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[Merchandising Agreement for Motion Pictures](#)

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Parlaying film characters and corresponding film elements into commodities could proffer participants another financial conduit. Yet, not every motion picture is a proper conduit and not every corresponding merchandise a prudent investment. In this article, we explore the salient legal intricacies involved in negotiating and effectuating a merchandising agreement for motion pictures.

BACKGROUND

Production companies are well cognizant of the financial value of merchandizing. Nonetheless, the substance of the negotiated merchandising agreement and mechanism to effectuate the agreement determine success or failure of a motion picture merchandising campaign, to a large extent.

Production companies rightly seek to retain control over the rights licensed and ensure the merchandising accurately reflects the motion picture. On the other hand, the distributor or manufacturer seeks to retain Cart Blanche in taste, design and more importantly ways to split up "profits".

1. LICENSE SPECIFICATION

This is incumbent upon legal counsel to delineate the specifications relating to the license being granted. The specifications should expound on:

A) The Definition of Property: The license should specify if the property includes all portrayals, characters, visual representations which appear in the motion picture or not.



B) The Exploitation of Property: The license should specify that:

- What does Property mean and what does it encompass?
- Does Property include ALL portrayals, characters, visual representations which appear in the motion picture or not?
- Is there a specific time period for the license?
- Is there a specified territory for the licensed Property?
- Is the right granted exclusive?
- If not exclusive, what are the rights specifically being granted?

2. PAYMENT SPECIFICATION

The license should delineate the calculation method and amounts of payment to the licensor, i.e. the production company. Often, the licensor receives a percentage of the gross receipts. However, it might be possible to negotiate an arrangement for the licensor to receive a guaranteed minimum amount of payment either TOGETHER with or applied against an amount of compensation.

The latter rather insures that the licensor at least is paid regardless of the merchandising efforts undertaken as part of this agreement. In addition, the latter financial arrangement insures that the licensor will participate in financial success of any merchandising efforts through percentage of the profits, as calculated under the agreement. Furthermore, since the licensee is advancing some funds, the licensee would have more incentives to optimize revenue to recuperate what the licensor, i.e. the production company, received at the outset of the deal.

It is important to note that the amount of compensation or advance paid to the licensor is predicated upon several factors, among which are:

- The Types of Licensed Products
- The Subject Matter of the Motion Picture
- The Financial Stature of Characters
- The Commercial Viability of the Motion Picture Juxtaposed with "similar" Motion Pictures
- The Acceptance of the Licensed Products
- The Popularity of the Licensed Products
- The Costs Involved in Manufacturing and Distributing the Licensed Products

3. BOOKS AND RECORDS SPECIFICATION

The license agreement should also specify the mechanism employed to inspect books and records and the procedure and remedies to rectify any discrepancies found in such inspections.

At least, the license agreement should entitle the licensor to inspect books and records once a year. Nonetheless, it is more advantageous for the licensor to have the right to audit books and records at least twice a year.



It is beneficial to set some reasonable thresholds for remedies sought after accounting discrepancies come to light after an inspection. For instance, the license agreement could delineate:

- If the inspection found a discrepancy of 5% or more, then the licensee (i.e. the manufacturing company/distributor) should pay the cost of inspection. Often, the licensee to avoid such remedy, may seek to obtain a higher threshold such as 10 or 15%.
- If the inspection found a rather substantial discrepancy, then the licensor could terminate the agreement. Since this remedy is rather extreme, the licensor and licensee often negotiate over the precise threshold to be invoked in such circumstances. Licensor possibly aspires to set such threshold relatively lower such as 25%. On the other hand, the licensee often diligently seeks to set a higher threshold as high as 50% or even more.

4. LICENSOR'S RIGHTS SPECIFICATIONS

This is of utmost of importance to the licensor that the licensee protect its copyright and goodwill.

The licensor (i.e. the production company) may require the licensee to deliver copies of the artwork and samples of the products. It is possible for the licensor to condition distribution of the products on the licensor's written approval of the licensee's artwork and sketches.

In addition, the licensor should intelligently protect its goodwill by ensuring inferior quality and dangerous products are not put out in the marketplace. Towards this end, the licensor should require the licensee that it maintain sufficient insurance coverage to protect against products liability claims and other forms of potential litigation. The licensor may seek to require a specific insurance company or alternatively set out clear parameters as to the financial requirements and evaluation of the insurance company.

5. SALIENT MISCELLANEOUS PROVISIONS SPECIFICATIONS

It is imperative for the licensor to insert some other provisions on:

- No warranty as to the amount of sales generated.
- No warranty as to continued exploitation of the element of the motion picture to drive sales. In other words, the licensor, the production company, should not become hamstrung by the merchandising agreement's success or failure.
- Warranty to be given to the licensor that the licensee at all times has the obligation to promote the merchandise(s).
- Limitations as to the pricing and manner of sale.
- Prohibition of licensee from granting exclusivity without written informed consent of the licensor.



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This article NEITHER supplants NOR supplements the breadth or depth of such esoteric subject. In fact, this article ONLY provides a rather rudimentary synopsis of such rarefied subject matter. If you have any questions, you may contact [Doron Eghbali](#).

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