

Off the air

Screenrights' Newsletter

screenrights

Screenrights is a non-profit company which administers copyright licences in Australia and New Zealand and collects similar royalties from Europe and North America for its 2,500 members from 52 countries.

June 2007

Feature: Know the Quid Pro Quo: Negotiation Tips that are easier to learn than Latin

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02

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05

Code of Conduct: Call for submissions

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05

Brushing up on copyright

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06

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06

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06

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OTA0607

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Feature: Know the Quid Pro Quo: Negotiation Tips that are easier to learn than Latin

Too often people are so excited about the prospect of doing a deal, that they are willing to sign anything. Whether it be a script writer hoping to have their work produced, or a producer promised a distribution deal, everyone inevitably has to face the music and boogie to the groove that is wheeling and dealing or be damned. Alida Stanley, Senior Solicitor at the Arts Law Centre of Australia gives her tips for successful negotiation.

The Arts Law Centre of Australia (Arts Law), a national community legal centre that provides free and low cost legal services to all artists and arts organisations, recognises that creators are more interested in their creative work than learning how to wheel and deal. But if creators are to survive and thrive in a commercial world, it is worth investing in some negotiation skills.

The Status Quo

Generally, unequal bargaining positions are the *status quo* in the creative industries. The reason being, that one person usually controls access to the market and *ipso facto* (by that very fact) the cash register. Increasingly, with the fall in production costs and the ease of digital and online distribution, some creators are able to access the market more directly, thereby improving their bargaining power. But the fact remains that many creators are not interested in also assuming the role of producer, distributor or promoter. And so, they continue to rely on commercial service providers who hold the keys to the cash.

However, an unequal bargaining position does not necessarily mean that you have no choice but to agree to whatever is offered.

Tip #1: Get it in writing

The following four elements are necessary for the formation of a binding contract: there must be an offer, an acceptance, the payment of money or something else from the party accepting the offer to the party making the offer (lawyers refer to this as "consideration") and an intention to create a legal relationship. If one or more of these elements is missing, generally there is no contract. However, there is NO requirement that a contract must be in writing. Sometimes, transactions can be so mundane, say, buying an every day item at the store that it is inappropriate to enter into a written agreement.

Even so, when entering an agreement for anything that is not mundane, it is worth documenting the terms of whatever is proposed and then agreed between the parties. This does not mean that you must always sign a formal contract. Often terms can be documented in a letter or an email. However, letters or emails may represent only one side's understanding of what is being agreed to. The benefit of a written agreement is that when both sides sign the document, it is evidence that they both agree to what is contained in the document.

Tip #2: Negotiate

Arts Law is aware of scenarios in which one person has been pressured into signing an agreement under the threat that the offer will be withdrawn if they do not sign immediately, without the opportunity to seek legal advice or negotiate the terms. In our view, threats of this kind indicate that the other party is not serious about entering into an agreement.



Alida Stanley, Senior Solicitor at the Arts Law Centre of Australia

June 2007

While it is not impossible, it is very difficult to get out of an agreement once it has been signed. It can also be more costly than seeking legal advice *before* entering an agreement. Sometimes it is better to try to negotiate and walk away if unsuccessful, rather than sign up to a really bad deal.

Tip #3: Realise what you've got – How big is your bargaining chip?

Before you enter into a negotiation, it is important to understand exactly what you have to bargain with. Obviously, this will vary from transaction to transaction. But in the context of film productions for example, a producer must understand exactly what he or she has to offer. The short answer is of course, a film. But in the world of contractual negotiations, things are often not as simple as they sound. The owner of a film may or may not own all, or some, of the rights associated with that production. In the most basic example, a producer would have the exclusive rights to make copies of the film, cause the film to be seen or heard in public and electronically transmit or communicate the film to the public.

A detailed understanding of these rights is critical when entering a negotiation because it impacts on what you might choose to give up and what you choose to retain. For example, if a producer is negotiating a deal to theatrically release a film, he or she must decide whether to grant the distributor a broad right to exploit the film globally, or limit the scope of distribution to a country, state or city. Conversely, a producer must be very clear whether he or she has already given up some of these rights to a third party in exchange for financing, for example. If so, any rights already granted to someone else would need to be clearly excluded from the terms of the negotiation.

Tip #4: Work out what you want.

Before you enter a negotiation, it is important to know exactly what it is that you want to achieve. Do not be surprised if your ideal outcome is very one-sided in your favour. That's okay. Write down a list of all the elements of the agreement and identify your wish list of outcomes. Once you have your wish list, prioritise each element, thinking through those which are most important to you and those you might be willing to give up. This process will help you decide whether the deal is worth doing and at what cost.

Tip #5: Is it good for you?

It is a non *sequitur* (it does not follow) that any deal is a good deal. As mentioned above, some deals are just not worth doing. The way you work out whether a deal is worth your while starts with the list of priorities you compile under Tip #4 above.

First ask yourself, is there a deal breaker? In other words, if the other side does not agree to one of your top priorities, will you walk away from the deal?

Second, if there is a deal breaker, what are you willing to give up on your wish list in exchange for the other side to agree to your top priorities? The art of successful negotiation is to achieve your top priorities, with the minimum compromise. However, often compromise is inevitable and you need to decide whether the outcome is worth it.

Tip #6: Don't give away more than you have to.

Understanding what you have to offer in the transaction (Tip #3) is critical to ensuring that you tailor the transaction to get the best deal possible. It is not unusual, and is often commercially sensible, for one party to try to get as much as possible from the other party in a transaction. The danger lies in giving up too much because you haven't thought about what may be appropriate in the circumstances.

June 2007

For example, take the case of a creator who signs a licence agreement under which all worldwide rights in the creator's work are exclusively licensed for a significant period in exchange for a percentage of sale proceeds. This may appear to be a reasonably standard arrangement. However, nothing in the agreement addresses what happens if the other party fails to make any sales. Accordingly, the creator's work is tied up for a significant period of time unless the creator is prepared to take legal action. Legal action is generally costly, onerous and best avoided if possible. In this scenario, it would have been better for the creator to limit the rights granted and provide for specific sale targets under the agreement.

Tip #7: Only promise what you can deliver.

Be very careful of what you agree to under the terms of an agreement. Arts Law often encounters clients who have signed agreements without negotiating them carefully or because they feel intimidated or pressured to do so. There is no point agreeing to do something that you cannot or will not do. In fact, if for some reason you fall into this trap, you may well find that you end up breaching the agreement. This may give the other party the right to compensation for any loss they may have suffered as a result of your failure to fulfill your promise. You would have been much better off negotiating the terms of the agreement at the outset so that you only promise what is possible.

Tip #8: Is it enforceable?

It is all very well to enter into a well negotiated agreement with another party, but make sure you can hold the other party to their side of the bargain. Make sure you know exactly who you are contracting with; is it a company, a partnership or an individual? Consider whether the party you are contracting with can deliver what they are promising and whether they are capable of compensating you for any loss you might incur if they fail to fulfill their obligations. If you are contracting with someone who may not be able to financially compensate you if something goes wrong with the deal, consider whether a different solution may be viable and negotiate to have that included in the agreement.

Tip #9: Always keep a copy of anything you sign.

Often the only record of the detailed terms of a transaction is that contained in a written agreement. There should always be as many copies of an agreement as there are parties – one for each party to keep after the agreement is signed. Sometimes these agreements are short, one-page letters and other times they can be voluminous. As mentioned above, if you have signed an agreement, the likelihood is that you will be bound by its terms regardless of whether you can remember the details of what is documented. What's more, the other party to the agreement is under no obligation to provide you with a copy of the signed agreement if you have lost your copy and can hold you to its terms even if you do know what those terms are. Accordingly, keep copies of anything you or anyone else signs.

Tip #10: If you are unsure, get legal advice.

It is not necessary to always employ a lawyer to negotiate an agreement on your behalf. However, when there are large sums of money, complex legal issues involved or serious consequences if things go wrong, it may be advisable to seek legal assistance. Certainly, if there is anything unclear about an agreement, it is worth having an agreement reviewed by a lawyer. Arts Law provides its subscribers with legal services including up to two hours of contract review and negotiation advice. Arts Law prefers that creators seek legal advice *before* they sign agreements but can also provide creators with legal advice in relation to agreements after they have been signed.

For more information contact: www.artslaw.com.au and remember the sage advice of George Bernard Shaw:

It's just as unpleasant to get more than you bargained for as it is to get less.

June 2007

Screenrights and Telstra sign new deal

Screenrights has entered into a deal with Telstra ensuring filmmakers will be paid for the retransmission of free to air broadcasts of their work offered as part of the Telstra Velocity™ service supplied by Telstra to property developers.

Under the Telstra Smart Community® plan, developers can sign up with Telstra to deliver the Telstra Velocity™ network to houses in new developments. A number of services, including high speed broadband and retransmission of the free to air networks, are delivered over the Telstra Velocity™ network.

Screenrights Licensing Executive James Dickinson said the deal enabled new home owners to enjoy premium services while ensuring payment to the creators of the content that is to be retransmitted.

"Retransmission is not just confined to the carrying of free to air broadcasts by pay television operators," he said. "We will increasingly see deals such as this one, benefiting both consumers and the film industry. Screenrights will actively engage with the housing development industry to ensure that the film industry and creators of free to air content are appropriately remunerated where retransmission occurs."

For more information about Telstra Smart Community®, visit <http://www.telstrasmartcommunity.com/>

Code of Conduct: Call for submissions

Screenrights' and other collecting societies' compliance with a voluntary Code of Conduct is soon to be the subject of an independent annual review being conducted by former Federal Court judge Mr James Burchett QC.

As part of this review, Screenrights' members and licensees can make submissions directly to the Code Reviewer at the following address:

The Code Reviewer Suite 704

4 Young Street

Neutral Bay NSW 2089

Email: codereviewer@screenrights.org

Submissions must be made before 31 July 2007.

A copy of the Code can be found on Screenrights homepage: www.screenrights.org

June 2007

Brushing up on copyright

Most people working in the film industry need at least a rudimentary knowledge of copyright, and the best place to brush up on the latest changes is at an Australian Copyright Council seminar.

The Copyright Council holds training sessions, including a workshop that covers basic copyright principles, across Australia on an annual basis. The Council also has a number of publications that provide practical knowledge of how the law works.

To find out more about the training program and a list of Council publications, visit their website: www.copyright.org.au

Documentary feast for New Zealanders

Showcasing the best documentary films from around the world, and playing host to a number of related events, DocNZ will be held across New Zealand during September, October and November.

The festival, which is sponsored by Screenrights as part of its commitment to the film industry, is Australasia's only international competitive documentary film festival, and a must on the calendar for doco makers and lovers.

The festival also hosts a pitching competition, with the deadline for submissions on 29 June.

To find out more about the program, visit www.docnz.org.nz

Update for NZ school librarians

School librarians across New Zealand can receive an update on copyright and educational licences at the annual School Librarian Association of New Zealand Aotearoa (SLANZA) conference in Wellington from 2-4 July.

Screenrights Corporate Counsel Gillian Clyde will speak at a session entitled Copying Right in school libraries along with representative from CLL, APRA and the New Zealand Federation Against Copyright Theft.

To find out more about the conference go to www.slanza.org.nz/index.html