

Negotiating and Drafting Contracts in the Entertainment Industry

Professor Anthony Berman

FINAL EXAM – Spring 2007

Instructions

1. You have three (3) hours to complete this exam.
2. This is an open book exam. You may use any written notes, books, or other materials to assist you in responding to the questions.
3. This exam consists of two (2) questions. Each question is worth 50 points. Answer each question as fully as you can in accordance with the instructions set forth below.
4. You are not required to spend the entire time working on the exam - the average time for completion is between two and three hours. You should outline your response to each question, before writing the response. I recommend that you spend one third of the time on each question creating your outline, and the remainder of your time writing your answer. For example, if you spend 1.5 hours per question, devote .5 hours to the outline, and 1 hour writing the answer.
5. Please note that Question No. 2 requires you to review and redline the attached Audio-Visual Content License and Distribution Agreement. You will be given two copies of the agreement, one to use to outline your response, and a second clean copy to use as your answer copy to be turned in. Mark your outline copy with the word “**Draft**” clearly written on top of the first page, and mark your answer copy (the one you want the professor to read) “**Answer**”. Remember you must turn **both** your draft and answer copies in at the end of the exam.
6. WRITE LEGIBLY OR PRINT IF YOUR HANDWRITING IS DIFFICULT TO READ. If I cannot read your response to a question, your grade will be adversely affected. Please write your answers in the blue books provided to you. Written or typed answers need to be double-spaced and please only write on the right hand side of the page of the blue books.
7. Write you exam number on your exam envelope, at the top of this exam packet, your blue books and both copies of the Audio-Visual Content License and Distribution Agreement. Do not use your name, student ID number or Social Security Number on any exam materials.
8. At the conclusion of the exam, return all exam materials to the exam envelope and submit to the proctor. Do not seal the envelope.

QUESTION NO. 1 (50 Points)

Our client is an audio recording school called Audio Recording School, Inc. (“ARS”) ARS has a stable of non-employee (independent contractor) instructors. ARS wishes to engage the services of some of its instructors to create instructional podcasts (“Pod Tips”). ARS intends to post the Pod Tips on its website but may also press CDs and/or DVDs with the Pod Tips.

ARS wants each instructor to deliver an outline of a Pod Tip for review by ARS. ARS will develop a script from the outline and will then produce the Pod Tip with the instructor.

ARS might later have the instructor do further Pod Tips on other topics, but there is no commitment to do so by ARS.

ARS will pay the instructor 35% of net income received by ARS from the exploitation of the Pod Tip twice each year.

Please draft an agreement, which will incorporate the above-referenced deal points as well as any other standard and customary provisions.

QUESTION NO. 2 (50 Points)

You are the attorney for EcoMuse Video, a company that produces ecology and outdoor lifestyle DVDs. The DVDs feature performances by and interviews with hikers, climbers, surfers and artists who are active in ecological and outdoor sports issues. They have been operating for a couple of years and have been successfully selling their product into small “mom and pop” stores that sell “green” products and outdoor sports gear. They also sell their product at booths at jamband rock festivals. EcoMuse Video is now interested in securing a deal that would get their product into the major mass retail stores in the United States and Canada such as Best Buy and Walmart. However, they want to continue to sell directly to nature/sports shops and rock fans at the festivals.

USA Distribution is a major mass retail market distributor of audio and audio-visual product.

USA Distribution’s in-house legal counsel has drafted and provided to EcoMuse Video a proposed Audio-Visual Content License and Distribution Agreement. Review and redline the attached agreement for the client.

USA DISTRIBUTION, INC.

100 Main Drive

Nashville, TN 59347

April 23, 2007

EcoMuse Video

300 Fast Avenue, No. 1

San Francisco, CA 94000

RE: USA Distribution, Inc. -w- EcoMuse Video

Audio-Visual Content License and Distribution Agreement

Dear Sirs:

This letter confirms the Agreement between EcoMuse Video, a California corporation ("EcoMuse") and USA Distribution, Inc., a Tennessee corporation ("USAD"), with respect to USAD's manufacture and distribution of the video products further described below ("Licensed Products").

Definitions:

- a. "Retail" or "Retailer" means all normal and customary brick & mortar and internet retail sales channels for the sale of Licensed Products.

- b. The term "Advance" shall be understood to mean any expenses in connection with USAD's exploitation of Licensed Products. USAD may recoup

Advances from royalties to be paid or accrued to or on EcoMuse's behalf pursuant to this Agreement.

c. The term "Net Sales" shall mean the gross sales of Licensed Products, less returns, credits and other normal and customary adjustments.

d. The term "Delivered" or "Delivery" shall mean the actual receipt by USAD of fully cleared, mixed, and edited master digital video discs commercially and technically reasonably satisfactory in a format ready for manufacture and that allows for the highest quality of duplication of VHS videotapes and DVDs together with all necessary licenses, consents and approvals.

e. "AWP" shall mean the actual wholesale price paid to USAD for Licensed Products sold under this Agreement, which shall be reasonably determined by USAD, and shall be the same as the AWP for the majority music video products manufactured and sold by USAD, and which shall at all times reasonably reflect market rates for music video products sold at Retail.

f. "Video Products" means videotapes and DVDs, as well as all other formats now known or hereafter devised utilizing the Licensed Products.

g. "Licensed Products" shall mean Video Products authorized and delivered by EcoMuse to USAD as provided hereunder.

1. **Term/Renewal** The rights granted to USAD by EcoMuse under this Agreement shall commence from EcoMuse's Delivery of the masters for the first video title released under this Agreement, and continue five (5) years from release of the final video title constituting a Licensed Product hereunder, and for

any renewal period as described below ("Term"). In the event that aggregate sales of all Licensed Products exceed one hundred thousand (100,000) units prior to expiration of the initial Term, USAD shall have the right to renew the term for an additional period of five (5) years.

2. **Territory** EcoMuse hereby grants USAD the exclusive, assignable right and license to sell the Licensed Products to all retail channels throughout the world.

3. **Product Delivery and Requirements/USAD Release Options**

a. During the term of this Agreement, EcoMuse shall Deliver to USAD (in DLT digital video disc format) its next six (6) newly produced video titles to be used by USAD in the manufacture, distribution, promotion, and sale of Licensed Products as further described in Paragraph 4 below.

b. In regard to the second through sixth new Video Products deliverable under this Agreement, EcoMuse hereby grants to USAD an irrevocable Option to manufacture and release these titles for the Retail market. USAD shall exercise its Option in writing delivered to EcoMuse within thirty (30) days of delivery to USAD of a copy of a final cut or master of the new Video Product. In the event USAD rejects a title under this paragraph, EcoMuse shall submit an alternate title for approval.

c. EcoMuse hereby agrees that it shall not transfer, assign, sell, or license all or part of any of the Licensed Products to any other third party during the Term of this Agreement, without the prior written permission of USAD.

4. **Grant of Rights** EcoMuse hereby grants to USAD the following exclusive rights during the Term:

a. The exclusive right to advertise, sell, distribute, or otherwise use the Licensed Products for Retail throughout the world, employing any media now or hereafter known, and under such trademarks, trade names, service marks or labels as USAD may now have or hereafter reasonably designate.

b. The exclusive right to publicly perform, and to authorize the public performance of such Licensed Products, in any medium whatsoever, including but not limited to, the Internet.

c. The exclusive right to couple Licensed Products distributed hereunder on videotapes embodying the performances of other individuals, and the right to include Video Products distributed hereunder in packages with videotapes not produced hereunder.

d. The non-exclusive right to use, publish, reproduce or distribute in any medium, the names, photographs, pictures and approved likenesses of all featured musicians and athletes appearing in the Video Products solely for purposes of advertising, promotion or trade in connection with the exploitation of said Licensed Products.

5. **Manufacturing License** Pursuant to the terms of this Agreement, EcoMuse hereby grants to USAD a non-exclusive license to copy, manufacture, assemble and package the Licensed Products for distribution and sale as permitted herein. In the event that the masters delivered to USAD are unsatisfactory, and USAD must pay for additional mastering, said mastering costs shall be deemed Advances.

6. **Advance** Upon Delivery of the masters described herein, USAD shall pay to EcoMuse the sum of Ten Thousand Dollars (\$10,000) as an advance against the royalties payable hereunder for each video title delivered hereunder, but which shall be a fully recoupable as specifically provided in Section 7(b).

7. **Royalties**

a. After recoupment of the Advances referred to in Section 6, for sales within the United States USAD will pay EcoMuse the following royalty rate for each Licensed Product sold by USAD and not returned or credited at the following rates:

Video/DVD Products: Twenty Percent (20%) of AWP.

No royalties shall be payable if the AWP of any title drops below \$5.99 for VHS, or \$8.99 for DVD.

For sales outside of the United States, USAD shall pay EcoMuse fifty percent (50%) of its Net Receipts received by USAD from the sale of Licensed Products in foreign territories. Net Receipts shall mean gross receipts received by USAD from the sale of Licensed Products in foreign territories minus any taxes, import or customs fees, shipping or other costs incurred in the sales of goods in foreign territories.

b. **Recoupment of Advances.** Except as expressly provided for in this Agreement, the Advances in Section 6 are non-refundable. Notwithstanding the above, no cash payment of any royalty will be made to EcoMuse until, all Advances have been recouped by USAD out of the royalties that would otherwise be owed to EcoMuse from the sale of Licensed Products hereunder. Furthermore, no royalties will be payable on Licensed Products that are returned

to USAD as defective or furnished by USAD as free or given away for promotional purposes.

c. Free Goods Allowance. USAD may deduct up to fifteen percent (15%) from the total royalty due EcoMuse to help offset USAD's costs for free promotional goods provided by USAD to promote sales of Licensed Products.

8. Statements USAD shall send EcoMuse statements for royalties payable hereunder within ninety days (90) days following the expiration of each quarter-annual period. However, no statements shall be provided for any period in which royalties are not payable to EcoMuse hereunder.

9. Representations and Warranties EcoMuse represents and warrants that all Licensed Products delivered to USAD by or on behalf of EcoMuse will be the original work of EcoMuse and will not infringe upon any patent, copyright, trade secret, trademark or other proprietary rights of others. EcoMuse further warrants that it has the full power and all necessary rights to enter into this Agreement, to carry out its obligations hereunder and to grant the rights herein granted and has not previously granted and will not grant, any rights to any third party which are inconsistent with the rights granted herein.

10. Indemnification EcoMuse shall defend, hold harmless and indemnify USAD from any and all damages, liabilities, costs, losses, and expenses (including reasonable outside attorney's fees) arising from any third-party claims for copyright, trademark, or publicity infringement; EcoMuse's non-payment of clearance or production fees; arising from or in any way related to the Licensed Products.

11. Right of Sell-Off Following the termination or expiration of this Agreement, USAD shall have the right to sell off its remaining inventory of

Licensed Products (“the Sell-Off Period”). Within thirty (30) days following the conclusion of the Sell-Off Period, EcoMuse shall give USAD instructions concerning the delivery to EcoMuse of the inventory in USAD's possession. If EcoMuse has not given delivery instructions to USAD within such thirty (30) day period, EcoMuse shall be deemed to have authorized USAD to destroy such inventory on EcoMuse's behalf and expense, which shall not exceed Ten Thousand Dollars (\$10,000.00) without the prior written permission of EcoMuse.

12. USAD Credits USAD shall have the right to place its USAD “logo” in the beginning credits of the films. USAD shall have the further right to place its trademarks or logos on the packaging of Licensed Products. USAD shall be entitled to use a credit as distributor in all print advertisements, in the film credits, and on the packaging of the Licensed Products distributed by USAD in substantially the following form: “Distributed by USA Distribution”.

13. Legal Clearances

EcoMuse shall secure and grant to USAD the right to use the names and likeness of all featured persons, their images, voices, sounds and music included in the Video Products.

14. Governing Law

This Agreement shall be governed by Tennessee law and any dispute or proceeding referring or relating to this Agreement shall be filed and prosecuted in the State of Tennessee.

If the above terms are acceptable, please confirm your client's agreement by arranging to have an officer of EcoMuse sign where designated below, and returning a copy to us.

Sincerely,

USA Distribution, Inc.

By: _____ Date: _____

Agreed and accepted:

EcoMuse Video

By: _____ Date: _____

USA DISTRIBUTION, INC.

100 Main Drive

Nashville, TN 59347

April 23, 2007

EcoMuse Video

300 Fast Avenue, No. 1

San Francisco, CA 94000

RE: USA Distribution, Inc. -w- EcoMuse Video

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Advances from royalties to be paid or accrued to or on EcoMuse's behalf pursuant to this Agreement.

c. The term "Net Sales" shall mean the gross sales of Licensed Products, less returns, credits and other normal and customary adjustments.

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c. EcoMuse hereby agrees that it shall not transfer, assign, sell, or license all or part of any of the Licensed Products to any other third party during the Term of this Agreement, without the prior written permission of USAD.

4. **Grant of Rights** EcoMuse hereby grants to USAD the following exclusive rights during the Term:

a. The exclusive right to advertise, sell, distribute, or otherwise use the Licensed Products for Retail throughout the world, employing any media now or hereafter known, and under such trademarks, trade names, service marks or labels as USAD may now have or hereafter reasonably designate.

b. The exclusive right to publicly perform, and to authorize the public performance of such Licensed Products, in any medium whatsoever, including but not limited to, the Internet.

c. The exclusive right to couple Licensed Products distributed hereunder on videotapes embodying the performances of other individuals, and the right to include Video Products distributed hereunder in packages with videotapes not produced hereunder.

d. The non-exclusive right to use, publish, reproduce or distribute in any medium, the names, photographs, pictures and approved likenesses of all featured musicians and athletes appearing in the Video Products solely for purposes of advertising, promotion or trade in connection with the exploitation of said Licensed Products.

5. **Manufacturing License** Pursuant to the terms of this Agreement, EcoMuse hereby grants to USAD a non-exclusive license to copy, manufacture, assemble and package the Licensed Products for distribution and sale as permitted herein. In the event that the masters delivered to USAD are unsatisfactory, and USAD must pay for additional mastering, said mastering costs shall be deemed Advances.

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10. Indemnification EcoMuse shall defend, hold harmless and indemnify USAD from any and all damages, liabilities, costs, losses, and expenses (including reasonable outside attorney's fees) arising from any third-party claims for copyright, trademark, or publicity infringement; EcoMuse's non-payment of clearance or production fees; arising from or in any way related to the Licensed Products.

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Sincerely,

USA Distribution, Inc.

By: _____ Date: _____

Agreed and accepted:

EcoMuse Video

By: _____ Date: _____

End of Exam