

Law 101 . . . Filmmaker Self Defense Checklist

by Mark Litwak



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There's a venerable Latin saying: "caveat emptor." It means buyer beware. This is good advice for anyone swimming in the shark-infested waters of the motion picture industry. Here, newcomers may not be able to spot the sharks because they are charming, well-mannered and highly educated. That is not to say that everyone in the industry is a scoundrel. The difficulty is that one often doesn't fully know the character of the person or company you are dealing with when the contract is signed.

I've seen filmmakers borrow large sums of money and work grueling hours to fulfill their dream of producing a film, but ultimately fail because they do not secure their legal rights or they neglect to arrange proper distribution for their picture. If independent filmmakers do not repay investors, they often don't get a second chance to make a film. Here are some ways filmmakers can protect their interests:

1) Obtain All Promises in Writing. Don't accept oral assurances from others. If they promise to spend \$50,000 to promote your film, put that promise in writing. If there is not enough time to draft a long-form contract, insist on a letter agreement spelling out the essential terms.

2) Register All Works with the Copyright Office. Before you pitch a story, or submit a script, register it with the Copyright Office.

3) Obtain an Arbitration Clause: Make sure contractual disputes are subject to binding arbitration where the prevailing party is entitled to reimbursement of legal fees and costs. Arbitration is less costly than litigation, and going to court is not much of a remedy if you can't afford it.

4) Water down the Warranties: Warranties are promises. For example, when you sell a script, the buyer will want you to promise that you have not plagiarized another writer's work or defamed someone. If you make an absolute warranty, you will be liable even if you made a good faith mistake and honestly believed that you had secured all the rights. Therefore, it is best to make your warranties "to the best of your knowledge and belief," rather than making them absolute.

5) Retain Possession of Your Negative: You should not relinquish possession of their master materials. Instead, give the distributor a lab access letter permitting it to order copies of your originals held in *your* lab under your name. This way, if the distributor ever breaches your contract or goes bankrupt, at least it will not have your masters. You should also retain control of your original still photos and any artwork.

6) Obtain Insurance Coverage: Typically the producer purchases insurance, including Errors and Omissions (E&O) insurance, which protects the producer if he inadvertently defames someone, invades their privacy, or infringes their copyright. This type of insurance will pay (minus a deductible) for a defense and any damages that may arise from liability for inadvertently defaming someone or infringing their rights.

7) Check References: The most airtight contract in the world offers limited protection against a scoundrel who ignores its terms. Carefully investigate any party with whom you contemplate doing business. For distributors, confer with other filmmakers who have had dealings with a distributor over the course of several years. Usually, people who have lousy reputations have earned them.

8) Termination Clause: If the other party

defaults, it is best if you have the right to terminate the contract and regain all rights to your film in addition to monetary damages. Writers should insist on a reversion clause so that if a script is bought and not produced within a reasonable amount of time (*eg*, five years), all rights revert to the writer.

9) Investor Money: Never make any "offers" to investors or accept any investor money without fully complying with all applicable state and federal securities laws.

These laws apply when you offer investments to "passive" investors, which

are investors who provide financing but are not actively involved in making the movie. Have an entertainment attorney with experience in securities prepare appropriate disclosure documents (*e.g.*, a Private Placement Memorandum).

10) Save Copies: Retain copies of all correspondence, contracts, and drafts of your screenplay. When you make a story suggestion or enter into an oral agreement, follow up with a letter documenting the extent of your contribution.

11) Minimum Advertising Specified: Distribution contracts should specify in writing the minimum amount the distributor will spend to advertise and promote a film. It is wise to cap expenses as well. Obtain a detailed definition of which advertising, promotional and marketing expenses are recoupable thereby precluding the distributor from reimbursing itself for overhead and any inappropriate or undocumented expenses.

12) Indemnity: You should be indemnified (reimbursed) for any losses incurred as a result of the distributor's breach of contract, and for any liability arising from material added to the script/film by the distributor.

13) Right to Inspect Books and Records: The distributor should be required to maintain complete books and records with regard to all sales and rentals of the motion picture. You should receive quarterly producer reports with a detailed accounting statement along with any payment due. In the event that you want to examine the distributor's books and records, you should be permitted to do so with reasonable notice. If an audit discloses a significant underpayment, the distributor should reimburse you the cost of the audit.

14) Late Payments/lien: All monies due and payable to you should be held in trust by the distributor. In addition, you should have a lien on your share of the gross receipts derived from the film. The distributor should be required to pay you interest on any late payments.

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