OPTION AGREEMENTS IN INNOVATION AND ENTERTAINMENT

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Introduction

Intellectual Property constitutes a major segment of the economic and corporate spheres in Nigeria and across the globe. In Nigeria, the innovative and entertainment industries are among the fastest growing industries of the intellectual property sector. Because of its commercial nature, Intellectual property rights and transactions are usually determined, and its contours are delineated by agreements. One of such agreement that is usually used in both the innovative and entertainment industries is the Option Agreement.

For this article, innovation means patents and inventive works, while entertainment majorly covers film and TV. We will explore the concept of option agreements and examine its usage in the innovative and entertainment industries. In essence, we will examine the uses of option agreements for innovations/patents and their uses in the film and TV industries.

Option Agreement for Patent and Inventive Works

An option agreement is a contract between the patent holder or an invention owner (the grantor) and a potential licensee (the grantee). The goal of the agreement is to give the grantee sole authority to acquire certain rights to the IP in the patent or invention. Option agreements are used as exceptional instruments for grantee to limit their financial exposure while locking in potentially critical intellectual property[1].

The option agreement grants the grantee a contractual right to enter a license or negotiate the license of the IP of the invention or patent within a defined period. Therefore, what the agreement gives is an "option" and not an obligation to exercise the right to enter the license or its negotiations. The option agreement in this bit has a commercial utility by (i) giving the grantee some sort of confidence that the patent holder or IP owner will not grant a license to any other competitor before the defined period in the agreement and (ii) allowing the IP/patent owner to earn option fees while still owning and using the optioned IP/technology. Some factors that determine the language and/or terms of the option agreement include (a) duration of the option period, (b) nature of the technology or IP involved, and (c) costs involved.

Some key clauses in technology option agreements are; parties, extent of option, option period, option fee, technology optioned, exclusivity, intellectual property, confidentiality, limitation, termination, law and jurisdiction, and disputes resolution. In some cases, the option agreement contains an evaluation option such that the prospective licensee has a right to evaluate the patented technology for a limited time and an option to enter into a license agreement for the technology.

Option Agreement for Film and TV

Option agreement in the film and tv industry is similar to the option agreement in technology as explained above. A traditional option agreement gives a production company an exclusive right to develop an underlying copyright work (including books and written screenplays) into a movie or screenplay. The owner of the underlying work (copyright owner) grants a right to the grantee to develop the underlying work for a fee. Option agreements are usually between the period of 18 months to 3 years and may be renewable for an additional fee.

The assignment or license of the rights in the underlying work may be contained in the option agreement or contained in a separate agreement. The latter is usually tidier for commercial purposes. However, in order to hedge any failure to sign the separate assignment or license

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[1] Tibor Papp & Fintan Walton, "**The rise of option agreements", June 2010, Retrieved from** [The rise of option agreements | Nature Reviews Drug Discovery]

agreement, a donation of power clause may be inserted in the option agreement to allow the grantee sign on behalf of the grantor.

The utility of an option agreement is to establish the right of the producer while paying a minimum amount as option fees to the copyright holder. This allows the producer/grantee to be able to show a contractual understanding to financiers as security of investments. Usually after the option is exercised, the ownership of any work that is produced from the underlying work belongs to the grantee/producer, however, the grantor/copyright holder may be entitled to certain pre-agreed royalties.

There are different types of option agreements and these agreements can be for books, television shows, or movies, etc. Acquiring an option to obtain a right in the film and television rights for a literary work (such as a novel, play, or original script) often serves as the initial step in developing a film or television project. If the literary work has been produced (and the option is exercised), the copyright owner receives a predetermined fee for granting ongoing permission to use the work in the film. Option agreements undergo extensive scrutiny throughout the lifespan of the project.

The author of a book can enter into an option-purchase agreement with B who wants to make a film adaption of the book. The option agreement will give B a specific timeframe for some groundwork such as the testing of the viability of the project, raising of funds, etc. At the end of the option agreement, B can exercise his option and have the adaptation right assigned to him.

Legal Framework Governing Option Agreements under the Nigerian Law.

The substantive laws applicable in regulating various option agreements in the Entertainment and IP industries include:

The Copyright Act 2022: The Copyright Act, 2022 governs, among others, the literary works in the IP industry, although, there are no specific requirements with respect to option agreements. Copyright provides protection for original works of authorship, including literary, musical, dramatic, artistic, and other works2. Copyright exists from the moment of creation in a fixed form; registration of the copyright while affording certain benefits, is not required.

One important area of the copyright law in the context of the entertainment industry is the right of the copyright owner. A copyright owner controls who may create a work based on the artist’s original work. In Nigeria, any work eligible for copyright is protected without any formalities or requirements of registering, provided the work has fulfilled the requirements of originality, fixation, and originality3. However, a copyright owner may agree to voluntarily register and deposit his work at the Nigerian Copyright Commission (NCC) under its copyright notification scheme.

Patent and Designs Act. In the innovative industry, the Patent and Designs Act of 1970 plays a significant role in regulating the registration and ownership of patents and designs in Nigeria. This Act bestows exclusive rights upon inventors for their new inventions or processes, empowering them to control and prohibit others from using, making, selling, or importing their creations without permission.

For an invention to be eligible for patent protection, it must meet specific criteria: it must be novel, industrially applicable, and can be an improvement on an existing patented invention. The individual who is recognized as the first to file for the patent or claim foreign priority is typically considered the statutory inventor, and they hold the patent rights.

[2] Copyright (wipo.int)
[3] Section 2 (2) Copyright Act 2022

In the realm of intellectual property, an option agreement comes into play as a mechanism to potentially transfer patent or design rights. This type of agreement allows a patent or design owner to grant another party the option to acquire the rights to the invention or design at a future date.

While the Patents and Designs Act itself doesn't explicitly address option agreements, it does include provisions related to contractual licenses, assignments, and transfers of patents. Section 23 of the Act, for example, enables a patentee or design owner to grant a license to another individual or entity through a written contract. This contractual license permits the licensee to exploit the relevant invention or design subject to the terms specified in the agreement.

Contract Laws: Majority of the laws which regulate contracts in Nigeria are in the form of a codified common law principles. A contract is an agreement between two or more parties that creates mutual legal obligations, establishing the rights and duties. The Law recognizes a property interest in one's creations, be it a film, music, dance literary or an act, a person who makes use of another's intangible property without obtaining the owner's permission, can be liable for theft, crime, or conversion.

Other Key Clauses in Option Agreement

The following are some other major provisions that are commonly included in an option agreement, which cover the essential aspects that define the rights, duties, and conditions of the agreement:

1. Grant of Rights: This is a critical section in the option agreement, and the rights provided must be detailed, which may include the right to make a film adaptation, create merchandise, or monetize the work. To make sure that all parties are aware of their respective duties, it is essential that the rights of both parties are clearly established. This provision often states the necessity to recognize any rights that may already be owned by the government or nonprofit groups that may have an impact on the granting of the exclusive rights. Furthermore, the clause may provide that the grantee has a limited period to negotiate an exclusive license, in the event that the grantee fails to exercise this option, that may result in the expiration of the company's right to negotiate exclusively.
2. Consideration. The parties' agreement should also outline the fees to be paid, the timeline for making payments, and the costs and expenditures of reimbursement. The provision may further specify that the sum to be credited should be applied to the total cost of the acquisition, as well as the terms of the acquisition, such as the payment schedule, any royalties or profit-sharing arrangements, and any other consideration.
3. Liabilities of the Parties. Both parties may include a clause permitting them to make a compromise on an issue, without incurring any liability. The parties are free to decide on any arrangement that would allow them to leave the agreement without suffering any consequences. It is possible for the parties to negotiate without incurring penalties for refusing to reach a settlement or carry out an agreement, providing for flexibility and risk reduction.
4. Option Period: The agreement between both parties should define length of the option period, during which the grantee has the sole right to exercise the option, and this will allow the grantee to assess the viability of the proposed project and secure the funding it needs.
5. Termination of the Agreement. This specifies the conditions under which the agreement will automatically terminate, which can be mutually agreed upon or imposed by either side. The agreement may be cancelled if the grantee fails to pay the option fee; fails to

exercise the option within the designated exclusive period; or fails to execute the licence agreement by the end of the negotiating period. The parties may mutually cancel the agreement in writing or by notice, and it may provide an exit strategy for both parties.

Governing Law. This provision guarantees that there is a clear and agreed-upon jurisdiction for resolving disputes, eliminating forum surfing. It establishes a clear legal framework for resolving disputes, including applicable legislation, interpretation, enforcement, and jurisdiction.

Relevance of Option Agreements

1. Securing of Exclusive Rights: In the fast-paced and ever-changing world of the entertainment and technology, option agreements have arisen as a significant tool for producers/rights owners to protect their rights without committing to an instant purchase or licence. It gives an option to both parties to evaluate the utility of the IP while securing the exclusivity within the option period.
2. Cost Effectiveness. Option agreements have become widespread practise, owing largely to their low cost. It is sometimes more cost effective for producers/purchasers to option a script rather than buy it outright from the start. Producers/purchasers can evaluate the sustainability of their funding and limit the risk of investing in a script that may not result in a lucrative motion picture by opting for an option agreement.
3. Risk reduction in financial matters. Option agreements are a useful strategy for lowering financial risk. By choosing an option agreement, producers may negotiate the uncertain terrain of their financing and guarantee they invest in initiatives with good prospects. The idea of exclusivity within these agreements gives producers with the required time and space to investigate other routes before committing to production.

Conclusion

In the entertainment and technology industries, option agreements are essential for fostering productive partnerships between creators and financiers while also safeguarding the interests of both sides. A strong grasp of the key elements and ramifications of these agreements will support the development of a dynamic and inventive ecosystem in Nigeria. Since these agreements are essential instruments in these sectors for navigating their economic success, it is crucial that both parties understand the utility of the agreement and their implications.

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