

LEGAL AND BUSINESS SOLUTIONS TO LICENSING AGREEMENT ISSUES CAUSED BY CORONAVIRUS

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Webinar April 7, 2020

CORONAVIRUS EFFECT ON LICENSING INDUSTRY

- **Every consumer products company around the globe is effected.**
- **Licensing Agreements add an additional layer of business and contractual issues.**
- **Everything we planned for 2020 is now different!**
- **We are all going through this! We are just trying to hold on!**

WORDS OF ENCOURAGEMENT

"Don't worry 'bout a thing, cause every little thing's gonna be alright." --- Bob Marley

"When the world is running down, you make the best of what's still around." --- Sting

"Everything will be okay in the end. If it's not okay, it's not the end." --- John Lennon

"You can't always get what you want. But if you try sometime, you just might find, you get what you need," --- Rolling Stones

... Leave here today with hope, confidence and the spirit of cooperation... we are in this together!

-- Steven Heller

STEVEN W. HELLER, ESQ.



- Attorney with 25+ Years Trademarks, Licensing
- Both Brands/Licensors, Manufacturer/Licensees
 - Large International Brands to Start-Ups
- Business Law Professor
 - Graduate and Undergraduate Levels
 - Negotiation of Licensing Agreements
- Founder of Licensing Agency **The Brand Liaison**
Fashion, Character, Entertainment,
Celebrities, Sports, Art/Photography

Current State of Industry

Some of the Critical Business Problems We Are All Facing:

- Supply Chain Disruptions
- Retail Store Closures (Temporary, Perm, Questionable Viability)
- Suspension of Payments
- Delayed Deliveries and Complete Cancellation of Orders
- Missed Seasons and Product Launches
- Missed Movie Releases, Cancelled Sports and Social Events
- Reduced Disposable Income and Conservative Spending
- And More...

In light of these problems, how do we address licensing contract issues?

STEP 1: REVIEW LICENSE CONTRACT...

1. Review all key BUSINESS Terms

- Financial Terms and Payment Commitments, Dates
- All Other “Performance” Requirements

2. Key LEGAL sections of Licensing Agreements:

- Breach, Termination, Cure
- Remedies and Sell-Off Period
- Cross-Termination
- Force Majeure Clause

FORCE MAJEURE CLAUSE

Force Majeure (“Superior Force”): Event beyond control of the parties

- What is a Force Majeure Clause in a contract?
- What does it do / What doesn't it do?
 - **SUSPENDS PERFORMANCE TEMPORARILY, DOES NOT RELEASE**
- Must look to specific wording in your agreements, narrowly construed
- What if there is no Force Majeure Clause?

Force Majeure. If performance under this Agreement by a party is prevented, delayed or made impracticable because of an **Act of God**, riot or civil commotion, act of public enemy, terrorism, fire, flood, **pandemic**, order or **act of any government or governmental instrumentality or similar cause beyond the control of either party**, that party **shall be excused from such performance** to the extent that performance is prevented, hindered or delayed by such causes.

“... Obligations under this Agreement **are suspended** while the Force Majeure Event continues”

OR “... If the Force Majeure Event continues for more than 90 days starting on the day the Force Majeure event starts, the **non-Affected Party may terminate this Agreement.**”

STAY OUT OF THE COURTROOM...

LICENSEES WANT STAY OUT OF THE COURTROOM:

- Long and Expensive
- Complete Distraction
- Liable for significant moneys including BOTH SIDES attorney fees

LICENSORS WANT STAY OUT OF THE COURTROOM:

- Distraction
- Harmful to Long Term Relationships
- Uncertain Results
- SQUEEZE TO HARD – GET NOTHING (and still paid legal fees!)

STEP 2: COMMUNICATION AND ACTION

WHERE TO BEGIN?

- Communication – Reach Out!
- Licensees Reach Out ASAP – Even if personal touch base!
- Licensors Adopt a Plan, Send Memo working on plan,
- Or Licensors reach out to Licensees and invite discussion

CONSISTENT OVERALL PLAN OR CASE-BY-CASE BASIS ?

PROPOSED SUGGESTION:

Licensors take affirmative step, adopt a “Corona Relief Plan” or at minimum “Corona Relief Guidelines” or some sort of consistent Amendment Policies

Can be global company wide, and apply to all licenses, tiers, or just guidelines

But also plan for exceptions:

1. Performing Categories (Food, Hygiene, Puzzles, E-Comm)
2. Underperforming, Struggling Licensees
3. Always Consider Special Circumstances

KEY BUSINESS ISSUES: “GMR” and “GMS”

... That aint workin’, that’s the way you do it.
Money for nothing...”

-- Dire Straits

I. Q-1 Payments Due This Month

2 Immediate and Very Hard Issues because Q1 basically as usual

- 1. Royalties on Actual Sales
 - Are Licensees in a position to even generate proper reporting?
 - Most License Agreements provide that royalties accrue “On Shipping”
 - What if Licensee has Not Been Paid???
- 2. Q-1 GMR Payments

POTENTIAL SOLUTIONS:

1. Actual Royalties:

- Licensees must pay if collected whether from customer or factor. That’s Just Fair.
- If Licensee has not received payment, Licensors could defer until collection.

2. GMR’s - If part of bigger solution of GMR’s, perhaps roll this into broader solution.

LICENSEES: THIS IS ONE TO CONCEDE AND PAY, PUSH FOR OTHER BIGGER CONCESSIONS

II. Q-2 Royalty Payments

- Q2 Guaranteed Minimum Royalty Payments or “GMR”
- 2020 Or Current License Year GMR’s
- 2020 or Current Year Guaranteed Minimum Sales or “GMS”

3 POTENTIAL SOLUTIONS TO CONSIDER:

1. **Defer Q2 GMR** – buys some time but not take in all factors of current markets
2. **Reduce or Waive Q2 GMR completely** - buys time and amounts, some relief, concessions
 - How to address yearly totals for GMR and GMS? Is 25% reduction Accurate?
 - May not be applicable if prepaid, annual or term guarantee
3. **Reduce all of 2020 GMR or Waive 2020 GMR and GMS completely!**
 1. Leave term and all deal terms same - except GMR/GMS/Performance thresholds
 2. Sets 2020 to ACTUAL PERFORMANCE ONLY

III. 2020 License Year GMR Payments and GMS Thresholds:

- 2020 Or Current License Year GMR's (some not on calendar year)

POTENTIAL SOLUTIONS: WIN-WIN FOR ALL PARTIES

1. LICENSE YEAR EXTENDED (2020 and ½)

MAKE CURRENT LICENSE YEAR AN 18 MONTH LICENSE YEAR

- Leave all the #'s the same as the contract requires,
- Leave all the Total Dollars as set forth in the agreement the same
- Simply spread out all payments and all performance metrics over 18 months

I CALL IT "2020 AND ½" OR "HELLER-EXTENSION"

2. Combine 2020 and 2021 or Cross Collateralize GMR's and GMS

- Similar to above but now leaves all payment dates the same but allows the Licensee to recoup with stronger performance in 2021

IV. Non-Financial Considerations

Considerations for Potential Non-Financial Concessions BY LICENSORS:

1. **Expand Channels of Distribution**
Off Price, Home Shopping, Club or other Channels
E-commerce: Amazon and Brand Owner Sites, Licensee E-commerce Site
2. **Waive Off Price Caps**
3. **Remove Caps on Discounts and Allowances**
Especially Seasonal or Timely Merchandise
4. **Expand Territory** (Additional Contractual and Legal Considerations)
5. **Expand Product Offerings**

Considerations for Potential Non-Financial Concessions BY LICENSEES:

1. **Reconsider Exclusivity Provisions In Light of Performance and GMR/GMS**
2. **Concede Categories and focus only Core competencies**

Team Up for Distribution Strategies:

1. **Coordinate Sales Strategies; Licensor Website or Key Retailer**
Licensor Approved Liquidation Strategy → Approved Corona Acceleration Strategies

V. If No Other Viable Options, Consider Mutual Termination

Licensors, Consider This Option If:

1. If Licensee was under-performing before Corona
2. If Licensee is unable to survive and facing potential of going out of business
3. If there are other agreements with Licensee now or potential programs in the future
4. No other options seem viable

Licensees, Consider This Option If:

1. If release dates missed around a film, opportunities completely lost based on timing
2. Key required retailers cutting back or going out of business
3. Licensee needs to significantly contract your business direction
4. No other options seem viable

MUTUAL TERMINATION TERMS.

1. Payment from Licensee to Licensor:
 - Reduced Fee - Based on % of remaining GMR's
 - Consider No Payment At All???
2. Consider Inventory Positions and Sell-Off Periods
3. Transfer of Molds or Other Assets
4. Transfer of Existing Business Opportunities

Concluding Notes:

Concluding Remarks:

- **If we work together and support each other - we will make it through**
- **Licensors and Licensees - need to communicate. Reach Out!**
 - **Your Agents Can Help Coordinate and Provide Tools**
- **Take advantage of Industry Resources -**
Licensing International and Brand Liaison Websites have
an “Industry Resources” sections for you to access these
- **May be Time to Pivot: Assess Business Strengths and Weaknesses**
- **New Business Modeling: Financing, Sourcing, and Fulfillment**

... and we'll get by with a little help from our friends...



THE B® AND LIAISON



 LICENSING INTERNATIONAL

Questions?

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Checklist for Licensing Agreement Corona Modification Considerations

- Review All Business Performance Terms
- Chart of 2020 GMR and GMS
- Any other 2020 Performance Requirements (marketing, launch, etc.)?
- Review Termination Provisions
- Note Sell-Off Period
- Is there a Cross-Default Provision
- Is there Force Majeure Clause? What are Terms?
- Q1 2020 Actual Royalties. Can We Report? Can We Pay?
- Q1 2020 GMR? Pay or Modify.
- Chart Q2 2020 GMR and GMS
- Chart Total 2020 GMR and GMS
- Channels Of Distribution Expansion Opportunities?
- Is there Off Price Cap Limitation? Can we amend?
- Is there a Discounts and Allowances Cap? Can we amend?
- Are there any Territory Expansion Opportunities?
- Are there any Opportunities to Expand Product Categories?
- Should we consider Mutual Termination?
- Look at Pivot Opportunities for our Business
- Call Steven Heller to check-In and let him know you are doing OK!

Email Me for Copy of Checklist!

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WRITTEN AMENDMENTS

AMENDMENT TO LICENSE AGREEMENT

This Amendment No. _____ dated this May _____, 2018 hereby amends that certain License Agreement dated on or about _____, by and between _____ (as "Licensor") and _____ (as "Licensee") as previously amended (the License Agreement). Any capitalized terms not otherwise defined below shall have the meanings set forth in the License Agreement.

1. **License Term:** The Initial Term shall be a total of 3 years as follows:
 - a. **License Year 1:** execution of the License Agreement through 6/30/21
 - b. **License Year 2:** 7/1/21- 6/30/22
 - c. **License Year 3:** 7/1/22- 6/30/23
 - d. **Renewal Term:** 3 years on mutual consent.

2. **Guaranteed Minimum Royalties:** Guaranteed Minimum Royalties shall be a total of \$300,000 for the full Initial Term paid as follows:
 - a. \$300,000 was paid as an advance on signing;
 - b. \$300,250 shall be paid upon the signing of this amendment
 - c. \$300,250 shall be due June 30, 2020 (unless Licensee terminates this Agreement prior)
 - d. \$300,250 shall be due January 31, 2021 (unless Licensee terminates this Agreement prior)
 - e. \$300,250 shall be due June 30, 2021 (unless Licensee terminates this Agreement prior)

3. **Promotion:** Following execution hereof, Licensee shall present a marketing plan and strategy for the promotion of the Licensed Products. The parties shall cooperate to effectuate such marketing efforts which may include schedule for tweets or social media posts, videos filmed at Licensee facility, signage at Licensor events, etc., and such other promotional opportunities as the parties shall agree.

Except as specifically modified by the provisions of this Amendment, all terms of the License Agreement as previously amended shall remain in full force and effect and unmodified. Any inconsistencies between the provisions of this Amendment and the License Agreement shall be governed by this Amendment. This Amendment may be signed in counterparts, by facsimile and/or electronic mail, which shall be deemed valid as if original signature for all purposes.

IT WITNESS WHEREOF, THIS AMENDMENT IS CONSENTED TO AND AGREED:

LICENSOR _____
By: _____
Name: _____
Title: _____

LICENSEE _____
By: _____
Name: _____
Title: _____

3.5. **Licensor** bearing the License hereunder may be promotional purposes, including gift-wrapped collections, similar to the Licensor's other products, or (iv) charitable events and fundraisers; and in each case, such products may be marketed and/or sold in the Territory by Licensor or Licensor's other licensees.

hereunder, products similar to the Licensed Products licensed to Licensor or other licensees for (i) any marketing or promotional items, (ii) bundled packages, items, as well as in connection with including products in collections of products (ie. products sold in collections with other products), including retail capsule programs and fundraisers; and in each case, such products may be marketed and/or sold in the Territory by Licensor or Licensor's other licensees.

all be defined as the net for the account of net returns and any net or Royalties. No net costs, costs incurred and promotional net Product shall be net occurs first and netions.

pay to Licensor the net Year ("Guaranteed Year" pursuant to the license shall pay to net rough the end of the royalties pursuant to net valty for the current

OFFERS: On annual net Advertising and net Licensed Products net for itself, the net promotion of the net he right to include net mpaigns, programs net and Licensee shall net activities, including, net Licensed Products net Licensee's lowest price net ensed Products at a net contribute sufficient net cost of booth space net ensed Products at a

