Filmmaker's Guide to Negotiating the Distribution Deal, Part One

BY MARK LITWAK

This is the first installment of an article written by veteran entertainment attorney Mark Litwak. It is designed for the express purpose of guiding independent filmmakers through what can sometimes be the dangerous waters of a distribution deal. To be published in three parts, it contains specific guidelines to protect the writer/filmmaker in making the deal.

Mr. Litwak's experience makes him eminently well-qualified to dispense such advice. The author of numerous articles and books, he has won hundreds of thousands of dollars in compensation for clients after distributors have tried to defraud them through practices like "creative accounting." Mr. Litwak is Of Counsel to the Beverly Hills law firm of Berton & Donaldson. His practice includes the representation of writers, actors, directors, production and multimedia companies.

As a law professor, he has taught entertainment and copyright law at UCLA, Loyola Law School and the University of West Los Angeles. He has lectured widely, including presentations at the American Film Institute, Columbia University, NYU, USC, UCLA, The New School for Social Research, the Royal College of Art in London and the University of British Columbia. He has been interviewed as an authority on the movie industry on TV and radio shows, including The Larry King Show, *NPR's* All Things Considered, *ABC and CNN.*

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When a distributor negotiates a deal with a writer or filmmakers, the distributor often has a lot of clout and profits. The producer can use this money to repay investors. Producers will want to obtain as large an advance as possible because they know they may never see anything on the back end of the deal (i.e., no profits).

The distributor wants to pay as small an advance as possible, and usually resists giving an amount that is more than the cost of production. Its executives will propose, "We'll be partners. We will put up all the money for advertising and promotion. If the picture is successful we will share in its success." Sound good?

Unfortunately, distributors have been known to engage in creative accounting, and profit participants rarely see any return on their share of "net profits" because of the way that term is defined. Consequently, the shrewd producer tries to get as large an advance as possible. He also tries to retain foreign rights and keep them from being cross-collateralized.

ORCHESTRATING THE DISTRIBUTION DEAL

It is most important not to brag about how little money you spent to make your film before you conclude your distribution deal. 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. Remember, the distributor has no right to examine your books. (Assuming the distributor has not provided any financing.) What you have spent is between you, your investors and the IRS.

Negative pick-up deals can be negotiated before, during or after production. Often distributors become in-

Don't believe them. Most people c extrapolate. They will view your u finished film and think it amateurish. First impressions last.

The only reason to show your film before completion is if you are desperate to raise funds to finish it. The terms you can obtain under these circumstances will usually be less than those given on completion. 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.

2) 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 secretary. After being distracted times, he passes on your film because it is "too choppy." Well, of course it's choppy with all those interruptions.

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 at MGM, invite all the acquisition executives you can, and pack the rest of the theater with your friends and relatives, especially Uncle Herb with his infectious laugh.

3) MAKE THE BUYERS COMPETE AGAINST EACH OTHER: Screen the film for all distributors simultaneously. Some executives will attempt to get an early look—that is their job. Your job is to keep them intrigued until it is complete. You can promise to let them see it "as soon as it is finished." They may be annoyed to arrive at the screening and see their competitors. But this will get their competitive juices flowing. They will *movie industry on TV and radio shows, including* The Larry King Show, *NPR's* All Things Considered, *ABC and CNN.*

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When a distributor negotiates a deal with a writer or filmmakers, the distributor often has a lot of clout and the writer/filmmaker may be desperate for a deal. As a result, the writer/filmmaker is often forced to accept a contract that is skewed heavily in favor of the distributor.

If a film is developed in-house by a studio, the studio will finance development and production itself. The writer/filmmaker will receive a fee for their services and some profit-sharing. However, profits may be defined in such a way that there is little likelihood of ever seeing any money.

Other films are developed and produced away from the studio that ultimately distributes them. These independently-produced projects are often dependent on investors or pre-sale distribution deals (selling off various foreign distribution rights) to finance production. The producer then enters an acquisition agreement with a distributor for release of the picture. This is called a negative pick-up deal.

THE NEGATIVE PICK-UP DEAL

While the terms of negative pick-up deals vary, the studio/distributor typically pays for all distribution, advertising and marketing costs. The studio and producer share profits. Because the producer has taken the risk of financing production, he probably can obtain a better definition of net profits than if he made the film with studio financing. Profits may be split 50/50 between the studio and producer without a deduction for a studio distribution fee. Of course, the independent producer takes the risk that if the film turns out poorly, no distributor will want it. In that case the producer can incur a substantial loss.

In a negative pick-up deal, the distributor will often agree to give the producer an advance of his share of 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. Remember, the distributor has no right to examine your books. (Assuming the distributor has not provided any financing.) What you have spent is between you, your investors and the IRS.

Negative pick-up deals can be negotiated before, during or after production. Often distributors become interested in a film after viewing it at a film festival and observing audience reaction. All the studios and independent distributors have one or more staffers in charge of acquisitions. It is the job of these acquisition executives to find good films to acquire.

It is not difficult to get acquisition executives to view your film. Once production has been announced, don't be surprised if they begin calling you. They will track the progress of your film so that they can see it as soon as it is finished—before their competitors get a shot at it.

From the filmmaker's point of view, you will get the best distribution deal if you have more than one distributor interested in acquiring your movie. That way you can play one off another to get the best terms. But what if one distributor makes a pre-emptive bid for the film, offering you a $500,000 advance, and you have only 24 hours to accept the offer? If you pass, you may not be able to get a better deal later. It is possible you may fail to obtain any distribution deal at all. On the other hand, if you accept the offer, you may be foreclosing the possibility of a more lucrative deal that could be offered you later. Consequently, it is important to orchestrate the release of your film to potential distributors to maximize your leverage.

ORCHESTRATING THE RELEASE

1) KEEP THE FILM UNDER WRAPS: Don't show your film until it is finished. Executives may ask to see a rough cut. They will say "Don't worry. We're professionals, we can extrapolate and envision what the film will look like with sound and titles."

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4) OBTAIN AN EXPERIENCED ADVISOR: Retain an experienced producer's rep or entertainment attorney to negotiate your deal. Filmmakers know about film, distributors know about distribution. Don't kid yourself and believe you can play in their arena and win. There are many pitfalls to avoid. Get yourself an experienced guide to protect your interests. Any decent negotiator can improve a distributor's offer enough to outweigh the cost of his services.

5) INVESTIGATE THE DISTRIBUTOR: Always check the track record and experience of potential distributors. As an entertainment attorney who represents many independent filmmakers, I often find myself in the position of trying to get unscrupulous distributors to live up to their contracts. I am amazed at how many distributors refuse to abide by the clear terms of their own distribution agreements. The savvy filmmaker will carefully investigate potential distributors by calling filmmakers who have contracted with them. One can also check the Superior Court dockets in Los Angeles to see if a company has been sued.

(Next week: Mark Litwak continues his series and offers strategies in selecting a distributor, and what to look for when dealing with a studio's accounting practices.)