



1-1-1998

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Recommended Citation

Michael R. Fuller, *Turnaround for Writers - Not Quite, but Close: The Writer's Right to Reacquire Theatrical Literary Material under the WGA Basic Agreement*, 18 Loy. L.A. Ent. L. Rev. 241 (1998).

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TURNAROUND FOR WRITERS? NOT QUITE, BUT CLOSE: THE WRITER'S RIGHT TO REACQUIRE THEATRICAL LITERARY MATERIAL UNDER THE WGA BASIC AGREEMENT

Michael R. Fuller*

I. INTRODUCTION

*How many studios does it take to make a motion picture about a bumbling Ninja from Beverly Hills? Five, but who's counting?*¹

If you were the writer of the screenplay in question, you would be counting. For Mark Feldberg and Mitch Klebanoff, the writers of *Beverly Hills Ninja*,² this situation was no joke.³ This screenplay “spent more than 10 years in development, bouncing from studio to studio before it landed in a familiar place: the hands of the original writers.”⁴ Soon thereafter, Motion Picture Corporation of America (“MPCA”) produced the film, which was released by Sony Pictures in early 1997.⁵

It is not entirely uncommon for a studio other than the original purchasing studio to produce a project. Most often, this situation occurs

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1. See Ted Johnson, *Scribes Get Clause on 'Ninja'*, DAILY VARIETY, Jan. 27, 1997, at 4 [hereinafter Johnson, *Scribes Get Clause*]. The *Beverly Hills Ninja* screenplay was first optioned by United Artists in 1986. *Id.* After residing with United Artists for some time, the script went on to the following studios: Universal, Paramount and MGM/UA before the writers exercised their right of reacquisition in 1995, with Motion Picture Corporation of America picking up the tab, having just made a \$6 million pay-or-play acting agreement with the deceased comedic actor Chris Farley. Ted Johnson, *With This History, 'Ninja' Should Have Been an Epic*, VARIETY, Jan. 27, 1997, at 2 [hereinafter Johnson, *With This History*].

2. BEVERLY HILLS NINJA (Motion Picture Corp. of Am. 1997); see Johnson, *With This History*, *supra* note 1, at 2.

3. See Johnson, *With This History*, *supra* note 1, at 2.

4. *Id.*

5. *Id.*

when a project goes into “turnaround.”⁶ Turnaround is an option negotiated for by producers and sometimes directors, but typically not writers, to reacquire a dormant or abandoned project.⁷ Through turnaround, a producer may reacquire a project he or she brings to a studio, or at least shop the project to another studio, if the project does not remain in active development through the “progress to production schedule” defined in the applicable agreement.⁸ During standard turnaround, the studio’s rights to such material are put on hold during a specified time while the producer’s option to reacquire the project is exercisable.⁹ When a producer brings a project to a studio, it is industry practice for him or her to receive turnaround rights in the project.¹⁰ Undoubtedly, studios negotiate and obtain many restrictions and time constraints on turnaround rights. However, turnaround allows a producer or director to lessen the risk that a project will get stuck in “development hell” or abandoned. Accordingly, this right allows the filmmaker to receive the substantial sums of money customarily due when a picture commences principal photography.

6. “A turnaround is a negotiated option allowing someone (generally a producer) to shop an abandoned property [to another company].” WRITERS GUILD OF AMERICA, WRITER/AGENT ALERT!, IS IT A REACQUISITION OR A REVERSION? (THIS IS NOT YOUR MOTHER’S TURNAROUND) 1 (April 1997) (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter WRITER/AGENT ALERT!].

7. See *id.*; see also discussion *infra* note 10.

8. *Id.* A “progress to production schedule” is a term given by the author to the defined period of time in a rights acquisition, producer or director agreement, during which certain development and production-related activities must occur by certain prescribed dates (e.g., the engagement of a screenwriter, commencement of principal photography and release of picture) or the project goes in turnaround or is subject to reversion, as applicable. See *id.*

Turnaround rights exist only through industry practice and case-by-case contract negotiation between the producer and the studio. Therefore, the terms, restrictions, time constraints and all other terms affecting turnaround are left to individual negotiation. See *id.*

Turnaround is similar to, but distinct from, reversion. See *id.* (“Guild reacquisition appears similar to a ‘turnaround,’ but it is not the same.”). While turnaround provides the right to set up the material at a different studio for a defined period of time, no rights in the material are assigned to another party until such time as the material is set up at a different studio, and such studio pays the monies required under the specific turnaround provision. See 1 ERIC B. YELDELL, *THE MOTION PICTURE AND TELEVISION BUSINESS: CONTRACTS AND PRACTICES* § 1.04, at 1-7 (1985). With reversion, the original purchaser’s rights to the material actually revert to the assignor, usually with no restrictions or requirement of the payment of monies. See, e.g., 17 U.S.C. § 203(b) (1988) (providing reversion of rights in the copyright context).

9. Typically, the length of turnaround (i.e., the period of time the producer may set up the material at a different studio) is between one and two years, and if the producer fails to set up the project during such time, the turnaround rights cease, and the original purchasing studio retains its rights to the material in perpetuity. YELDELL, *supra* note 8, § 1.04, at 1-7.

10. See *id.* While it is more common for producers to receive turnaround rights than directors, many A-list directors who bring projects to a studio receive such rights. But see discussion *infra* note 13.

With *Beverly Hills Ninja*, however, the project was not picked up by MPCA in turnaround.¹¹ It was reacquired by the writers of the screenplay under a seldom-used provision of the 1995 Writers Guild of America Theatrical and Television Basic Agreement (“WGA Basic Agreement”).¹² Although producers, and sometimes directors, are generally successful in negotiating for turnaround rights, writers typically are unsuccessful in negotiating for such rights even though writers arguably have the same stake in a project.¹³

This Article focuses on the WGA Basic Agreement’s provision bestowing on a WGA writer the ability to retain control of his or her screenplay after its sale or option. Part II discusses a writer’s right to reacquire theatrical literary material from a purchasing company under the WGA Basic Agreement. Part III explains a writer’s right to reacquire this material after the purchasing company sells or options it to a third party.

11. However, one could come to the conclusion that MPCA financed the writers’ reacquisition by agreeing to purchase the project after the reacquisition. See Johnson, *With This History*, *supra* note 1, at 4 (“[They] reacquired the rights to their script and quickly turned around the project, selling it to Motion Picture Corp. of America, which was ready and waiting . . .”). If this was the case, the MPCA was in effect able to obtain the screenplay at a much lower price than having acquired the screenplay in turnaround.

12. WRITERS GUILD OF AMERICA, 1995 WRITERS GUILD OF AMERICA THEATRICAL AND TELEVISION BASIC AGREEMENT art. 16.A.8, at 162-70 (1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter WGA BASIC AGREEMENT]; see Johnson, *Scribes Get Clause*, *supra* note 1, at 4 (“[Many] writers don’t even know that the clause exists, believing that the sale of their scripts is final.”); Johnson, *With This History*, *supra* note 1, at 2 (“*Beverly Hills Ninja* is believed to be the first time that the clause has been used and resulted in a project making its way to the screen.”). If the MPCA had acquired the project in turnaround, it would have probably spent thousands of dollars over the amount the writers paid to reacquire the screenplay. See discussion *infra* Part II.B.4-5. It is important to note that under typical turnaround provisions, the producer (or the subsequent studio acting on behalf of the producer) must reimburse the purchasing company not only the amount paid to the producer for the material, but also reimburse the company all costs incurred by such company in connection with the development of the project, including interest and overhead associated with the project, as well as agree to pay such company a profit participation on subsequent exploitation (usually a percentage of such company’s net profits). See, e.g., WRITER/AGENT ALERT!, *supra* note 6 (“[I]f the project is sold to another company [in turnaround], the original company will be paid negotiated ‘costs’ (often including overhead and production costs, with interest.”). The specifics of the amount to be reimbursed and paid are subject to negotiation between the parties, but the result is usually such that many attractive projects are available, but no buyers are able to afford turnaround. See, e.g., *id.*; see also Johnson, *With This History*, *supra* note 1, at 2 (noting that with overhead, the cost of reacquiring “*Beverly Hills Ninja* [through turnaround] almost certainly would have reached into the stratosphere”).

13. While writers do not typically receive turnaround rights, it is possible that the stature of the individual writer could enable him or her to obtain such rights when negotiating the applicable writer agreement. It also should be noted that it is not *fait accompli* that a producer will receive these rights when negotiating their deals with a studio either. As discussed above, this right is subject to case-by-case negotiation, taking into account the relative bargaining power of each party. See, e.g., discussion *supra* notes 8-10.

Part IV discusses the WGA Basic Agreement's procedures if more than one writer desires to reacquire the literary material. Part V suggests specific contractual language that could be added to writer agreements to assist the writer in reacquiring the project. The Article concludes that the WGA Basic Agreement's right of reacquisition benefits everyone involved in the film industry.

II. WRITER'S RIGHT TO REACQUIRE THEATRICAL LITERARY MATERIAL FROM PURCHASING COMPANY UNDER THE WGA BASIC AGREEMENT

While turnaround rights are customarily not given to writers during deal negotiations, theatrical writers do hold a similar right under the WGA Basic Agreement—the right of reacquisition.¹⁴ This right allows a writer of original theatrical literary material (i.e., original story or screenplay) to reacquire such material from a Writers Guild of America ("WGA" or "Guild") signatory purchaser under certain circumstances.¹⁵ This right is separate and distinct from standard turnaround rights and provides a writer with certain benefits that are not typically associated with turnaround.¹⁶ Furthermore, a studio cannot bargain away a writer's right of reacquisition during the negotiation process, making this right absolute if certain conditions are met.¹⁷

14. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 166–70. This Article discusses a writer's right to reacquire theatrical literary material acquired on or after August 8, 1988. While writers of literary material acquired prior to August 8, 1988, hold a similar right, the procedures to reacquire this material are different from those discussed herein.

The WGA Basic Agreement provides a similar right for writers of literary material for television. In the case of television, a writer holds the right of reversion, instead of the right of reacquisition. WGA BASIC AGREEMENT, *supra* note 12, art. 16.B.2, at 172–76. The most salient difference between these two rights is that, with regard to television, if after a specified time the original purchasing company has not produced a series or movie for television, depending on the specific literary material, both the writer and the company hold a nonexclusive right to do so without any obligations to the other (except the original purchaser is required to pay the writer WGA-mandated payments and the specific obligations arising under the underlying acquisition or services agreement). See WGA BASIC AGREEMENT, *supra* note 12, art. 16.B.2, at 172–76.

15. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8, at 162–70; see also discussion *infra* Part II.A–B. It is important to note that the WGA Basic Agreement only binds production companies and studios that are signatory companies (i.e., those companies who agree to adhere to WGA rules and regulations). See WGA BASIC AGREEMENT, *supra* note 12, Preamble, at 1. As such, any rights to reacquire material from a non-signatory company must be specifically acquired during negotiations.

16. See, e.g., WRITER/AGENT ALERT!, *supra* note 6. ("Guild reacquisition appears similar to a 'turnaround,' but is not the same."); see also discussion *infra* Part II.B.

17. See WGA BASIC AGREEMENT, *supra* note 12, art. 9, at 38 ("The terms of this Basic Agreement are minimum terms . . .").

A. Two Conditions For Right of Reacquisition: Original and Unexploited

The literary material in question must meet two conditions for it to fall within a writer's right of reacquisition under the WGA Basic Agreement.¹⁸ The literary material must be original and not previously exploited in any medium.¹⁹ While the WGA Basic Agreement does not adequately define "originality," it does provide a simple explanation: The material must not be "based on any pre-existing material."²⁰ The WGA Basic Agreement also fails to provide a detailed analysis of the specific meaning of the phrase "not previously exploited in any medium." As such, this requirement must be taken literally. Certainly, if a company produces a motion picture based on the material, the material is no longer subject to reacquisition.²¹ The intent of the WGA in imposing these requirements appears clear: It wishes to reward and provide writers of original literary material with certain benefits that are not provided to writers of non-original material.

B. Procedures for Reacquisition

A writer of original theatrical literary material may reacquire the material from the purchaser during a two-year period commencing five years from the original purchase of the material or completion of the writer's services rendered in connection with such material, whichever is later,²² by: (1) notifying the purchaser of the intended reacquisition, provided the reacquisition may only take place if such material is not in active development at the time a writer notifies the company; (2) refunding the compensation paid to the writer by the purchaser; and (3) obligating any subsequent third-party purchaser to reimburse the original purchaser,

18. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8, at 162. It is important to note that the WGA right of reacquisition applies to literary material that was sold or optioned as a "spec," as well as to original literary material written under a writing services agreement or assignment. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 166.

19. *Id.* at 162. ("The provisions of [reacquisition] apply only to literary material (i) which is original, *i.e.*, not based on any pre-existing material, and (ii) which has not been exploited in any medium.").

20. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8, at 162; *see also* WRITER/AGENT ALERT!, *supra* note 6 ("Original theatrical motion pictures stories and screenplays (not based on any pre-existing material) may be reacquired . . .").

21. *Id.*

22. Although it is not specified, it appears that the date of the original purchase agreement or the completion of writing services begins the tolling of the five year period. *See* WGA BASIC AGREEMENT, *supra* note 12, art. 16, at 168 ("The buyer(s) shall have five (5) years *from the date of its/their agreement* . . . to place the material into active development . . .") (emphasis added).

when principal photography of the picture is commenced, the direct costs incurred by the original purchaser in connection with such literary material.²³

1. Writer's Notification

During the prescribed two-year period during which reacquisition may occur, a writer must notify the original purchaser (the "Company") in writing of the writer's intent to reacquire the material in question.²⁴ The writer must "include in such notice written notification of the address(es) where further correspondence and notices relating to reacquisition of the material shall be sent."²⁵

2. Active Development

A writer may reacquire the story or screenplay only if, at the time of the writer's notification, the project is not in active development.²⁶ The WGA Basic Agreement provides five examples of active development for the purposes of this provision: (1) employment of a writer to rewrite the literary material; (2) employment of a director, major actor, or other key above-the-line element on a pay-or-play basis for a motion picture based upon the literary material; (3) a production designer, production manager, or other supervisor is in active preparation for the production of the motion picture; (4) a unit production manager or other person is engaged to prepare a budget for the motion picture; or (5) production has commenced upon a theatrical or television motion picture based on the literary material.²⁷

23. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 166-67; see also WRITER/AGENT ALERT!, *supra* note 6 ("[T]he period for the writer to buy back his/her script begins 5 years following the completion of the sale or the original writer's services (whichever is later)."); see discussion *infra* Part II.B.1-6; Johnson, *Scribes Get Clause*, *supra* note 1, at 4 ("In general terms, the clause says that if a studio has had an original script for five years, and if the script is no longer in active development, the writers have a window of two years after that to buy back the rights. The price: what they were originally paid. Then, the company that buys the project from the writers also has to pay additional script costs . . .").

24. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 162.

25. *Id.* art. 16.A.8.d, at 166. Notwithstanding any notice provision in the underlying acquisition agreement or services agreement between the Company and the writer, all notices that the Company is required to serve upon the writer, or that the Company decides to serve upon the writer, shall be addressed to the writer at the address(es) specified by the writer in this notice. *Id.* art. 16.A.8, at 169. The writer may amend the designated address(es) at any time by sending written notice to the Company. *Id.* art. 16.A.8, at 170.

26. *Id.* art. 16.A.8.d, at 166.

27. *Id.* art. 16.A.8.c, at 165.

As the WGA Basic Agreement specifies the foregoing activities constituting active development to be examples only, the list is arguably not exhaustive.²⁸ It is also possible for the Company to constantly keep projects in active development by ensuring that a paper trail exists evidencing that the Company is continually undertaking at least of one of the five examples. Admittedly, this activity would take an enormous amount of oversight and energy, therefore, making it unlikely to be employed.

After having five years to develop the material, the Company has had sufficient time to develop the material to the point where it can make an informed determination as to whether to produce a motion picture.²⁹ This time period protects the Company from having a screenplay “pulled out from under them” before it has had time to hone the screenplay and assemble the necessary cast and crew.

3. Company’s Right to Commence Active Development Immediately

Not only can the Company prevent a writer from reacquiring the material if at the time of the writer’s notification the material is currently in active development, but the Company can also prevent reacquisition if it places the material in active development within sixty days following a writer’s notification of intent to reacquire the material.³⁰ However, to prevent the Company from avoiding reacquisition by undertaking meaningless development activity after such notification, the WGA Basic Agreement sets narrow parameters for active development after notification.³¹

After the writer’s notification, material is deemed to be in active development only if: (1) the Company employs a writer to rewrite the literary material; or (2) the Company employs a director, or major actor on a pay-or-play basis for a motion picture based on such material.³² Narrowing the definition of active development raises the stakes and requires the Company to commit a substantial amount of money to the

28. *See id.*

29. *See, e.g.,* Johnson, *With This History*, *supra* note 1, at 2. As Grace Reiner of the Writers Guild of America theorizes, “[I]f you haven’t made a film in five years, and it is not in active development, the chances are you are not going to make it.” *Id.*

30. *See* WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.c, at 165. The 60-day period is measured from the time the Company receives the notification from the writer. *See id.*

31. *See id.* art. 16.A.8.d, at 166.

32. *Id.* While the WGA Basic Agreement does not provide a definition of “major actor,” it is the author’s belief that the Guild’s intent of this provision is to require the Company to commit to the spending of a substantial amount of money if the Company desires to commence active development after receiving notification of a writer’s intent to reacquire material.

project. If the material later ceases to be in active development, the Company must notify the writer, and the writer may institute the prescribed reacquisition procedures.³³

4. Company's Response

Within sixty days of receiving a writer's notification of an intent to reacquire the material, the Company is required to provide the writer and the WGA written notice of one of two responses.³⁴ First, the Company may notify the writer and the Guild that the Company does not believe the writer may reacquire the material, stating specific reasons for such belief.³⁵ This belief could be based on several different reasons. For example, the Company may not believe the material is original, or may believe that it has been previously exploited.³⁶ The Company may also be actively developing the material, or it may intend on also placing the material in active development within the required sixty day period.³⁷ The Company may have also sold the material or placed it under option or in turnaround to a third party.³⁸ Finally, the reacquisition period may also have expired.³⁹

The Company must promptly notify the writer and the WGA if material that was in active development at the time of the Company's response, or placed in active development within the required sixty-day period, later ceases to be in active development.⁴⁰ If the writer notifies the Company of the writer's intent to reacquire the material within thirty days following receipt of this notice, the Company, within sixty days, must then notify the writer of the reacquisition price for which it will sell its right, title, and interest in the literary material to the writer.⁴¹

The Company must also notify the writer of any encumbrances

33. See discussion *infra* Part II.B.4.

34. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 166.

35. *Id.* art. 16.A.8.d, at 166-67.

36. See discussion *supra* Part II.A.

37. See discussion *supra* Part II.B.2-3.

38. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 167. If the Company notifies the writer that the material has been sold, or is under option or in turnaround, the Company must include in such notice: (1) the identity of the third-party involved; (2) the date of such encumbrance; and (3) the expiration date of any such option or turnaround. *Id.*

39. "If the reacquisition period has expired, and the writer has not approached the Company to reacquire the material, the writer no longer has the right under the Guild agreement to buy the material back, and would need to negotiate directly with the Company to buy back the script." WRITER/AGENT ALERT!, *supra* note 6.

40. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 167.

41. See *id.*; see also discussion *infra* Part II.B.5.

and/or commitments that are attached to the material at the time the Company receives the writer's notification, including security interests, participations, employment rights, future options and turnaround rights.⁴² The Company shall have no right to place the material into active development during the sixty day period.⁴³ If the Company notifies the writer that the material is in active development, under option or in turnaround, any remaining time on the two-year period shall be tolled during the period of any such active development, option or turnaround and until the writer receives notice from the Company that the material is no longer in active development, under option or in turnaround.⁴⁴

Second, if no reasons exist at the time the Company receives the writer's notification to prevent the writer from reacquiring the material, the Company must notify the writer of the terms and conditions on which it will sell its right, title and interest in the literary material to the writer, including the price and any encumbrances and/or commitments that are attached to the material.⁴⁵ Although, it does not appear that the WGA Basic Agreement specifically requires the Company to provide the writer with copies of all agreements encumbering and committing the material, the writer should attempt to obtain copies of these documents.⁴⁶ Otherwise, the writer and any subsequent purchaser would have to strictly rely on the Company's notification to the writer.⁴⁷

5. The Reacquisition Price

The writer shall reacquire the material in question if the Company notifies the writer of the reacquisition price for which it will sell its right, title, and interest in the literary material to the writer, and the writer tenders the reacquisition price within six months after the writer's receipt of such notice.⁴⁸ The reacquisition price will be the total compensation the Company actually paid to the writer for the purchase of the material and/or

42. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 167.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*; see also discussion *infra* Part IV.

47. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 166.

48. *Id.* art. 16.A.8.d, at 169.

The writer shall reacquire the literary material pursuant to this subparagraph 8.d upon payment to the Company (or the [subsequent] buyer, if applicable) of all compensation actually paid by the Company (or the [subsequent] buyer, if applicable) to the writer for services in connection with the literary material and/or for the purchase or license of the literary material from the writer or Company.

the writer's services for the material.⁴⁹ The WGA Basic Agreement strictly prohibits the Company from seeking more than such amount from the writer, thus preventing the Company from receiving participations, points and the like.⁵⁰

As the writer takes the reacquired material subject to existing encumbrances, the WGA Basic Agreement prevents the Company from actively developing or additionally encumbering the material by entering into new agreements or commitments during the six-month period the writer has to pay the reacquisition price.⁵¹ This prevents the Company from further tying up the material and allows the writer to know with certainty the existing encumbrances when attempting to set up the material at a third-party company.⁵²

If the writer should fail to tender the purchase price within the six-month period, the writer may begin the process for reacquisition at any time prior to the expiration of the two-year period.⁵³ Moreover, a writer need not complete the procedures for reacquisition prior to the expiration of the two-year period, but he or she must have commenced these procedures before the expiration.⁵⁴

49. *Id.*; see also WRITER/AGENT ALERT!, *supra* note 6 (“[T]he writer may reacquire the material . . . by paying back what the writer received for the original material (the purchase price and/or employment fees).”).

50. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 169.

It is understood that the purchase price . . . is the sole monetary consideration due from the writer to the Company to reacquire the literary material; in no event will the writer be obligated to pay more than the amount specified in the preceding sentence (e.g., in the form of profit participations to the Company.).

Id.; see also Johnson, *With This History*, *supra* note 1, at 2 (“Writers who trigger the [reacquisition] clause don’t have to pay other fees, like producers’ overhead, which can run into the hundreds of thousands of dollars for a script in lengthy development.”).

51. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168 (“The Company shall not further encumber the literary material during such six (6) month period by entering into new agreements or commitments, such as options, turnarounds, security interests, participations and employment rights or actively develop or sell the literary material.”); see also discussion *supra* Part II.B.4.

52. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168.

53. *Id.*

In the event the writer fails to make the payment within such six (6) month period, the writer may reinstitute the procedure for reacquisition at any time within the time remaining in the two (2) year period referred to above, it being understood that such procedures need only be commenced, and not completed, within the two (2) year period.

Id.

54. See *id.*

6. Writer Must Bind Third-Party Subsequent Purchaser

If after reacquiring the material, the writer sells the material to a third party, the writer must contractually obligate the third party to reimburse the Company certain limited direct costs that the Company incurred in connection with the material prior to the writer's reacquisition.⁵⁵ These costs include payments for writing services of other writers in connection with rewrites and polishes of the material. The third party is also responsible for any typical fringe benefit costs, including pension and health fund contributions, social security payments paid on behalf of such writers, and interest on all the foregoing costs.⁵⁶ Unlike typical turnaround provisions, the Company cannot require the reimbursement of overhead and production costs.⁵⁷

While the third-party subsequent purchaser must be bound to make these payments, the party does not have to tender payment until commencement of principal photography of a motion picture based on such material.⁵⁸ As such, the WGA has lessened the risk a third party will encounter when acquiring the material by not requiring the subsequent purchaser to commit to paying these monies by solely acquiring the reacquired material.⁵⁹

7. Reacquisition Subject to Existing Encumbrances

Any reacquisition under the WGA Basic Agreement remains subject to any existing commitments and encumbrances the Company imposed on

55. *Id.* art. 16.A.8.d, at 169.

If the writer reacquires the literary material from the Company (or [subsequent] buyer, if applicable) and the writer thereafter sells or licenses the literary material to a third party, the writer shall obligate such third party to reimburse the Company (or [subsequent] buyer, if applicable), upon the commencement of principal photography, for any other direct cost previously incurred by the Company (or [subsequent] buyer, if applicable) in relation to such literary material . . . plus interest thereon.

Id. It is important to note that the agreement documenting the writer's reacquisition of the material must contain a provision setting forth the writer's obligation to bind a subsequent third party purchaser to pay the required costs. *See id.*

56. *Id.* art. 16.A.8.a, at 163; *see also* WRITER/AGENT ALERT!, *supra* note 6.

57. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 169; *see also id.* art. 16.A.8.a, at 163 (stating that the costs are "exclusive of overhead and exclusive of costs of any other kind (e.g., costs relating to proposed production other than writing costs)"); *see also* discussion *supra* note 12.

58. *See id.* at 169; *see also* WRITER/AGENT ALERT!, *supra* note 6 ("Monies due from the subsequent purchasing Company are payable (with interest) upon commencement of principal photography . . .").

59. *See* WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 169.

the material, “such as security interests, participations, turnaround rights and employment rights.”⁶⁰ It appears that this policy arises from the WGA’s desire to circumvent third-party contractual agreements between only the WGA signatory purchaser and a writer surrounding or governing a project.⁶¹ Therefore, it is important for a writer to receive all relevant agreements concerning the material from the Company, so the writer can know the extent of these commitments and can adequately inform any subsequent third-party purchaser.⁶²

III. WRITER’S RIGHT TO REACQUIRE THEATRICAL LITERARY MATERIAL AFTER SALE OR OPTION BY THIRD PARTY

If the Company subsequently sells or options the literary material to a third party, a writer’s right to reacquire such material continues, subject to certain procedures depending on whether the material is assigned or optioned.⁶³

A. Assignment or Sale

If the Company sells or assigns the material to a third party, it is incumbent on the Company to bind the third party in writing to the provisions of the WGA Basic Agreement regarding a writer’s right of reacquisition, including the obligation that any subsequent purchasers of the material also comply with such terms.⁶⁴ The writer may reacquire the material from the buyer or any subsequent third-party purchaser under the procedures and time constraints applicable to the original purchaser.⁶⁵ In other words, any subsequent third-party purchaser has five years to place the material in continual active development.⁶⁶ Otherwise, the writer may begin the process for reacquisition from that company.⁶⁷

B. Option or Turnaround

If a third party options the material or it goes into turnaround, the five-year period for active development is tolled.⁶⁸ The tolling period is

60. *Id.* art. 16.A.8.d, at 166.

61. *See id.* art. 16.A.8.d, at 169.

62. *See* discussion *infra* Part IV; *see also* text accompanying *supra* notes 46–47.

63. *See* WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168.

64. *See id.*

65. *Id.*

66. *Id.*; *see also* WRITER/AGENT ALERT!, *supra* note 6.

67. *See* WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168.

68. *See id.*; *see also* WRITER/AGENT ALERT!, *supra* note 6 (“That [Company’s] 5-year

measured by the length of time the material is under such option or in turnaround, or for eighteen months, whichever is shorter.⁶⁹ However, only the first such option or turnaround tolls the Company's active development period.⁷⁰

If the third party does not exercise the option or pick up the material in turnaround, the writer may commence the normal reacquisition procedures with the Company, subject only to any tolling that has occurred.⁷¹ However, in the specific situation where the material was optioned or placed in turnaround but not exercised and acquired, and the Company's time period to place the material in active development ends (i.e., more than six and one-half years have passed since the original purchase by the Company), the writer may give the Company the required reacquisition notice prior to the expiration of such option or turnaround period and the writer will not have to wait for the option or turnaround period to expire to give such notice.⁷²

In this situation, the Company is deemed to have received the reacquisition notice on the date of expiration of the option or turnaround, even when the Company received notice prior to such expiration.⁷³ This exception prevents the Company from immediately placing the material in active development on the day the material is no longer subject to an option or turnaround.⁷⁴ If the option is exercised or the material is acquired in turnaround, the writer may reacquire the material from the third party under the procedures applicable to an assignment or sale.⁷⁵

IV. PROCEDURE IF MORE THAN ONE WRITER DESIRES TO REACQUIRE THE LITERARY MATERIAL

If more than one writer was involved in writing the material subject to reacquisition and more than one wishes to reacquire the material, the WGA will have the sole discretion on which writer has the right to

period is extended if the purchasing/employing company sells the material to another Company . . .").

69. See WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168.

70. *Id.*

71. *Id.* art. 16.A.8.d, at 169 ("If an option is not exercised and the Company's period of active development . . . has ended, and the writer's notice of intent to reacquire was received during the time the literary material was under option, the writer may, without further notice to Company, reacquire such material . . .").

72. See *id.*

73. See *id.*

74. *Id.* art. 16.A.8.d, at 168.

75. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168-69; see also discussion *supra* Part III.A.

reacquire the material.⁷⁶ The decision of the WGA shall be binding on all such writers.⁷⁷

While the above procedure might appear to be concise and unambiguous, it raises a few important questions. How does the Guild determine which writer should have the right of reacquisition? How does the right of reacquisition affect any underlying collaboration agreement between the writers?

Consider the following fact pattern: Writers *A*, *B*, and *C* write an original screenplay and sell it to Studio *X* for \$200,000. The screenplay becomes eligible for reacquisition, and Writer *B* immediately notifies Studio *X* of his desire to reacquire the screenplay. Writer *C* notifies Studio *X* of her desire to reacquire the screenplay ten days after Writer *B*'s notification. Unbeknownst to Writers *A* and *C*, Writer *B*'s representatives have approached Studio *Y*, and Studio *Y* wants the screenplay and has offered to pay \$400,000.

What does the WGA do? Does Writer *B* reacquire the screenplay since he notified Studio *X* before Writer *C*? If the WGA determines Writer *B* may reacquire the material, does Writer *B* get a \$200,000 (less commissions) profit? Or, do Writers *A* and *C* share equally in any profits or as set forth in the writers' collaboration agreement? Must Writer *B* disclose to the WGA that Studio *Y* has approached him regarding the reacquisition?

It appears this particular aspect of reacquisition requires additional explanation by the WGA. Although not discussed, the following outcomes seem logical. If all writers of a certain material wish to reacquire the material, the writers should be able to reacquire the material together as a team. When the WGA receives the Company's response to a writer's notification of her desire to reacquire material, the WGA should determine whether more than one writer was involved in writing the material. If more than one writer was involved, the WGA should contact the writer(s) to determine their desire to reacquire the material. If one writer desires to reacquire material and that writer alone finances the repurchase without the assistance of a subsequent third-party purchaser, that writer should be entitled to receive any future compensation received in connection with a subsequent sale. If, however, a subsequent third-party purchaser finances the reacquisition on behalf of a writer, all the writers should receive a proportion of subsequent compensation equal to the proportion of the initial compensation received under the writers' original agreement.

76. WGA BASIC AGREEMENT, *supra* note 12, art. 16.A.8.d, at 168-69.

77. *Id.* art. 16.A.8.d, at 169.

V. SUGGESTED LANGUAGE TO ADD TO ANY WRITER AGREEMENT TO ASSIST THE WRITER IN REACQUISITION

Notwithstanding the detailed procedures in the WGA Basic Agreement related to reacquisition, certain provisions remain ambiguous. It is unclear whether the WGA Basic Agreement requires the Company to supply a writer with actual copies of any agreements encumbering the material, or whether the Company must only inform the writer of such encumbrances.⁷⁸ A provision in the original acquisition or services agreement that requires the Company to supply the writer with actual copies of all encumbering documents would assist the writer in reacquiring the material. An example of such a provision follows:

If Artist notifies Company of Artist's desire to reacquire the Screenplay [defined term in agreement for the subject literary material] pursuant to Article 16.8.d of the WGA Basic Agreement, and Artist is actually entitled to reacquire the Screenplay pursuant to Article 16.8.d of the WGA Basic Agreement, Company shall include with its written response to Artist stating the reacquisition cost and any existing encumbrances to the Screenplay, copies of all agreements encumbering the Screenplay, including, without limitation, all agreements concerning options, acquisitions, turnaround, security interests, participations, and/or employment rights.

As the reacquisition price is the amount the Company actually paid to the writer for the purchase of the material and/or for the writer's services in connection with the material,⁷⁹ it is critical for a writer to ensure the original acquisition or services agreement distinguishes between monies paid for the acquisition and/or for the writer's services, on the one hand, and monies paid for other services of the writer on the other.⁸⁰ If the agreement does not clearly distinguish these monies, the Company could argue that monies paid to the writer for other services under the agreement are included in the calculation of the reacquisition price, resulting in a higher reacquisition price.⁸¹ To assist a writer in avoiding this problem,

78. See *id.*; see also *supra* text accompanying Part II.B.4.

79. See discussion *supra* Part II.B.5.

80. Other service fees a writer could receive include consulting fees or development fees if the writer serves as a producer on the project or cash payments in lieu of expenses.

81. If the writer is providing other services in addition to writing, putting aside all other issues except for reacquisition, it is beneficial to the writer to structure the applicable acquisition or services agreement so that as much money as possible is paid to the writer for nonwriting services or for the acquisition of the material so the reacquisition price is as low as possible.

the following provision could be included in the original acquisition or services agreement:

If Artist notifies Company of Artist's desire to reacquire the Screenplay [defined term in agreement for the subject literary material] pursuant to Article 16.8.d of the WGA Basic Agreement, and Artist is actually entitled to reacquire the Screenplay pursuant to Article 16.8.d of the WGA Basic Agreement, only the amounts actually paid to Artist pursuant to paragraphs X, Y, and Z [paragraphs in agreement providing for compensation to Writer for only the purchase of the material and/or Writer's writing services] shall be used to calculate the purchase price Writer must pay to Company to reacquire the Screenplay pursuant to Article 16.8.d of the WGA Basic Agreement, and no other amounts paid or payable to Writer other than the amount actually paid to Writer pursuant to paragraphs X, Y, and Z shall be used to calculate such purchase price.

VI. CONCLUSION

While writers do not typically receive turnaround rights in literary material written on "spec" or under assignment, the WGA Basic Agreement has taken strides to bestow upon a writer of original, non-exploited theatrical literary material a more attractive right—the right of reacquisition. This WGA-mandated right allows a writer to reacquire his or her literary material if certain procedures are followed. In creating the right of reacquisition, the WGA has attempted to strike a balance between the interests of writers and the original purchasing company. For example, the original purchasing company is given ample time to adequately develop the material before a writer may begin the reacquisition procedures. Furthermore, the WGA ensures that the original purchasing company will be properly reimbursed for its out-of-pocket expenditures when material is reacquired by a writer. While the writer must only reimburse the purchasing company the compensation actually paid by the Company to that writer, the Company will receive reimbursement from a subsequent purchasing company for costs and interest associated with the reacquired material, provided that the money does not have to be actually paid until, if ever, a motion picture is actually produced on such material.

The WGA provides writers of original, non-exploited theatrical literary material a degree of control that was previously unavailable—the ability to retain control of their written work *after its sale*. The WGA-mandated right of reacquisition is a step forward for all in the film

industry, as it increases the odds that a quality screenplay will reach the big screen.

