

by JILL L. SMITH

PERK POINTS

Publicity services, approval rights, exclusivity, and approvals are often key elements of a deal between actors and studios

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A CONTRACT IS an “agreement, upon sufficient consideration, to do or not to do a particular thing.”¹ In the entertainment field, an attorney often is brought into a contract negotiation on behalf of an actor client after an agent has discussed and potentially resolved some of the material deal points—most likely the fee and credit. The attorney is likely to handle the remaining noncompensation provisions that are essential to the deal. While actors just starting their careers often have little leverage or desire to haggle over much beyond a standard deal, seasoned or breakout performers may be able to negotiate for better nonfinancial terms. The provisions that can make or break a deal are largely dependent on the type of deal at issue.

For theatrical motion pictures or long-form television motion pictures, settling on the fee payable to the actor can often raise more questions. The first question is likely to be, “What services are covered by the fee?” For day and weekly player agreements, which are the standard for newcomers and unknown performers, the answer is usually simple. A day rate covers a day of services; a weekly rate covers a week. But the answer is not as obvious in a “flat fee” deal, which is the norm for talent of greater stature and for roles requiring services longer than a few days or weeks.

One issue is likely to be exclusivity, which is generally not a contentious issue in movie deals. The presumption is that the actor’s services will be exclusive to the production com-

pany during production periods and subject to professional availability during periods not consecutive to the production period. Both parties must agree upon the extent to which the flat fee covers these services.

Actors are typically required to render services for preproduction (rehearsal, costume fittings, etc.), production (i.e., principal photography), postproduction (which may include special effects work, dubbing, and reshoots), and publicity for the film. It is not unusual for an actor’s deal to be based on a set amount of services, broken down into a specific number of days for consecutive exclu-

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sive preproduction services, a specified number of weeks for shooting, and a maximum number of days for postproduction services. The actor may be required to render services beyond those specified, for which the production company pays additional sums known as overages.

Parties will often agree to a “run of show” deal in which the fee is intended to cover the services for the entire length of production. However, there can be differing interpretations of what that means. A production company may expect that a “run of show” deal means that there is no chance for overages and that no matter how long the shoot lasts, the flat fee covers all production services. The talent, on the other hand, may interpret a “run of show” deal to mean that the fee covers the period of shooting based on the scheduled period as of the start of the shoot. In that case, the expectation might be that if the shoot goes overschedule, the actor will be entitled to overages. Notwithstanding the efforts of both parties to negotiate each material deal term prior to papering a deal, these issues of interpretation may not become apparent until both sides attempt to document their differing understanding of the deal.

Similar discussions are required concerning the number of days included in the flat fee for preproduction and postproduction services. In addition, there may be limitations on the type of postproduction eligible to be included in the flat fee. For instance, are reshoots to be considered postproduction services covered by the flat fee or additional photography services that could give rise to overages? The more attention given to these issues during negotiation, the less likely disagreements will arise during the documentation phase.

Publicity Services and Credit

The requirement to render publicity services is another area for debate. Studios often consider an actor’s promotional and publicity services essential to the deal. Some studios will attempt to make it a requirement that the actor be present at certain promotional events (e.g., the picture’s premiere). While seemingly reasonable, this requirement may affect the actor’s ability to take on other work, as the new job may conflict with the deal picture’s publicity schedule.

Another issue involving required promotional services could arise in the case of an actor who is taking less money to work on a movie or is not receiving any contingent compensation. In that situation, actors may believe that they should not be obligated to render publicity services. A well-known actor appearing in a cameo role may feel that it is not appropriate to publicize the picture, given the small role, for example.

In addition to compensation, another deal point that is usually raised early is credit. Discussions will involve the order of the actor’s credit in relation to other actors as well as other details such as size and placement. While the movie-watching public may pay scant attention to the placement of credits before or after the title of the movie or in big bold letters in a poster, talent and production attorneys tasked with working out these complexities are typically quite concerned with whether the credit to actor A or B will appear first, or at the same time, or with one on the upper right side and one on the lower left. While the usual focus is on getting the biggest and best credit, there are instances in which no credit is permitted. For example, a high-stature actor appearing in a cameo may insist on not being accorded any credit. The intricacies of credit negotiation at times will also involve discussions about the use of an actor’s image in advertising for a movie. A contract might address not only when the likeness can, or must, be used, but also the size of the actor’s image in relation to other likenesses appearing in the same advertisement.

Approval Rights

Some actors have sufficient clout to be accorded certain creative approval rights. Typical areas of such creative input are in respect of the selection of the director, the final screenplay, and other principal cast members. But not all approval rights are the same. Most approval rights afforded talent will provide that, in the event of a disagreement, the studio’s decision will prevail. An absolute approval right, however, provides the actor with the ability to walk away from the picture if the actor does not approve a certain element. Such an approval right can put an entire movie in jeopardy, a potentially untenable position from the perspective of a studio that may have already invested millions of dollars in development and preproduction. Similarly, an actor of a certain stature may find it wholly unacceptable to work on a film that he or she does not completely support. A typical compromise would provide for a true approval right to convert into a consultation right at some point prior to the start of shooting; but even that concept will require the parties’ agreement as to when that conversion occurs.

Other common approval rights concern the actor’s photograph, nonphotographic likeness, and biography as well as behind-the-scenes materials including the actor and footage recorded for, but not used in, the picture. It is not unusual for an actor to have input on some or all of these areas. The degree of that input will depend on the parties involved.

Another key area of negotiation in respect of motion picture talent deals is the use of the artist’s name, likeness, and voice. No one disputes the studio’s ability to use the actor’s recorded performance in the movie itself, but the breadth to which that performance may be used beyond the movie and publicity, promotion, and advertising for the movie can result in extensive conversations prior to agreement. The request in a talent deal to a “one picture license” is commonly understood to mean that the results and proceeds of the actor’s services may only be used in the picture itself and in advertising, promotion, and publicity for the picture. The biggest hurdles to overcome in that regard concern the right to use the talent’s name, likeness, and voice in connection with merchandising and soundtrack albums.

The request for a one-picture license is no longer as innocuous as it was in the past. A successful movie can lead not only to a line of board games, toys, books, and music videos but also to mobile applications, computer wallpapers, video and computer games, theme park rides, and ice arena shows. In this instance, the determinative factor is less likely to be about the performer’s stature and more likely to be about what studio is involved, as Disney and Universal have theme parks. At times a studio will insist on the ability to use an actor’s name or likeness in connection with merchandising. Short of the actor’s ending negotiations (which can happen), the next best step is to ensure that the actor is appropriately compensated for this use.

Merchandising tends to be an all-or-nothing proposition. Most pictures have little or no merchandising, but when a movie’s merchandising campaign hits, it can hit big. It is incumbent on the talent attorney to ensure that the royalty provisions are adequately and clearly negotiated. But even under the best of circumstances with heavily negotiated provisions, an actor may not feel that he or she is getting what was promised.²

The use of someone else to dub an actor’s voice in their native language can be embarrassing from the actor’s perspective—or necessary from the studio’s. While not at all the only instance, Andie MacDowell’s entire performance in 1984’s *Greystoke: The Legend of Tarzan, Lord of the Apes* was famously overdubbed by Glenn Close.³ Limiting the circumstances under which the voices of actors can be dubbed and providing actors with the first opportunity to dub in their native language are customary compromises.

Consideration also needs to be given to the studio’s ability to re-create an actor’s likeness. Use of technology to fabricate an actor’s image means that the use of a double is no longer the only way to do so. An attorney representing an actor will want to give consid-

eration to these issues in order to ensure the integrity of the actor's work.

Nudity

Another area often addressed in talent deals is the extent to which an actor may appear in nude, semi-nude, and sex scenes. For most roles, this topic is a nonissue; there will be no nudity or sex scenes. For others, this issue can result in heated discussions between the production attorney and the talent attorney. The SAG-AFTRA Agreement states: "The appearance of a performer in a nude or sex scene or the doubling of a performer in such a scene shall be conditioned upon his or her prior written consent."⁴ Separate consent is typically contained in a nudity rider, which "must include a general description as to the extent of the nudity and the type of physical contact required in the scene."⁵ Indeed, the nudity rider more typically addresses, in painstaking detail, the specific permitted and nonpermitted filming areas of the actor's body as well as the use of the materials. If an actor agrees to perform in nude scenes and then reneges on the agreement, the usual recourse for the production company is that a body double will be hired. The engagement of a body double in those circumstances is permitted by SAG-AFTRA.⁶ However, there has been a recent counter-suit filing by the company that produces *Femme Fatales* for Cinemax against an actress, Anne Greene, for allegedly breaching the applicable nudity rider by retracting consent.⁷ Time will tell if that reaction proves credible.

Perquisites and Options

The final area of nonboilerplate, noncompensation terms in respect to an actor's motion picture deal concerns perks. This area, like the others, comes with a wide range of possibilities. The A-list actor commanding a private jet and a full entourage including an on-set pilates teacher, masseuse, and chef is far from routine. Nonetheless, negotiations between the studio and the actor's attorney may go into the finest details. The particulars concerning the type and size of dressing room and the amenities to be included in it, the hotel, room type, quality of ground transportation (for both self-drive and with a driver) and, of course, the class and number of roundtrip air transportations to be provided, are all likely to be discussed.

Although a television or internet/streaming series may begin as a pilot (or even just a test in which an actor auditions for a pilot), the specifics are customarily entirely negotiated before the actor says a single line on camera. Series deals differ from theatrical or MOW motion picture deals primarily because they have the potential for continuing for so many years. Accordingly, while some of the non-



compensation issues raised in talent deals for motion pictures are the same in series deal negotiations, there are significant distinctions.

Deals and fees for a series regular are generally structured as a per-episode payment. But even that resolved issue brings its own set of questions and negotiations. It is not unusual for a series to include episodes in which a regular cast member does not appear. The question of whether or not that actor is nonetheless paid for that episode depends on how his deal was negotiated.

The gold standard in such respects is for an actor to be paid his or her episodic rate on an "all episodes produced" basis. The actor would then be compensated for all episodes even if he or she appears in less than all. Even then there will be a discussion as to whether there is a minimum number of episodes guaranteed per season. Particularly in light of the long production schedule and burdensome exclusivity requirements, there are strong justifications for an actor to be guaranteed payment for a certain number of episodes each season.

Although some series regular actor deals are intended for one season only, the traditional series deal will grant the studio options for additional seasons. Accordingly, another

threshold issue in a series deal will be the number of options granted to the studio. It is typical in these instances for the studio to want options totaling seven seasons (or seven and a half if the show initially airs in the spring). The number of options results in a long-term commitment from the actor and impacts the inevitable renegotiation of a series deal which occurs once a series becomes a success; that is, the shorter the commitment, the more leverage the actor has if a series becomes a hit.

Exclusivity and Relocation

A main component of a television series deal is exclusivity. The requirements of exclusivity flow in two directions—what other services the actor is permitted to render and when those services may be rendered. Unlike feature motion pictures, which customarily have a straightforward beginning and end of production schedule requiring an actor's exclusive services and after which the actor is released, a television series by its nature is in a relatively constant state of production and postproduction during which there will be stretches of time when an actor's services are not needed. As a result, a series actor is not usually barred from rendering outside services

during production periods, albeit in second position to the series. The bigger issue in series deals is the other aspect of exclusivity—the nature of permitted outside services.

As a starting point, studios want the actors on their shows to be relatively exclusive to the show, at least in respect of television and, more recently, internet programming. So, even when the agreement permits an actor to render outside services, there is a practical limit to his or her ability to do so. Since the actor may only have periods of a few consecutive days off, other than during true hiatus periods (traditionally during May and June), from the beginning of production of a season to the season's production wrap, it will be nearly impossible for an actor to schedule work on a feature. And, whereas it may be more realistic to coordinate production schedules for an appearance on another series, the actor's deal may preclude that. While there may be some exceptions to television exclusivity in episodic deals (a limited number of guest spots, appearance in foreign commercials and services in nonidentified voice-over commercials are commonly permitted), in general, an actor signed to a series role has made a significant commitment.

Another distinction between series deals and movie deals concerns location services. For a movie, the actor may need to be on location for several months. For a television series, if the show is successful, there is a possibility that the actor will be at the production location more than at his or her preseries residence.

An actor may be provided with traditional travel and expenses for pilot services. However, most series actor deals will provide that if the series is produced on location the actor will receive a one-time relocation fee in lieu of accommodations and per diem. For some individuals, the possibility of such uproot can result in the death of a deal.

Publicity

An actor's publicity commitment is also significant in a series deal. Like motion picture talent deals, most publicity services are subject to the actor's professional availability. However, most studios also obligate the actor to be present at certain events (e.g., the Television Critics Association Press Tour occurring in January and July, and the annual upfront presentations and related activities occurring in May), further affecting an actor's ability to take outside work.

The other nonfinancial deal terms that may be addressed in a talent agreement for a series are for the most part comparable to those of a feature deal. Those provisions will assuredly include credit as well as approvals and restrictions in respect of the use of the actor's name, voice, likeness and biography.

Another venue for an actor to render services is in connection with product or service commercials or endorsements. By nature, endorsements focus on the use of an actor's name, likeness, voice, and persona. The value of an actor's name and likeness in connection with supporting a particular product or service is evidenced by the number of lawsuits by an actor or actor's estate in which a likeness was used without consent.⁸ Accordingly, issues relating to such usage are of paramount importance in these deals.

A starting point for the question of permitted usage will be the type of services required. The range of possible services includes on-camera work, voice-over services, live appearances, still photography sessions, or any combination of these. The services rendered pursuant to these types of deals are usually more limited and may result in more flexible scheduling for the actor.

Once the nature of the required services is determined, the manner in which the services can be used is the overriding issue requiring resolution. For instance, a deal requiring one day of on-camera services can result in a multitude of commercials in various lengths as well as still photographs that can be used in print ads or the like. The details of the allowable usage will address territory, term, and media. These negotiations can be a critical aspect of the deal for actors with existing deals (e.g., for a series) that impose limitations on their ability to appear in commercials.

An infrequently used but potent provision in this type of deal is a liquidated damages provision. Such a clause would obligate the contracting party (often the advertising agency rather than the product manufacturer) to pay the actor for each individual breach of the agreement. The amounts are usually very high (six or seven figures per breach), which creates a strong incentive to comply with the terms of the deal.

Another area of significance in an endorsement-type agreement is exclusivity. The exclusivity at issue does not relate to the actor's ability to do other work but rather to what products the actor may be prohibited from also endorsing during the term of the deal at issue. Is an actor appearing in a beer commercial to be prohibited from promoting another beer, any other alcoholic beverage, any refrigerated beverage, or any beverage at all? The actor will want the scope of exclusivity to be as narrowly defined as possible while the company whose product the actor is endorsing may want to broaden the scope to both protect the brand and to have the actor's endorsement be that much more meaningful.

Approvals and Liability

Approval rights in these types of deals may also be significant. An actor may require

approval of the director of the commercial as well as the storyboard prior to committing to rendering services. While the company will be reluctant to give an actor approval rights that could significantly affect the company's right to use materials already created (and paid for), certain deals will nevertheless provide an actor with additional approval rights over the finished products. In light of the Federal Trade Commission's truth-in-advertising requirements, including that "[e]ndorsements must reflect the honest opinions...or experiences of the endorser,"⁹ approvals can protect endorsers as well as sponsors. For example, Octavia Spencer was awarded almost \$1 million in damages in a default judgment against Sensa, a weight loss company, for wrongful termination of her endorsement contract based on her appropriate social media postings that reflected that she was a paid sponsor.¹⁰

One issue unique to these types of deals is the nature of protection afforded the actor arising out of a third party's use of the product endorsed. An injured party will often seek relief against anyone affiliated with a product causing the injury that could include the actor who has been promoting the product. While the actor may ultimately be released from the claim or otherwise determined to be not responsible, the burden of defending himself from a frivolous claim should not fall on the actor. Accordingly, the issues of liability insurance and indemnification provisions are of particular importance in these types of deals.

Notwithstanding the many similarities among all talent deals, the differences between them require a talent attorney to evaluate, analyze, and negotiate each deal individually and at some point make a determination about whether a deal is in place. When all goes smoothly, as it does more often than not, that determination will not be subject to scrutiny. But, when something goes wrong, a threshold question may be whether or not there was a contract. The most famous, or perhaps infamous, situation regarding that issue reached involved the motion picture *Boxing Helena* and a lawsuit by the producers against Kim Basinger after she backed out of portraying the lead role. While the producers were initially victorious against Basinger in the 1993 jury trial,¹¹ the verdict was ultimately overturned and the case settled.¹²

A diametrically opposite lawsuit was the topic of another notable case filed in 2001 by Sharon Stone in which Stone alleged that her deal to reprise her star-turning role from *Basic Instinct* was in place.¹³ Stone's suit against the producers of *Basic Instinct 2* was initiated when the production was canceled. That case eventually settled,¹⁴ and, ultimately resulted in the completion and

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release of the sequel starring Stone. As the suits involving Basinger and Stone reveal, it is not always comprehensible to both sides whether or not an agreement is reached. The bottom line is that the attorney tasked with closing an actor's deal needs to carefully consider all issues particular to, and the individual circumstances of, that deal. Not one of these issues by itself is usually insurmountable; rather, it is the totality of the deal (which certainly includes the compensation) that gets evaluated and results in either mutual agreement on all material issues or an endnote in an article about deals gone awry. ■

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¹ See <http://thelawdictionary.org/contract>.

² See, e.g., Scott Zamost, 'Happy Days' actors settle lawsuit with CBS, CNN (July 7, 2012), at <http://www.cnn.com/2012/07/06/showbiz/happy-days-lawsuit-settled>; Dominic Patten, Fox Hit With \$250M 'Simpsons' Lawsuit by 'Goodfellas' Actor, Deadline (Oct. 21, 2014), at <http://deadline.com/2014/10/simpsons-lawsuit-goodfellas-character-rip-off-fox-857282>.

³ See, e.g., Andie Macdowell at <http://www.tcm.com/tcmdb/person/118671%7C0/Andie-Macdowell>; Mark Iveson, 10 actors who got dubbed out of their movies (Mar. 16 2011), at <http://www.shadowlocked.com/201103161613/lists/10-actors-who-got-dubbed-out-of-their-movies.html>.

⁴ SAG-AFTRA Agreement, Art. 43.D, available at <http://www.sagaftra.org/files/sag/2005theatricalagreement.pdf>.

⁵ *Id.*

⁶ "If a performer has agreed to appear in such scenes and then withdraws his or her consent, Producer shall have the right to double, but consent may not be withdrawn as to film already photographed." *Id.*

⁷ Eriq Gardner, Producers Allowed to Sue Actress for Refusing to Film Nude Sex Scene, The Hollywood Reporter (Oct. 20 2014), at <http://www.hollywoodreporter.com/thr-esq/producers-allowed-sue-actress-refusing-742081>.

⁸ See, e.g., Nate Raymond, Katherine Heigl, Duane Reade end lawsuit over actress' photo, Reuters.com (Aug. 27, 2014), at <http://www.reuters.com/article/2014/08/27/us-people-katherineheigl-idUSKBN0GR2BD20140827>.

⁹ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §255.1(a).

¹⁰ See, e.g., Eriq Gardner, Octavia Spencer's Tweets at Center of Endorsement Lawsuit (Exclusive), The Hollywood Reporter (Aug. 28 2013), at <http://www.hollywoodreporter.com/thr-esq/octavia-spencers-tweets-at-center-616596>; Daniel Taylor, Octavia Spencer Wins Wrongful Termination Lawsuit Involving Tweets, FindLaw (Dec. 24, 2014), at http://blogs.findlaw.com/celebrity_justice/2014/12/octavia-spencer-wins-wrongful-termination-lawsuit-involving-tweets.html.

¹¹ Robert W. Welkos, *Basinger Ordered to Pay \$8.9 Million for Jilting Film*, LOS ANGELES TIMES (Mar. 25, 1993), available at http://articles.latimes.com/1993-03-25/news/mn-14793_1_kim-basinger.

¹² Judy Brennan and Edward J. Boyer, *Damages Against Kim Basinger in Film Suit Voided*, LOS ANGELES TIMES (Sept. 23, 1994), available at http://articles.latimes.com/1994-09-23/local/me-42074_1_boxing-helena.

¹³ Stone's Basic Instinct: Sue the producers, The Guardian (June 7 2001), at <http://www.theguardian.com/film/2001/jun/07/news>.

¹⁴ Robert W. Welkos, *Settlement Near in Suit Over 'Basic Instinct 2'*, LOS ANGELES TIMES (July 14, 2004), available at <http://articles.latimes.com/2004/jul/14/business/fi-stone14>.