The Necessity of Mediation and Arbitration in Film & Media Disputes & Bird & Bird

Peter Brownlow
peter.brownlow@twobirds.com
"The industry has enjoyed significant success in recent years. UK box office takings reached a record-breaking £944 million last year, and will almost certainly break the £1 billion barrier this year"

Ed Vaizey, 29 November 2010
Film Production in the UK

- 125 films with budgets of more than £500,000
  - 22 Co-productions
  - 71 Domestic Features
  - 32 Inward Investment features
- £956,900,000 aggregate UK spend in 2009
  - £32 million Co-productions
  - £169.2 million Domestic UK features
  - £752.7 million Inward Investment
- 110 qualified as "UK films" (£915.9 million UK spend)

Source: UK Film Council Research and Statistics Unit
Film Production in the UK

• Split between US Studio and Independent Films in 2009
  ● 26 US Studio films
  ● 99 Independent films

• Majority of UK spend accounted for by US Studio films
  ● £728.5 million US Studio films in 2009
  ● £228.4 million Independent films in 2009

• Median budgets on Independent UK films in 2009 £1.9 million
  ● Down from £3.4 million in 2004

Source: UK Film Council Research and Statistics Unit
Broad range of projects and parties

- Single studio funded / Multi-party financing arrangements
- Global corporations / small independent production companies
- Multiple jurisdictions potentially involved
  - Locations
  - Sources of financing
  - Domicile of Artists/technicians
- Varying project sizes
- Short Production times
  - Small Independent (a few months)
  - US Studio (Iron Man 2: 1 year)
- Unknown value – "Blockbuster" or "Straight to DVD"
"In some areas of civil litigation costs are disproportionate and impede access to Justice"

Rupert Jackson, December 2009
Types of disputes that go to Court?

• Artist/talent agreements – *Crosstown Music Company v Rive Droite* [2010] EWCA Civ 1222

• Music copyright disputes – *Hadley and others v Kemp and another* [1999] All ER (D) 450

• Distribution agreements – *International Asset Control Limited (t/a IAC Films) v Films Sans Frontiers SARL* [1998] EWCA Civ 1579

• Merchandising agreements - *Gumball 3000 Films Ltd v Revolver Films Ltd* [2010] EWHC Ch 1190

• Confidentiality and non-disclosure agreements

• TV and other media formats – *Celador v Melville, Boone v ITV, Baccine v Celador* [2004] EWHC 2362; *Burrows v Smith* [2010] EWHC 22
Why Court might not always be the answer

Value of the claim

- Dispute arises before success of film is known
- Value of film might not justify the expense and time investment of litigation
- Parties unable to afford it
  - Gowers IP Review
    - SMEs unable to afford High Court litigation—another forum required
    - Recommended cheaper, fast-track litigation for IP cases
  - IPCC/PCC

Nature of dispute may not be suitable for adversarial proceedings

Length of Proceedings and effect on production timetable
...Even in larger value disputes

- Open Court v Confidential
- Speed
- High Court Judge v Sector specialist mediators/arbitrators

Complex disputes – have to weigh-up the pros/cons
Similar Problems in another field - Domain Names

• "Cybersquatting gives rise to disputes between trade mark owners and domain name registrants, which present features stretching the capacity of the ordinary judicial system."

• "Judicial system is territorially based and thus cannot always provide a comprehensive solution to a conflict of global dimension."

• "Court litigation can be slow and expensive, factors that can produce a de facto situation in which it may be quicker and cheaper for a trademark holder to buy backs its rights to a domain name from a cybersquatter, rather than seek to retrieve those rights through litigation."

WIPO Arbitration and Mediation Center
Domain Name Dispute Resolution Process

- ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP) in 1999. Applies to .com, .org and .net registrations.

- Competing dispute resolution forums administer the UDRP on ICANN's behalf, all have their own supplemental rules:
  - WIPO – the first to be accredited by ICANN
  - National Arbitration Forum
  - Asian Domain Name Dispute Resolution Centre; and
  - Czech Arbitration Court.

- World Wrestling Federation Inc v M. Bosman [D-1999.0001]
  - www.worldwrestlingfederation.com
WIPO- Domain Name Dispute Procedure

- Both parties make written submissions
- Case decided by an independent panel consisting of one or three members appointed by WIPO Center
- Procedure normally completed within two months of the date WIPO receives the compliant
- 19,592 cases since 1999
- Involving 35,507 domain names

Results

- 4,446 terminations – 22.6% of total cases
- 12,179 transfers – 62.2% of total cases
- 207 cancellations – 0.02% of total cases
- 1,990 complaints denied – 0.1% of total cases

WIPO - Domain Name Dispute Procedure

- Single mechanism for resolving a domain name dispute regardless of where the registrar, the domain name registrant, or trade mark owner is located

- Time and Cost effective given size of disputes and international context

- Mandatory implementation. No international enforcement issues

- Transparent – WIPO Centre posts all disputed domain names, case status and full text decisions on its website.

- Without prejudice to Court adjudication. Either party may commence a lawsuit before, during or after a UDRP proceeding. BUT in practice this is rare.
Necessity of Mediation and Arbitration in Film and Media disputes?

- Increasing value of film production activity in the UK
  - Although lower median spend for independent films

- Short duration projects

- Involvement of SMEs

- Uncertainty as to eventual value of film/media project

- Potential for involvement with more than one jurisdiction

- Success of alternative dispute procedures in similar situations
Thank you & Bird & Bird

Peter Brownlow
peter.brownlow@twobirds.com