

# Auteur, Defend Thyself!

*A leading indie attorney explains how producers can protect themselves when selecting a distributor.*



Mark Litwak

**T**he film is just about finished. The producer-director is physically and financially exhausted. She has borrowed from friends and family, maxed out her credit cards, and she has been editing on the mid-night shift. She needs a vacation.

This is when filmmakers are most vulnerable. They can easily give away their movie if they are not as vigilant in selecting distributors as they were in making their films.

In an effort to help fledgling filmmakers, The Hollywood Reporter asked veteran entertainment attorney Mark Litwak to offer filmmakers advice about entering into a distribution deal. As a producer's rep, Litwak has arranged for distribution of many independent films. He has also sued distributors on behalf of filmmakers and won large awards. He is the author of several books, including "Reel Power, The Struggle for Influence and Success in the New Hollywood" and "Dealmaking in the Motion Picture and Television Industry."

Here are his guidelines for filmmakers:

**No sneak previews.** Don't show your film to distributors until it is finished. Distributors want to acquire good films before their competitors learn about them. They will ask to see a work in progress, telling the filmmaker: "Don't worry. We can extrapolate and envision the finished project." Don't believe them. They will view your unfinished film and think it amateurish. First impressions last, and most executives will only see a film once. The only reason to show your film before completion is if you are desperate to raise funds to finish it. If you must show a work in progress, exhibit it on a Moviola or flatbed editing table. People have lower expectations viewing a film on an editing console than when it is projected in a theater.

**Don't brag about your small budget.** You may feel justly proud of making a great-looking picture for a mere \$400,000. But if the distributor knows that is all you have spent, you will find it difficult to get an advance beyond that. It would be wiser not to reveal your investment, recognizing that production costs are not readily discernible from viewing a film.

**Arrange a screening.**

Invite executives to a screening. Don't send them a videocassette. If you send a tape to a busy executive, he will pop it in his VCR. Ten minutes later the phone rings, and he pushes the pause button. Then he watches another 10 minutes until he is interrupted by his secretary. After being distracted 10 times, he passes on your film because it is too "choppy." You want to get the executive in a dark room, away from diversions, to view your film with a live audience — hopefully one that will respond positively. So rent a screening room, invite all the acquisition executives you can, and pack the rest of the theater with your friends.

**Get promises in writing.**

If a distributor promises to spend \$100,000 in advertising, get it in writing. If there is not enough time to draft a long-form contract, obtain a letter reiterating all the important terms.

**Make buyers compete.**

Screen the film for multiple distributors simultaneously. You will get the best distribution deal if you have more than one distributor bidding for your movie. If you

offer the film serially, you may face a dilemma if presented with a good but not great offer. If you pass, you may not be able to get a better deal later.

**Investigate distributors.**

Always check the track record and experience of potential distributors. The savvy producer will call filmmakers who have had dealings with a distributor. Distributors with lousy reputations have earned them.

**Retain possession of your negative.**

The easiest way for a distributor to cheat a filmmaker is to not report a sale. How does a filmmaker know whether her film has been sold to Malaysia? The best way to keep track of sales is by never giving the distributor any master or digital copies. Give a lab-access letter instead. Place your master in a lab other than the one used by the distributor. Your lab should be instructed to fulfill the distributor's orders and report to you how many copies are duplicated. If the number of copies made does not approximate the number of sales reported on your producer's report, investigate. Distributors

*Continued on page 139*

## Legal Advice

*Continued from page 38*

usually do not order prints unless they have an order in hand.

**Obtain an arbitration clause.** Make sure all contractual disputes are subject to binding arbitration with the prevailing party entitled to reimbursement of legal fees and costs. Litigation is too expensive and slow to provide an effective remedy.

**Water down the warranties.** Make the warranties to the best of your knowledge and belief rather than absolute. With an absolute warranty, if you make a good-faith mistake and defame another, you may be liable for damages.

**Get audit rights.** Filmmakers should have a reasonable length of time to challenge statements. If a significant error is disclosed, the filmmaker should be reimbursed his audit costs.

**Scrutinize advertising expenses.** Advertising costs should be carefully defined and limited to direct out-of-pocket costs for items such as trailers, posters and one-sheets. No deduction should be permitted for overhead, legal, office and staff expenses. If market expenses are recoupable, they should be limited to four markets the first year, with the costs allocated among the films represented at each market.

**Obtain an experienced adviser.** Filmmakers know about film. Distributors know about distribution. Don't kid yourself and believe that you can play in their arena and win. There are many pitfalls to avoid. An experienced entertainment attorney or producer's rep should be able to improve a distributor's offer enough to outweigh the cost of his or her services. □