

# CHECKLIST WHEN NEGOTIATING FILM AND TV DISTRIBUTION DEALS

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This is a summary of some of the points you may wish to consider in your negotiations with sales agents and distributors. It is to be used as a general guide only and each deal should be negotiated according to the circumstances.

## COMMISSIONS AND ROYALTIES

In our general experience, rates of sales agent/distributor commission:

- will usually result in the international sales agent/distributor taking one commission fee across all rights (including DVD/Online rights). However there will then be back end royalty splits against individual rights once it has been licensed to a distributor within a territory.
- are inclusive of sub-licensees' commission or are capped (i.e. a total aggregate fee may be negotiated for both at a slightly higher than the sales agent/distributor's rate)
- are lower (or have a sliding scale in the case of worldwide buy-outs):
  - US territory compared to Rest of World territory
  - Worldwide buy-out/multi territory deals (e.g. a single sale to a global SVOD platform).

Additionally, you may wish to negotiate a right of prior written approval over the key terms of any sales in major territories as those sales could affect your ability to recoup your investment and earn profits from the project.

The percentage rates of commissions and expenses set out in the tables below are indicative only and will need to be negotiated in the context of the particular deal.

<b>International Sales Agent / Distributor Commissions</b>	
<b>Territory/Rights</b>	<b>Commission</b>
Major Territories	20%-30%
Secondary Territories	30%-35%
US Territory	15%-20%
Collection Society	10%

Australian Sales Agent/Distributor Commissions	
Rights	Commission
Theatrical/Non-Theatrical	30%-35% or costs off the top 50/50%
FTA & Pay TV	30%-40%
SVOD	30%-50%
Airline	30%-50%
Collection Society	10%

Revenue Shares		
Commission/Royalty received by Sales Agent/Distributor	Producer share	Sales Agent/Distributor share
Commission: Ancillary (includes ship, hotel) VOD/PPV/Online DVD/DTO/DTR	50%	50%
Royalty: DVD	20-25%*	75-80%

*\* If the sales agent/distributor is licensing to a sub-agent/sub-distributor, 50/50 revenue sharing for DVD is acceptable if the sub-distributor remits the net after they have deducted costs and a fee from the selling price of the DVD units. If no sub-distributor is used then a royalty should be paid on Gross Receipts received from the wholesaler.*

## VIDEO/DVD DEALS

Be mindful of the distinction between royalty and commission. International sales agents generally take a commission on DVD rights while distributors in Australia will generally offer a royalty.

- Ensure there is a definition for the DVD/EST gross receipts on which a royalty is based.
- Commission base should be net of withholding tax.
- Ensure the definition of 'Gross Receipts' for each right is clearly defined so that it is clear what the commission/royalty will be calculated on.

## MARKETING EXPENSES

Marketing expenses are all publicity and advertising costs for the project.

The sales agent/distributor will take expenses "off the top" before the producer and other investors receive any returns from the project, therefore it is advisable to:

- **Definition** - check that the definition of marketing expenses (or any marketing fee) relates to direct, verifiable and accountable costs and excludes items that are not a genuine marketing expense, such as company overheads.
- **Approvals** - obtain prior written approval over:
  - certain marketing expenses, such as marketing materials, posters, trailers, promo reels, screening costs, publicist
  - for international sales, the marketing budget for costs to be incurred in the launch of the film/program at a market
  - for Australia/New Zealand sales, the print and advertising (P&A) budget and marketing plan.

- **Interest** - check that no interest is applicable on un-recouped marketing expenses.

## DISTRIBUTION EXPENSES

Distribution expenses are generally the 'costs of sale' items (e.g. duplication of materials, shipping, technical check of delivery materials and other expenses in connection with the distribution of the program/project including dubbing into other languages and subtitling. Things to consider include:

- **Cap** - it is not uncommon in the industry for there to be a cap on distribution expenses. When Screen Australia is an investor on a TV projects, we generally aim for the cap to be no more than 5% of gross receipts in each reporting period.
- **Interest** - it may be in your interest to check that no interest is applicable on un-recouped distribution expenses.

## DISTRIBUTION GUARANTEE/ADVANCE

- **Advance** - ensure that the distribution advance is net of any withholdings, set-offs or other deductions (such as withholding taxes, otherwise you may end up with a gap in your finance plan).
- **Interest** - it may be in your interest to check that no interest is being charged on any un-recouped portion of the advance, or otherwise ensure the amount is minimal.

## PAYMENT TERMS

- **Delivery** - be wary of payment terms that allow for 100% of the distribution advance/guarantee to be paid upon delivery of the program/film. This could delay payment if there is any dispute about delivery. Another option would be to negotiate terms where payments are staggered throughout production (weighted higher at the beginning of production and lower at delivery stage).
- **Arbitration** - limiting the payment milestone to the technical acceptance of the delivery items and/or delivery of essential delivery items, and including an arbitration provision around delivery and disputes, are some options for reducing the risks around payments.

## RIGHTS

- **Definitions** - ensure that definitions are defined adequately, particularly VOD and its sub-set of rights such as AVOD, BVOD, FVOD, SVOD, TVOD, DTO, DTR, Online and Mobile. For examples of common rights definitions, the following link is may be useful: <https://ifta-online.org/wp-content/uploads/2019/05/IFTA-International-Schedule-of-Definitions-V2018.pdf>
- **Sequels, Remakes and Spin-offs** - granting options or first or last rights of refusal over sequels, remakes and spin-offs may be a better position than granting an automatic right.

- **Exclusivity** - assess which rights it would be in your interest to grant on a non-exclusive basis and which to reserve to yourselves as the producer (e.g. collection society income).

## TERM OF THE LICENSE

- **Dates** - ensure the start and end date of the licence period is clearly set out in the agreement (e.g. ensure the agreement is dated if the start of the licence period is from the date of the agreement) and that a delivery date is advised if expiry is based on acceptance of delivery.
- **Automatic extension** - be wary of provisions granting the sales agent/distributor an automatic extension of the term. (However, in circumstances where the sales agent/distributor has not fully recouped its advance and any approved expenses by end of the initial term, it may be acceptable to allow an extension to the term until those sums have been recouped).

## ACCOUNTING AND DISBURSING OF GROSS RECEIPTS

- **“Gross Receipts”** - the definition of gross receipts should include all money received by or credited to the sales agent/distributor
- **DVD returns** - reserves for returns of DVD commonly do not exceed 25% in the reporting period and are paid out in the following reporting period.
- **Reporting** - check the frequency of reporting and disbursement. It is generally standard for reports to be provided at least quarterly for the first two years, then semi-annually for the next two years and annually after that.

## AUDIT RIGHT

Where possible, it is advisable to negotiate a right to audit the records and accounts of the sales agent/distributor.

For example, when Screen Australia is an investor in a project we typically require:

- a right for the Producer and its nominee (i.e. Producer’s auditor/Screen Australia/Screen Australia’s auditor) to audit the records of the sales agent/distributor, with minimal restrictions on the timeframe during which the audit can be undertaken.
- the cost of the audit (as well as the amount of any underpayment) to be paid by the sales agent/distributor if the audit reveals an underpayment greater than and equal to 5% of Gross Receipts.

For any further enquiries please email [marketplace@screenaustralia.gov.au](mailto:marketplace@screenaustralia.gov.au)

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