

# Desperately Seeking Distribution

Tips on Leveraging the Odds

by Mark Litwak, Attorney at Law

Filmmakers expend so much effort to produce their movies that they often don't give sufficient thought to distribution until production is complete. Many believe that if they just make a good movie, distribution will take care of itself.

Securing distribution, however, is often more challenging than financing and producing the movie. Ironically, the growth of independent film has glutted the marketplace. This, combined with rapidly increasing marketing costs and the conglomeration of the movie industry, has created an environment in which surviving distributors have become very selective in acquiring pictures. The increasing numbers of digital movies only adds to the flood of pictures desperately seeking distribution.

One's leverage in negotiating a distribution deal depends on whether distributors perceive the product as desirable. Of course, films cannot be appraised like real estate, as every picture is unique and there are no sure-fire criteria to determine a movie's commercial worth. I don't know of a single industry executive who could have predicted the success of the *March of the Penguins* or *The Passion of the Christ*. The major studios, despite all their market research and expertise, frequently release big budget flops.

But even if no one can accurately predict the commercial worth of a film, there are techniques and strategies that can be employed to improve one's prospects. Even filmmakers who have produced low-budget pictures with limited commercial appeal can usually improve upon the initial offer if they are savvy. An experienced negotiator can obtain many concessions just by knowing what to ask for. Many terms are negotiable. While you cannot blame a distributor for sending you their dream contract, there is no reason to accept it as is.

It is rare for an independent filmmaker to sell a movie's copyright to a distributor. Usually, specified distribution rights are licensed for a term of years. Once the term expires, the rights revert to the filmmaker. In a typical deal, the distributor secures the right to distribute the movie in one or more media (e.g., theatrical, home video, television). The distributor pays for all distribution, advertising and marketing costs. Both parties share revenue derived from

the project.

Most deals allow the distributor to retain a percentage of gross revenues as a distribution fee, and to recoup certain designated marketing expenses from film revenues, with the remaining balance, if any, paid to the filmmaker. I will call this formula a "standard" distribution deal, although there is nothing standard about it except that these deals calculate the distributor's fee as a percentage of gross revenues. Another type of deal, sometimes referred to as a "50-50 Net Deal," allows the distributor to first recoup its expenses from gross revenues, and then share the remaining amount 50-50 with the filmmaker. A third type of deal is a so-called royalty deal, wherein the distributor pays a royalty on a per unit basis, such as 20% of the wholesale price of each DVD sold.

Which deal is best? That depends on how much revenue is generated, the extent of expenses incurred, and the amount of the

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distributor's fees. If one million dollars is generated in gross revenues, a standard distribution deal with a 25% distribution fee, and recoupment of \$100,000 in expenses, would generate \$650,000 for the filmmaker. Under a 50/50 Net deal, with the same revenue and expenses, the filmmaker would receive \$450,000. With a royalty deal at 20%, the filmmaker would see \$200,000. Here the standard deal is best.

But wait. What if the film generated \$400,000 in revenue, and the standard distribution fee was 35% with recoupable expenses of \$150,000? Now the filmmaker would receive \$110,000 under the standard distribution deal, \$125,000 under a 50/50 Net Deal, and \$80,000 under a royalty deal. In this case, the 50/50 Net Deal is best.

However, suppose the film only gener-

ates \$125,000 in revenue and has \$150,000 in expenses. Under the standard deal and the 50/50 Net deal the filmmaker receives zero. Under the royalty deal, the filmmaker is paid \$25,000. Each of these deals might be best under certain circumstances, and the worst choice under other circumstances.

Keep in mind that most deals are more complex than this illustration because they cover multiple media with differing fees and formulas for each (e.g., 35% of gross receipts for theatrical, 25% of license fees for broadcast television, and 20% of wholesale price for home video), and often require cross-collateralization of expenses. Thus, it behooves the filmmaker to take pencil to paper and figure precisely how much s/he will receive under different revenue and expense scenarios.

A distributor may agree to give the producer an advance toward his/her share of revenue. The producer can use this money to pay production debts, recoup expenses or repay investors. Obviously, producers prefer large advances because they may never receive any subsequent revenue. On the other hand, the distributor will want to pay as modest an advance as possible, and may strongly resist giving an advance greater than the cost of production. That is why filmmakers should not disclose their paltry budgets before concluding their distribution deals.

Distribution can be negotiated before, during or after production. Sometimes distributors become interested in a movie after viewing it at a film festival and observing audience reaction. Many distributors send one or more acquisition executives to major festivals to scout for films.

It is easy to alert acquisition execs to the existence of your project. Once a start date has been announced, do not be surprised if they begin calling you. They will track progress so they can see it as soon as it's finished — and before their competitors can view it.

To ensure that acquisition execs and producers reps are aware of your film, send a press release announcing your project to the industry trade magazines — *Hollywood Reporter*, *Variety*, and *Indie Slate*. These publications provide listing forms and will include your project in their listings of films in development, preproduction and production. You can also list your project with Film Finders ([www.filmfinders.com](http://www.filmfinders.com)), another source which distributors and festivals use to learn about new films. [Editor's note: don't shortchange your prospects by failing to list your project early and keep it updated.]

From the filmmaker's point of view, competition improves terms. Giving one distributor an early peek at your movie is usually a bad idea. If the distributor passes on the project, word gets around and other acquisition execs may not bother to view it. On the other hand, if the distributor likes it, a pre-emptive bid is likely, and you may only have a day or two to decide whether to accept the offer. If you decline, you may be rejecting the best deal you will ever receive. If you accept, you foreclose the possibility of a better deal tomorrow.

Thus, you will be forced to make a decision without knowing where you stand in the marketplace and what other companies might offer. That is why it is important to orchestrate the release of your film to potential buyers so as to create maximum competition and enhance your leverage. Here are some guidelines:

#### **1. No sneak previews**

It's best not to screen your film for distributors until it is complete. Execs may beg to see a rough cut and assure you, "Don't worry. We're pros. We can imagine what the film will look like with sound and titles." Don't believe them. Most people can't extrapolate from an unfinished work. The only reason to show your film before it's complete is if you are desperate to raise finishing funds. The terms you can secure under these circumstances will be less favorable than what you could obtain with a polished film. If you must show a work-in-progress, exhibit it on an editing system. People have different expectations watching a film on an editing system as compared to viewing it in a theater. If you must send out DVDs or cassettes of an unfinished work, label them so that viewers are reminded that they are viewing a work-in-progress, e.g., "AVID output, not color corrected, temp sound." Always include the name of a contact person and phone number on all materials.

#### **2. Screen it before a crowd**

It's usually better to invite execs to a screening than to send them a DVD. If you send a DVD to a busy exec, he will pop it in his machine and hit the pause button as soon as the phone rings. Then he will watch another few minutes until his secretary interrupts. After numerous distractions, he passes on your film because it is "too choppy." You want an executive to view your film in a dark room, away from distractions, surrounded by a live audience — hopefully one that loves your film. Rent a screening room at a convenient location, invite all the acquisition executives you think appro-

priate, and pack the rest of the theater with your friends and relatives, especially Uncle Bob with his infectious laugh. Perhaps the best venue for exhibiting a picture is at a film festival. If the film is warmly received, your bargaining position will be strengthened. If an executive views your film surrounded by an appreciative audience, it may affect his perception of the film. Also, entertainment trades and selected publications will review pictures exhibited at major festivals. A strong review can induce distributors to make an offer, although a poor one can chill prospects. Screen in a theater that is convenient and well known to industry insiders. Invite only those distributors that are appropriate for the project. For example, if foreign rights are taken, there is no reason to invite international distributors. Likewise, don't invite art house distributors to view a beach blanket bingo movie. Book a theater large enough to hold everyone expected to attend but not so spacious that your viewers are sitting in a sea of empty seats. Filling out the audience with cast, crew and friends may be a good idea; however, warn them not to applaud names in the opening credits. Mail out invitations so they arrive on the desks of executives 7-10 days before your screening. If a producer's rep, agent or attorney represents you, it may be best to have that person send out the invites. Always mention any name actors and the identity of the director. If the writer, director or any other key member of your team has impressive credits or background, include this information. If an exec respects any of the people associated with the film, s/he is more likely to attend. If you have a professionally designed one-sheet and a good trailer, include them with the invite. In my opinion, asking for an RSVP is a waste of time. Half the people who RSVP do not show up; others who do not reply attend. As a general rule of thumb, if you invite 75 busy execs to a screening of a low-budget, no-name film, you'll be lucky to have a dozen show up. At the screening, have someone at the door collect business cards or take attendee names.

#### **3. Do not give away your festival premiere lightly**

Carefully plan a festival strategy. I have seen filmmakers give their premiere to minor festivals and thereby disqualify themselves from participating in more significant ones. If an important festival turns you down, the worse that happens is that you incur a small delay in seeking

distribution. No one knows which festivals passed on your film unless you tell.

#### **4. Timing is everything**

Sell your film when buyers are hungry for product. Distributors who acquire films for international distribution plan their activities around a market calendar. The major film markets are: AFM in November in Santa Monica, Berlin in February in Germany, and Cannes in May in France. There are also television markets, including NATPE in the U.S.A., and MIP and MIP-COM in France. Distributors are hungriest for product when a market is rapidly approaching and they do not have enough fresh inventory. A distributor may spend \$90,000 or more to attend Cannes, and if it appears the company will have nothing new to sell, the executives panic. This is the best time to approach a distributor. Do not solicit them a week before a market, however, because they need at least a month to prepare promotional materials, e.g., trailer, one-sheet, poster, screeners and advertising in the trades. The bumper editions of trade papers usually have ad deadlines three to four weeks before a market. These expanded editions contain product listings by distributor. A movie acquired at the last moment will often receive rushed and slipshod treatment and, consequently, may sell poorly at the first market, which is the most critical for a picture. At subsequent markets, the film is no longer new product. Avoid soliciting distributors to acquire your film during a market. They spend a great deal of money to attend, and their focus is on making sales, not acquiring. You might approach them at market's end when most buyers have departed. The best time to approach is 60-90 days before a market. Assuming a distributor wants to acquire rights to your film, it may take a month or longer to negotiate a deal.

Mark will be presenting a seminar on financing and distributing independent film in Dallas April 8, 2006, which is co-sponsored by Indie Slate. See page 13 to purchase tickets.

Mark Litwak is a veteran entertainment attorney and producer's rep based in Beverly Hills, CA. He is the author of six books, including the recently published *Risky Business, Financing and Distributing Independent Film* (Silman-James, 2004). He is the author of the CD-ROM program *Movie Magic Contracts*, and the creator of the Entertainment Law Resources web site: [marklitwak.com](http://marklitwak.com). Email [law@marklitwak.com](mailto:law@marklitwak.com).