the following research questions:

- 1) Why producers must master the concept of copyrights and legal issues?
- 2) What is the benefit of having reserved rights?
- 3) How can producer and distributor gain an opportunity from the digitalization?

METHODOLOGY

The paper compares the legal aspects of a distribution agreement with the different baseline guides such as the American Institute of Architects (AIA), the Guild of Project Controls Compendium and Reference (CaR), the International Federation of Consulting Engineers (FIDIC), the Construction Specifications Institute (CSI) and the Engineers Joint Contract Documents Committee (EJCDC). Then, the paper will use the Multiple Attribute Decision Making (MADM) method to benchmark the best attribute of each and propose a change proposal in a distribution agreement. Finally, the paper will analyze the pressure for and against this proposal using a Force Field Analysis.

A) Comparison with the AIA

In term of legal protection, the AIA consider several important points. It ensures that instrument of services like the design and the drawing are secretly used for the solely purpose of the project.

- “Through careful participant selection and contract drafting, integrated project delivery (IPD) participants achieve a level of comfort that project information exchanged will be utilized only for project purpose.” (4.1.5 Sharing Sensitive, Proprietary or Confidential Information)

A distribution agreement does not particularly ask for the confidentiality of the project but does also give exclusive rights to the distributor for the only purpose of the project. One main difference with the AIA would be the implication of the parties in the project that remains distant in a distribution agreement. Moreover, producers can ask the help of an attorney but it is usually preferable not to involve an indirect link between the producer and the distributor. On the contrary, the AIA tries to include all parties and considers an entity to help them negotiating the rights. That encourages designers and constructors to better collaborate. A separate entity can be created in that purpose but that also represents an inconvenient as designers and constructors will share the risks.

- “Negotiating and drafting agreements without the aid of prior similar contracts or standard forms can increase the cost of reaching an agreement. The AIA is developing standard forms to assist parties wishing to negotiate and execute an IPD agreement” (4.4 Legal considerations)
- “An IPD approach should not alter traditional requirements with respect to professional or business licenses. Collaboration between designers and constructors does not inherently result in a blending of disciplines” (4.4.2 Professional Responsibility and Licensing)
- “If a separate legal entity specifically created for the project, the entity may be required to obtain design and/or construction licenses, depending upon individual state laws” (4.4.3 Insurance)
- “The construction team might well bear the risk of design error and the design team could be at risk for construction errors” (4.4.4 Entity Formation)

Last but not least, AIA considers an insurance clause about “Errors and omissions” that can mitigate risks of claims. Such a clause would reduce the legal issues in a distribution agreement if any errors or omissions occur in the future.

B) Comparison with the CaR

The CaR questions the difficulty to decide whether the parties should own, rent or lease. In the film industry, one way to generate money for the distributor is to release the film to the public with copyright or one other way is to contract with sub-distributors and sell licenses.

- “Challenging job of calculating the Total Costs of Ownership (TCO) of a piece of equipment and then using that information to make the decision whether it is better to own, rent or lease a piece of equipment” (06.5.3.02 - Cost of Ownership)

The CaR also highlights the importance of Warranties as a requirement to ensure the documentation.

- Product warranties “are important to project controllers as we need to be sure to put in an activity in the schedule to ensure that these documents get properly handed over to the end user” (05.6.3.1 Guarantees and Warranties)

C) Comparison with the FIDIC

The FIDIC insists on the fairness of any deal. None of the parties involved should abuse their rights. Normally, it would be a Consultant who keeps the documentation and the client will have the right to reproduce the work. However, not all copyright or other intellectual property rights should be given. And more importantly, the FIDIC suggests adding a special clause which gives back the copyright property.

- “The Client shall be entitled to use them only for the Project and the purpose for which they are intended. Some employers do insist to be vested in the rights of the consultant such as public bodies. This may prove to be impossible subject to the intellectual property law which is applicable. According to German copyright law the author cannot assign the copyright but only grant licenses on it.” (11.7.3)
- “According to Sub-Clause 1.10 the Contractor shall retain the copyright and other intellectual property rights made by the Contractor. Software and programs may in fact be owned by third parties.” (7.6.8)

The FIDIC adds a “non-performance” clause that ensures the commitment of the contractor if he fails to do his work. This clause would help a distribution agreement to be more effective and motivate the distributor to act properly in the interest of the producer.

D) Comparison with the EJCDC

The EJCDC suggests that all rights should be prepared carefully by the Owner in the Contract Documents. Also, the owner should support the contractor for any licenses that remained to be obtained.

- “Contractor and its Subcontractors and Suppliers shall not have or acquire any title to or ownership rights in any of the Drawings, Specifications, or other documents without written consent of Owner and Engineer and specific written verification or adaptation by Engineer” (3.05 Reuse of Document)

E) Comparison with the CSI

One thing the CSI guidelines particularly suggest is to prepare a presentation product to understand all its aspects. In the Presentation guidelines (4.10.5.2 Preparing for the Product Presentation), several points are essentials and should be considered in a pre-contract phase before a distribution agreement: appointment, timing, attitude, preparation, style, relevance, manners, speaking, technical level, interactivity, flexibility, response and responsibilities.

F) MADM Method

The paper uses a Non-Compensatory Model in order to compare and analyze all components that may influence on the success of the agreement between the owner and the contractor. The aim is to make decisions and advise the best practices to improve the distribution agreement. To define the quality standard of a fair agreement to distribute legally the work, the paper considers several attributes: 1) Collaboration between the parties toward intellectual property; 2) Insurance in case an error or omission occurs in the future; 3) Modification of the work in order to fit the territory and law; 4) Balance of bargaining power between the owner and contractor in term of fairness between both parties; 5) Confidentiality of the work.

TABLE1: Multiple Attribute Decision Making³

DOMINANCE (Using PairWise Comparison)										
Selection Attributes	AIA vs CaR	AIA vs FIDIC	AIA vs EJCDC	CaR vs FIDIC	CaR vs EJCDC	CSI vs AIA	CSI vs EJCDC	CSI vs CaR	CSI vs FIDIC	FIDIC vs EJCDC
Collaboration	Better	Worse	Equal	Worse	Worse	Equal	Equal	Better	Worse	Better
Insurance	Better	Equal	Better	Worse	Equal	Worse	Worse	Worse	Worse	Better
Modification of work	Better	Better	Better	Worse	Worse	Equal	Better	Better	Better	Equal
Balance of bargaining power	Equal	Worse	Equal	Worse	Equal	Better	Better	Better	Equal	Better
Confidentiality	Better	Better	Better	Equal	Equal	Worse	Equal	Equal	Equal	Equal
DOMINANCE?	YES	No	MAYBE	No	No	No	NO	NO	NO	MAYBE

FINDINGS:

First, distribution agreements are mostly unclear and neglect some parts and rights of both parties involved. Producers need to get an understanding of distribution deals and how they can benefit from distributors' expertise. Each of the guidelines really understands the importance of having a well documented contract. Preparation is important. Like the CSI suggests, a preparation phase may help the producer to become a business person who deeply understands the challenge. Some of the product presentation guidelines may deserve to be highlighted:

- Attitude & Manners: Trust is essential to make a deal.

³ By Author

Distributors need to be sure they can earn some return on the investment. Confidence and honesty must be the first impression they have from each other. Producer must become a business person and prove professionalism and credibility.

- Relevance & Speaking:

Producers must clearly specify his/her intentions so that distributors would advise the strategy based on their expertise. The producer should be prepared to answer any questions concerning the territory, the platform to use, the languages, the format...

- Responsibilities:

This part is the main point of contentious between the producer and the distributor. The producer is accountable to ensure that all legal documentation has been acquired. Producer must make sure his/her work has the legal requirement.

Once these points mastered by the producer, the parties involved can truly start negotiated and have a clear understanding of the deal.

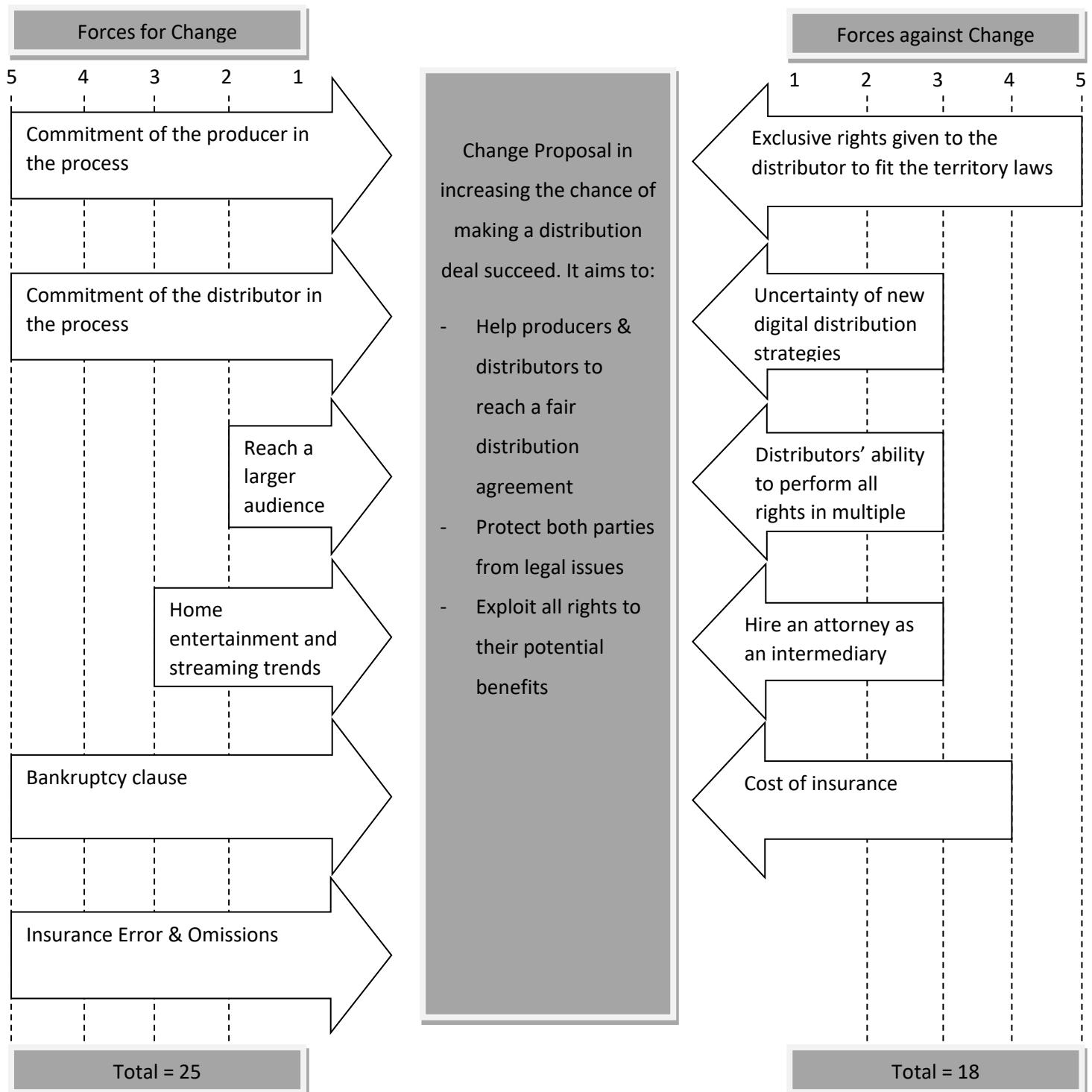
Second, a better collaboration would ensure and control the legacy of the work. The EJCDC and the AIA documents advise that the owner assists the contractor in dealing any legal issues. In many case, legal issues arise after distribution because the distributors did not really interact closely with the producer. Indeed if distributors ask for all documentations, it will secure their investment and allow them to legally perform and market the product. It is a fundamental to establish a distribution contract. This type of clause would reinforce the relationship between the distributor and producer to better collaborate. Thus, copyright documentations would remained clear and managed throughout the overall process until the final distribution step.

The paper now assumes that prior having the intention to distribute the movie; the producer had obtained all copyrights for the content of the movie: that can include music, books or screenplay copyrights... All rights must be granted by license and documents. Only after that, producer can have the right to distribute or transfer some rights to the distributors. On the other side, the distributor represents a legal entity or a corporation which title allows the distributor to make revenue. One way to generate money is to release the film to the public with copyright. One other way is to contract with sub-distributors and sell licenses. So, one other point to consider is: should the producer give the exclusive rights to the distributor?

The FIDIC does not state which party should own the ownership rights but highlights the importance to reach an agreement between parties involved. And more importantly, the FIDIC suggests adding a special clause which gives back the copyright property. In most cases, film distribution contracts give distributors the exclusive right to modify and distribute the work in

all languages, versions and digital formats. Especially in order to make trailers, advertisements or to fit the territory laws that may lead to modify the work for censorship, ethical or cultural contents. From the distributor perspective, detaining all the rights protect the distributor from any competition in case the producer contracts with another distributor. However, producer may lose control on their work and “piece of art”. Usually, the only protection in distribution contracts is a termination clause that settles the possibility to terminate the agreement according to the distributor’s performance. But often, it forgets to give back the rights to the producer. And if the distribution cannot reach the producer’s expectation or goes bankrupt, the producer would have difficulty to take back its copyrights. Having this particular clause would represent the only opportunity for the producer to have a second chance to distribute the movie. Thus, producers should consider reserve rights that may represent an opportunity for the producer to become self-distributor. Or else, the distribution agreement should contain a termination and bankruptcy clause that authorizes the producer to terminate the deal and regains the property rights.

Figure 1: Kurt Lewin's Force Field Analysis⁴



⁴ By Author

The Force Field Analysis (**Figure 1**) highlights some factors that influence the decision of the producer and the distribution in the distribution agreement. Important decisions need to be taken and it seems that the forces for change may reinforce the quality of one's decision.

CONCLUSIONS

This paper has been designed to answer the following research questions:

1) Why producers must master the concept of copyrights and legal issues?

A film is like a folder of copyrights that must be acquired by the parties. A film cannot be legally distributed without this pre-requisite. A pre-contract phase is necessary and should mainly clarify the commitment of the producer in the process and the commitment of the distributor in advising the suitable distribution techniques and on legal concerns. Insurance can be a tool to reduce the risk of future legal courts and issues.

2) What is the benefit of having reserved rights?

By keeping some potential rights, the producer can become self-distributor and seek for new opportunities. It is also a protection from letting the distributor exploit and modify all the work. More importantly, the producer should keep and/or ensure to get the rights back at the term of the contract.

3) How can producer and distributor gain an opportunity from the digitalization?

New kind of media and strategies are coming through a new Home entertainment or broadcast channels. Producer should have a clear strategy on which digital rights to give to the distributors in term of territory and online platforms. For example, should the producer authorize the rights to rent the film through a video player? Producers must know how to exploit their rights. However, parties should be concerned to the fact that digital globalization also represents risks as illegal streaming or piracy may lead to a loss of revenue.

FOLLOW ON RESEARCH

Nowadays, digitalization allows distribution companies to reach a worldwide audience. Legal barriers must be considered in the strategy to distribute a movie. The paper did not develop the challenge of legal barriers that distributors may face in some countries. This consideration even starts to change producers' way of thinking and the way they are making their film. For instance, they start to consider ethical and cultural contents to reach the targeted country's audience. One interesting insight would be to analyze the Chinese film industry as China aspires to become a key player in this field. Particularly in term of legal barriers, China imposes strict laws to foreign films and censors film contents that harm "the dignity, honor and interests"⁵ of China.

⁵ Global film market, regional problems. (n.d.). Retrieved October 31, 2017, from
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