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Let's Make a Deal: Buying or Selling a Screenplay

By Michael DeBlis

All movies, television series pilots, and features begin with an idea. Only once that bare bone is fleshed out with plot, theme, and character does that idea show potential as a movie.

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The path from idea to produced work is long and difficult and involves many steps along the way.

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Selling Your Original Idea

More often than not in today's market, movie ideas come from works with an established audience, such as comic books and old television shows. It is increasingly rare for an original screenplay, known in the business as a "spec," to make it to production. Studios are interested in things that people want to see. If they already know and love the story, they are more likely to decide to put money into the project.

A screenwriter with a spec script will, through an agent, manager, attorney, or their own determination, convince a producer or studio to put the screenplay into production. This has its own byzantine process, but in the end the writer will pitch the idea to someone with the power to say yes to beginning production.

Adapting, Another Story

If a writer wants to write a screenplay based on a favorite old book or forgotten story from the news, the writer will have to obtain the rights to that story.

If a producer agrees to move forward with production, the producer obtains the rights to the story and the work produced from it.

If a filmmaker wants to make the movie, the filmmaker also will have to obtain the rights to the script and the underlying work.

Sometimes an independent producer, filmmaker, or actor will like a screenplay and want to go forward with making the movie. Yet for various reasons, they may not be ready to start. They may need to obtain financing or may have scheduling conflicts. In this case, they will ask the screenwriter to consider an option deal.

You Have Options

An option deal is similar to the concept of making a lease agreement on a luxury car. The producer offers the writer a fee at a fraction of what the script is worth in exchange for temporary exclusive right to purchase the script. The agreement obligates the seller to sell to the purchaser at a price specified in the agreement. However, the producer would be under no obligation to purchase the script.

An option deal is similar to the concept of making a lease agreement on a luxury car.

The option deal gives the producer time to find financing or finish what they are working on. The option can last for a reasonable period, usually a year. The parties may agree to renew the option. If not, when the option period ends, the rights will revert to the writer.

The producer will obtain the rights to the screenplay as well as the rights to the underlying work and the right to start work on a sequel or serialized novel based on the screenplay, as it is likely that the screenwriter has already obtained the rights to base a visual work from the owner of the underlying work.

A producer can also option a book or other story that they would like to use as the basis for a film. The producer will have to determine whether the author has the rights to make a film from their work or whether the publisher has purchased the rights from the author. All else remains the same in an option deal whether the agreement is with a publisher or author.

Attachment

A filmmaker (writer/director) may want to pitch their script to a production company with themselves attached to direct. A producer may do the same.

The filmmaker or producer will have to assign the rights to the production company or studio whether there is an option agreement in effect or the transaction is a sale. The new producers will in turn hire the filmmaker or producer to work on the project.

Clean Title and Clearances

Often scripts go through many hands in Hollywood without ever becoming movies, even if there is significant interest from top talent. For example, a planned live-action version of the Japanese animated film *AKIRA* has been attached to dozens of stars and several writers and directors.

Often scripts go through many hands in Hollywood without ever becoming movies, even if there is significant interest from top talent.

If a studio finally decides to produce it, the studio's legal staff will have to conduct a thorough review of the chain of title to make sure the studio has all rights under its control. If production proceeds without a title search, the studio may reserve the right to cancel production if it finds a defect.

A clean title is among the conditions precedent to forming the option agreement. These terms usually must be met before the purchaser agrees. An attorney will check to see if the conditions are met.

The script clearance report will satisfy the buyer/optioner that there are no encumbrances on the script, things that could result in a lawsuit or ending production all together. In addition, if the script is non-fiction and it is portrays the subject or subjects in an unfavorable light or makes statements that may not be true, the subject or subjects could sue.

Unforeseen Circumstances—Force Majeure

Force majeure is a concept in law regarding some circumstance that a reasonable person involved in the industry would not expect to happen that would prevent them from fulfilling the contract. The option agreement should speak to what may happen to the agreement in those circumstances.

Warranties and Remedies

Issues regarding title, performance, and other warranties are found unsurprisingly under the warranties section of the agreement. The remedies section will specify what happens if there are clearance, title, or other performance issues.

Option Activities

An option agreement can specify what the parties should do to move the project towards production. Including this language is additional consideration for the writer above the option fee. However, such language is not enough to supplant the most important consideration, that fee.

Credit

Whether the writer or director gets a particular kind of credit has been a subject of contention, most famously regarding the Academy Award winner *12 Years a Slave*. An option or purchase agreement may be a good place to stipulate what credit the writer receives and under what circumstances.

This also becomes important when there are co-writers or when a producer brings in other writers to work on the project. The agreement will nail down whether the writer's name is displayed on screen by itself (a "single card") or jointly with co-writers.

If the script is based on an underlying work, the author of that work will want credit. This may be stipulated in an option agreement.

Additional Compensation

As there are a staggering number of ways to make money from a movie, any option or purchase contract should stipulate which party has rights to the various forms of distribution and ancillary products from sequels and remakes to novelizations and streaming VOD release.

Reserved Rights and Holdbacks

The purchaser of a screenplay may not wish to allow the writer to reserve any rights for themselves, obviously because of the potential windfall—in perpetuity—from a hot property. The writer may be able to reserve the right to write a stage or radio play based on the work.

As a practical matter, if a writer was in a position to produce the film, he or she would not likely be entering into an option agreement with a producer.

Thus, writers will not likely fight to reserve many, or any rights.

Should the writer reserve some significant right, the purchaser/producer will want the agreement to include a holdback provision. This clause stipulates that the writer will not exploit the reserved rights for some period so that there would not be a similar, competing story in production for a TV show or movie.

There are a staggering number of ways to make money from a movie.

The producer may ask the writer to write some ancillary product as part of the deal. The rights to that product should be reserved by the producer.

General Issues in Option Agreements

Other matters in the option agreement are relatively self-explanatory, like option fees, how long the option is in effect, and whether there can be an extension.

Setup Bonus

If the producer makes a deal to begin development of the project during the option, the writer should be compensated. An option agreement speaks to this issue by including a provision for a "Setup bonus."

Negotiating a Purchase Price in Parallel with the Option

A writer can also negotiate a purchase price for the script while talking about the option price. It can be included in the option agreement. However, if a script gains significant buzz during the option period, it may be worth more than it was during initial negotiations.

The purchase price can be a percentage of the total projected budget of the movie, usually 10 percent.

A high-concept superhero movie will have a larger budget than a drama, and the producer will likely agree to a range; the writer gets less if the budget turns out to be lower than expected or more if it turns out to be higher. The parties can also agree to a set price.

Turnaround

Those writers who enter into an option agreement should avoid any situation where the producer is constantly requesting a renewal, especially if during the initial period, production has not begun.

If the option expires without the producer either starting production or buying the script outright, the rights revert to the writer. The writer can include a provision to trigger a reversion if the producer buys the script but does not start shooting within a specified period.

Although most writers or filmmakers would prefer an outright sale, an option deal can be better than outright rejection.

If a production goes into “turnaround,” it means there is some defect in the production that causes the producer to abandon it, like a failure to secure a big-name actor or the oft-cited “creative difficulties.” The writer may include a provision where the rights may revert to them. They would of course have to pay some fee, and if the producer has already spent a significant amount on the production it may not be feasible.

Even if one does not include a provision in the option agreement, the writer may still be able to reacquire the property through a process with the Writers’ Guild of America (WGA).

The Purchase Agreement

Although most writers or filmmakers would prefer an outright sale, an option deal can be better than outright rejection. Ostensibly, the writer gets more money upfront from a sale, but a purchase agreement, often called a “literary purchase agreement” may not always yield the desired outcome.

The literary purchase agreement is the writer waiving exclusive control of their story in most cases, and rights in nearly all cases. The studio or production company will purchase the rights to the script as well as the rights to make changes.

The total payment in the agreement may appear impressive, but production companies often pay in installments.

Usually, the studio cuts the first check to the writer as part of the pre-production funds, so that first payment is contingent upon the approval of pre-production funding. The rest may come when the studio approves the initial budget, or payment may be contingent on a rewrite.

The studio may bring in another writer to do a second draft. You may get a guarantee in your contract that you will be the writer who writes all the treatments and drafts, but that is not likely. You also may be able to secure a deal with two installments (at the start of pre-production and production), though this is usually reserved for experienced writers who can command a higher price.

The WGA and Basic Minimum Prices

The Writers’ Guild of America has set basic minimums to protect writers and ensure fairness in negotiations for the sale of a script. The basic minimum rates, known as “scale,” must be used as a guide for pay by companies that are signatories to the WGA.

Back-end payments are payments on a percentage of the net profit from the movie.

The guide suggests prices for the various jobs for which the studio may hire a writer, from first draft to “polish.” The guide affects option prices as well as outright sales. It also sets minimums for what the writer receives in compensation for work on VOD programs and other mediums where the program airs over time. The guide also accounts for installment payments, setting minimums for the first draft and so on.

The WGA minimum price for an outright sale only buys the script from the owner/writer. If the writer is going to do additional writing, such as a rewrite or sequel, they must be paid for the work.

Reserving the Right to Negotiate

Either party may want to include a provision in the agreement regarding the first right to negotiate. The writer will want the first right to negotiate for any subsequent publications, work on reshoots or rewrites. The producer may want the first right

to negotiate for any rights the owner/writer has reserved.

Back-End Deals and Residuals

Back-end payments are payments on a percentage of the net profit from the movie. The writer may ask to include back-end payments in the option or purchase agreement.

However, it may not be worth it as studios often report that even their blockbuster movies do not make profit. Even if one does want, and successfully adds, a back-end payment provision, their take will be far down on the list of parties getting a back-end cut and probably a percentage in the single digits. The most powerful writers in the business may ask for a cut of the gross profits.

It is rare for a writer to receive any control over creative decisions outside the script, such as casting.

The most important back-end ask may be residuals. In today's market where it is likely somewhere in the world some movie or TV show will be seen streaming, a residual check is possible. You should address the potential profits from streaming and on demand use in your agreement.

If a writer is dealing with a company that is not a signatory to the WGA, the writer may still use WGA minimums as a guide during negotiation for a sale or option price.

Creative Control

It is rare for a writer to receive any control over creative decisions outside the script, such as casting. A producer may still seek the writer's opinion on various aspects of the story, as will the actors, but a provision addressing this in the agreement is unlikely. If the writer's contribution is significant, but not credited or compensated, they may seek some redress with the WGA.

Finally Making the Sale

Whether you are buying or selling a script, you will want to consider setting up a business entity (incorporating). Setting up a business will make finances easier, from receiving large sums of money to limiting liability on bad deals. Talk to an entertainment attorney about incorporating, the pros and cons of the various kinds of entities you can create, and how they can help you with the business of making films.

The first-time author should keep in mind that if he or she is represented by an agent, lawyer, or manager, that person will take a cut of the purchase price of the option or purchase. That big sum the script brings may not be as big as advertised once it is finally in the bank. Most will consider any sum for a first-time script sale or option a win.

Still, the process of making a deal can get complicated with all the issues to be considered. One thing you should not have to mull over is whether to hire an experienced entertainment attorney to examine any legal document any producer hands you to sign. Oh, and do not forget to sign the document!

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