

How to Cut Risks When Letting Production Company Film at Your Center

To create an authentic looking shopping center scene in a movie, TV show, or commercial, many production companies want to film in an actual shopping center. While this can be lucrative for you, there are many risks involved. For example, the production company could cause damage that costs more to repair than the fee it paid for the right to film at your center. Also, the company could disrupt your center's tenants and shoppers.

If you sign the production company's form license agreement (or short-form lease) without making substantial changes, you may not be adequately protected against these risks. That's because most production companies use an agreement that favors them and that disregards issues important to you. But since the term of the license agreement or lease is typically so short—usually a few days or weeks—many owners don't give the form much thought or consult their attorneys.

With the help of California attorney Susan Fowler McNally, we'll give you some factors to consider before negotiating a license agreement or short-form lease with a production company. Also, we'll give you a checklist of 10 important safeguards to include in the agreement or lease, and Model Language that you can adapt and use for some of the safeguards.

Should You Let Production Company Film at Your Center?

Before you let a production company film at your center, consider the following factors:

Disruption to tenants. The crew and equipment will probably make a lot of noise, warns McNally. For instance, they might film a fight scene in which actors yell at each other, fire prop guns, or even use pyrotechnics. If the noise level disrupts your tenants, they may argue that

you've violated the "covenant of quiet enjoyment" in their leases, she says.

Damage to center. It's not uncommon for a production company to cause damage during filming, says McNally. When large equipment is moved around, which is likely in this situation, property could get knocked over, ripped up, scratched, or damaged. If the part of your center or the space the production company wants to use has expensive fixtures, finishes, or other objects, you may want to think twice about letting it film there.

Need for extended services. The production company may want to use the space after hours or on weekends, when your center is normally closed. If so, you'll need to determine whether extended services—such as after-hours HVAC and/or security—will be required, says McNally. Although you can charge the production company extra for such extended services, doing so may be more trouble than it's worth, she notes. Instead, just require the production company to reimburse you for these extended services.

Insider Says: If a broker is helping you find a production company to film at your center, clarify in your agreement with the broker whether the broker is entitled to a commission on the license fee only, or also on any reimbursable costs paid by the production company for extended services, advises McNally.

10 SAFEGUARDS TO CONSIDER WHEN NEGOTIATING WITH PRODUCTION COMPANY

Before you sign a license agreement or lease with a production company, use the following checklist of safeguards to help you negotiate. The Model Language provided is written for use in a license agreement, so it refers to the production company as "licensee," to you as

“licensor,” and to the space in or part of your center that the production company wants to use as the “license area.” But you can easily adapt the Model Language for use in a lease. (See the box on p. 3 to help you decide whether you’re better off signing a license agreement or a lease.)

☐ Check Licensee’s Credit

Many well-known production companies with deep pockets form affiliates to produce each individual movie or TV show, says McNally. Sometimes production companies have the affiliates sign the license, but affiliates generally aren’t as creditworthy as the parent production company and so aren’t ideal licensees, she explains. If a licensee violates the license agreement, you don’t want to waste time and money getting a judgment against an entity that has few or no assets and thus is effectively judgment-proof. So McNally recommends that you make sure that the production company signing the license agreement is creditworthy.

And don’t accept an affiliate instead of the parent production company—unless the parent production company is willing to co-sign the license agreement or sign a guaranty, she adds.

☐ Make License Agreement Personal

Make the license agreement personal to the production company that’s named in it as the licensee and that signs it. You don’t want the production company to transfer its rights—by assignment or sublease—to anyone else, says McNally. But virtually all production companies will demand the ability to assign the rights to use the film, photography, and sound recordings made in the center to the distributor of the movie, TV show, or commercial that’s filmed at the center, she says. That’s not unreasonable, as long as the distributor assumes the licensee’s obligations that continue even after filming has been completed, she adds. Here’s language you can use to incorporate this safeguard into the license agreement:

Model Language

Licensee hereby agrees that the License to use the License Area is personal to Licensee and is not transferable; *provided, however,* that Licensee may assign the rights to use the film, still photography, videotape, and other recordings made in the License Area (“Recordings”) to the distributor of the Recordings in accordance with the terms of this Agreement, provided that such distributor assumes all of the obligations set forth in Clauses *[insert # of each clause that discusses obligations that will survive the end of filming in the License Area]*.

☐ Require Licensee to Get Permits and Approvals

Since the production company will be using—and may be temporarily installing—equipment in your center, you should require it to get all the necessary permits, vari-

ances, or approvals, says McNally. Also, if you have artwork in or around the space being used, you should require it to get the artist’s written permission to record or use images of the artwork in its filming, she explains. And require the production company to give you copies of all of its permits and approvals before you give it access to the space or center. To do this, use the following language:

Model Language

- a. Licensee shall install all equipment at the sole cost, expense, and risk of Licensee, and shall do so in a good, workmanlike manner and in compliance with all federal, state, and local building, zoning, electric, and safety codes, ordinances, standards, regulations, laws, and requirements.
- b. Licensee, at its sole cost and expense, shall obtain all necessary governmental permits, licenses, or approvals for use of the License Area or the installation or operation of any equipment in or about the License Area prior to the Commencement Date. Licensee shall deliver true and complete copies thereof to Licensor prior to commencing any installations and/or using said equipment.
- c. Licensee acknowledges and agrees that the License granted by this Agreement does not permit Licensee to make Recordings of any artwork located at the Center. Licensee agrees not to make any Recordings of any artwork in or about the Center without the prior written consent of the artist that created such artwork. Licensee shall deliver true and complete copies of such written consent to Licensor prior to commencing making any Recordings.

Insider Says: If the production company intends to shoot a scene in which a helicopter lands on your roof, you need to have it provide you with reasonable evidence that it has confirmed that your roof—or helicopter landing pad, if you have one—can support the weight of the helicopter it intends to use. Also, require it to provide you with copies of all necessary permits and governmental approvals required for such landings.

☐ Set Fee Production Company Must Pay for Filming Rights

Set the fee that the production company must pay you for the right to film at your center, says McNally. She recommends setting a per diem fee. You may want to charge more for filming days than for preparation days, she suggests. Be sure to include the daily cost of all your expenses for such things as use of freight elevators, security, cleaning service, parking, Dumpsters, and any extended services that you’ve agreed to provide. Typically, this is spelled out in an exhibit to the license agreement.

Insider Says: To reduce the risk of damage to your center during filming, you should hire a site coordinator to supervise the production company, says McNally. And you should require the production company to reimburse you for the cost of the coordinator. Also, be sure to get a substantial security deposit. It’s much easier to apply a

security deposit against a bill for repairing damage than to sue to get the company to pay for such repairs, she explains.

Set Self-Insurance Requirements

A production company often demands the right to self-insure, says McNally. So get the company's financial information—for example, its net worth, its liquid assets, and the amount it has set aside as a reserve in its self-insurance program—so that you can see if it has enough money to pay claims, she advises. Also, find out what the company's current "liability exposure" is—that is, how much of its potential liability under its existing contracts is covered by its self-insurance program's reserve amount, she says.

Then, to protect yourself, require the production company to have and maintain a minimum net worth as a condition to getting the right to self-insure. McNally suggests requiring the production company to have a net worth in excess of \$50 million and liquid assets of no less than \$10 million. Otherwise, it might have difficulty paying claims. And consider increasing these numbers if the self-insurance program is covering numerous productions, she adds. If you're not satisfied with the production company's numbers or its self-insurance program, she says, you may want to pass on the deal or make it get insurance from an authorized insurer.

Also, make sure that the production company's self-insurance program doesn't reduce the rights that you would have had if the production company had bought insurance from a traditional insurer—such as your rights as an additional insured or your rights under any other provision of the license agreement, says McNally. You don't want the production company's self-insurance program to limit your insurer's rights or to invalidate the waiver of subrogation clause in the license agreement, which pre-

► License Agreement or Lease?

If you agree to let a production company film at your center, you'll need to decide whether to sign a license agreement or a lease for the space. Which is more appropriate? If the production company wants to use your space for one month or less, consider using a license agreement, rather than a lease, says Santa Monica attorney Susan Fowler McNally. That's because a license, in theory at least, merely gives the licensee the right to enter, use, and exit a space, and doesn't give it any real property interest such as a tenant gets, she explains. So you can revoke or terminate the license almost immediately upon a default—without having to go through a lengthy and expensive eviction process.

But if a license agreement looks too much like a lease and the production company argues that it's a lease, a court may interpret it as a lease, and you'll lose your quick termination right and may be compelled to sue the production company to regain possession of the space.

vents the production company from suing you to get reimbursed for an incident that's covered by the self-insurance. Here's language you can use to set self-insurance requirements:

Model Language

Provided that Licensee has, and continues to have, a net worth in excess of \$[insert #, e.g., 50,000,000], as evidenced by audited financial statements and net liquid assets (i.e., cash and securities that are publicly traded on a recognized U.S. exchange in excess of liabilities) having a value no less than \$[insert #, e.g., 10,000,000], Licensee shall have the right to satisfy its insurance requirements as set forth in Clause [insert # of insurance clause] of this Agreement in the form of a "self-insurance" program acceptable to Licensor. This Clause shall in no way limit or diminish the rights that Licensor would have had as an additional insured under any insurance policy, or the rights it has under any other provision of this Agreement to receive from Licensee an amount equal to all or any portion of any insurance policy proceeds that would have been payable to Licensor or Licensee under any required policy of insurance that was not maintained by Licensee as a result of such self-insurance program. Furthermore, this Clause shall in no way limit or diminish the waiver of subrogation rights and obligations as provided for in Clause [insert # of waiver of subrogation clause] of this Agreement, or the rights that Licensor's insurance carriers would have had under "other insurance" or similar clauses in Licensor's insurance policies if Licensee had not satisfied its insurance requirements with said self-insurance program.

Say Who's Responsible for Utility Services

Most form license agreements don't say how the production company will get or pay for electricity and telephone service, notes McNally. That could mean it expects you to handle these responsibilities. Make sure you say who's responsible for obtaining/providing utility services and, if you're providing them, how you'll be reimbursed.

Require Consent to Use Center's Name, Signs in Trailers, Ads, Promos

Require the production company to get your written consent to use your center's name, signs, or any other objects that identify your center in any trailer, ad, or promotional spot, says McNally. If the production company uses your center in an advertisement in a negative manner, there's a risk that prospective tenants will be dissuaded from renting space at your center and that shoppers will be dissuaded from shopping there. For example, if a movie trailer shows someone being attacked in a center that's identifiably yours, a prospective tenant or shopper may think that your center is unsafe, forgetting that the unfavorable impression was created by an ad for a movie. Here's language you can use to protect yourself:

Model Language

Licensee shall not use:

- a. the name of:
 - (i) Center;
 - (ii) Licensor; or
 - (iii) any of Licensor's affiliates or subsidiaries; or
- b. any photograph, film, drawing, or other depiction or representation of the Center or any part thereof, which contains signage or distinctive architectural characteristics that cause the scene photographed, filmed, drawn, depicted, or represented to be identifiable as being the Center in any publicity, promotion, trailer, press release, advertising, or printed or display materials without Licensor's prior written consent.

Insider Says: Most production companies will demand that you give up your right to block them from showing your center's name or images of your center in an ad or trailer, says McNally. To help ensure that the production company complies with the above requirement, say in the license agreement that it must pay you a high amount of "liquidated damages"—that is, a stipulated amount of estimated damages—if it doesn't comply, she adds.

□ Use Short Cure Period

Since most film license agreements are for a very short term, you'll want the right to revoke the license quickly if the production company violates it, says McNally. Say in the agreement that the production company must cure—that is, correct—a violation within a few hours after getting oral notice of the violation, or risk having you terminate the license agreement. Here's language you can use to do this:

Model Language

Prior to exercising any remedies available pursuant to this Agreement or otherwise, Licensee shall be given notice of any default hereunder (which, for the purposes of this Paragraph, may be given orally), and accorded at least [*insert #, e.g., 2*] hours to cure any such default.

Insider Says: The production company may demand that if the violation can't be cured within the short cure period, it should get more time. If you agree to this demand, require the production company to start correcting the violation within the cure period, to proceed diligently to complete such cure, and to finish within, say, 24 hours, advises McNally.

□ Control Retakes and Reentry

A production company may request the right to reenter your center to re-shoot a scene after the principal photography—that is, the original shoot—has ended, says McNally. You'll probably have to agree to this, since refusing could be a deal-breaker. But limit when it can reenter

the space. Say that the production company can reenter the space only if:

- It reenters within a relatively short time—say, no more than six months—after the original shoot is completed;
- The space is available; and
- It pays an additional license fee based on the fee schedule.

Model Language

In the event Licensee desires to photograph or film retakes or other scenes at any time within [*insert #, e.g., 6*] months after completion of principal photography at the License Area, Licensee may, subject to availability with respect to prior contractual commitments, reenter upon and use the License Area only for such period as may be reasonably necessary therefor, and in such event the License Fee set forth in Exhibit [*insert #*] hereto shall apply.

□ Check for Missing Clauses

The production company's form license agreement may be missing some key clauses needed to protect your interests. Make sure the license agreement contains clauses on the following issues:

Indemnity. Require the production company to indemnify you—that is, reimburse you for, and defend you against, any claim arising from the installation, operation, and/or removal of all its equipment or its use or occupancy of the space. Also, say that it's responsible if one of its employees or guests is injured or killed while at your center.

Compliance with all laws. The production company's form license agreement will probably say that it must comply with laws affecting the space that stem from its use of that space. But it may not address whether the production company must also comply with laws affecting the common areas, which may be triggered by its installation or use of equipment. Make sure that the license agreement says that the production company should bear this responsibility, too.

Your liability. Limit your liability to the production company to the extent of your interest in the center it's using. This way, if the company sues you, it can't go after any of your other assets—such as other centers or property you own.

Surrender of space. Require the production company to return the space it uses in the same condition it was in before the production company entered the space, and double the per diem license fee for each day the production company holds over. Don't let the production company qualify its obligation to return the space in the same condition by excluding "reasonable wear and tear," as most production companies' ideas of what that phrase means may be equivalent to several years' worth of a standard tenant's wear and tear, warns McNally.

No representation of adequate utilities. Be clear that you're not promising the production company that either the utilities in the center or the center's structural elements are adequate for its use. Require the production company to provide its own generators if it determines that it needs additional electrical capacity, suggests McNally.

Subordination obligation. Require the production company to subordinate—that is, accept lower priority to—any existing and future loan or ground lease. Otherwise, your agreement with the production company could cause problems with your lender or affect your ability to get a loan.

Estoppel certificate. If the license agreement lasts more than a few weeks, make the production company agree to sign an estoppel certificate for you or for a prospective lender or buyer. A lender or buyer may require this certificate to prevent future lawsuits by the production company over the license agreement and its provisions. n

INSIDER SOURCE

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