

“Indies and the Law”

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Screen Actors Guild

An Interview with Entertainment Lawyer and Film Rep Mark Litwak.

Filmmaking with its numerous employees and production responsibilities is more of a business than art. And every business, no matter how small, needs some form of legal counsel. In the world of indie law, there are few names as prominent as Attorney Mark Litwak. He has represented filmmakers for almost twenty years as well as publishing several books on the subject.

SI: How did you get started in entertainment law?

I changed career directions several times before I became interested in entertainment law. I attended Queens College of the City University of New York where I earned a B.A. in Psychology, and was elected student body president in my senior year. As a student in the 60's and early 70's I was politically active, and I was one of the founders of the New York Public Interest Research Group (NYPIRG).

After graduation I earned an M.A. degree in Urban Studies at night while during the day I supervised a study of the New York State Legislature for NYPIRG. After working with young idealistic lawyers, I saw the value of earning a law degree. I enrolled in Law School at the University of San Diego in 1974, and clerked for a law firm. During my third year of law school I attended classes at night and worked full time for the San Diego District Attorney's office. I graduated in 1977, moved to Albany, New York, where I worked as a public interest lawyer for NYPIRG. One of the issues I was concerned about was the danger arising from nuclear fuel in power plants. After the movie "The China Syndrome" was released, I recognized that a movie could influence public opinion very quickly. I decided I wanted to make social issue movies, even though I had no background in film and no contacts in the industry. I moved to Los Angeles, and became a television producer with Marble Arch, and later a writer/producer for a syndicated news show. I also began writing my first book, *Reel Power, The Struggle for Influence and Success in the New Hollywood*, which was published by William Morrow in 1986. Since then I have worked as an entertainment lawyer building my own practice, and taught as a law professor for seven years. I continue to teach two courses a year at U.C.L.A. Over the years, I have written five more books, most of which concern entertainment law or independent filmmaking.

What is the purpose of an LLC and how does a filmmaker start one?

Filmmakers frequently establish a company that is a separate legal entity from themselves to produce and own their movie. While there is no legal requirement to do so, there may be some benefit to operating under the auspices of a company. The most common business entities used by filmmakers are corporations, limited liability companies (LLC), and limited partnerships. These are usually created under state law by filing the appropriate documents with the Secretary of State.

One reason to form a company is the desire to protect personal assets from potential liability. If a movie is produced by a company that is considered a separate legal entity from the individual filmmaker, then the filmmaker may not be liable for its debts and obligations. However, for the filmmaker to avoid personal liability, the filmmaker must sign contracts in the name of the company without giving any personal guarantees.

Likewise by establishing a separate business entity, investors can own the company that owns the film, without being liable for the actions of the company. Investors may be willing to accept the complete loss of their film investment, but will not want to risk losing their homes and other assets. Another reason to set up a company is to reduce one's taxes. Before forming a company, one should consider other ways to minimize liability, such as insurance.

If a filmmaker is not knowledgeable about the formalities of setting up a company, they should retain a lawyer to do this for them. If you don't set up the company correctly, and run it in accordance with legal requirements, courts may disregard it and not treat it as a separate legal entity. In this happens, you have wasted your time and money in setting up a company, and may be personally liable.

Where can a filmmaker get contracts, releases and other standard paperwork to protect his film?

A form contract is only useful if the person using it is knowledgeable enough to select the right form for the circumstances. Blindly using forms from another production without understanding the content of the form is risky, and can create serious legal problems for the filmmaker. There are many different variations of customary production forms. An employment contract for a director, for example, could be structured as a loan out or for direct employment. It could be subject to the DGA agreement or not subject to it. There are many variables that need to be considered. Furthermore, union or guild rules may override what is agreed upon by the parties in the contract. So it is best to have a lawyer counsel you and select the contracts you need, and customize them to suit your needs. It is rare that an experienced lawyer will draft a contract from scratch. We have thousands of templates to use, and often have to revise less than 10% of a form. But knowing which form to start with, and what needs to be changed, is important. A competent lawyer will know what questions to ask to elicit the information needed to draft the right agreement. Of course, if you produce the film and it turns out poorly, it will not matter that your documents are not in order. But if it is a hit, and distributors want it, they will only acquire rights if the documents are adequate. Distributors want to distribute your movie, not buy into a lawsuit.

Now with my cautionary words firmly in mind, should you decide you don't need a lawyer, there are number of sources for form contracts, including my book "Contracts for the Film and Television Industry, (2nd Ed, Silman James Press), and my software program "Automated Contracts for the Film and Television Industry" which is also sold under the "Movie Magic Contracts" brand. While lawyers cost money, you should always consider what it will cost you if you don't properly secure the rights to your film.

Where do most low budget film lawsuits originate?

I have not done an empirical study on this topic, but in my experience many disputes arise from collaborators falling out over some creative or business issue. If the parties have not entered into a written collaboration agreement spelling out their respective roles, credits and obligations, they may find themselves in a messy dispute, and the work product created by their joint efforts may be unusable by either party.

Another big area of dispute arises from filmmakers not being paid their share of revenues from distributors. It is best to carefully check the track record and experience of potential distributors. Newcomers are most likely to be taken advantage of. Ask a prospective

distributor to send you their press kit. It will likely contain one-sheets from the films they have distributed. Examine the credits. Track down the filmmakers. If you cannot find them, simply ask the distributor for a list of all the filmmakers they have done business with over the past two years. Call the filmmakers. Ask them specific questions: Did they receive timely producer reports? Have they been paid what they are due? Did the distributor spend the advertising dollars promised?

What is worker's comp and how does it protect the filmmaker?

If an employee is injured on the job, workers compensation insurance pays for medical expenses and compensation for any disability. Employers are required to have workers comp insurance with few exceptions. The employer does not have to be at fault for the injury in order for the employee to collect benefits. However, the injury or illness has to be incurred in the course of employment for benefits to be paid. Worker's Comp insurance is normally obtained through an insurance agent or broker. In California, go to the Division of Workers' Compensation website at <http://www.dir.ca.gov> for additional information.

What is E&O insurance?

Errors and omissions insurance (E&O) is essentially malpractice coverage for filmmakers. It protects the insured from liability arising from negligence in not securing the rights, permissions and clearances needed to exploit the film. Coverage includes liability arising from invasion of a third party's rights, which might arise if the film defamed an individual, invaded their privacy or infringed on their copyrighted work. E & O insurance does not insure against damages from a filmmaker's intentional misconduct.

The insurance policy also covers legal fees to mount a defense. There is often a deductible, which may be ten thousand dollars or more. Before issuing a policy, insurers will require applicants to secure all necessary licenses and permissions. A copyright report and title report will be requested, and employment agreements must be in writing. Insurers typically ask that the producer's attorney to review the insurance company's clearance procedures, clear the script, and review chain of title documents.

Low budget filmmakers may find it difficult to afford E & O insurance, which runs \$7,000 to \$12,000. While United States distributors usually insist on it, many foreign buyers don't require it. Foreign buyers operate in countries that are less litigious.

How does a copyright protect a film?

A copyright is a form of intellectual property. It is a bundle of rights the owner has in certain products of the mind. Copyright law protects works of authorship such as literary works and movies. A copyright owner can prevent others from copying, distributing or preparing derivative works.

A copyright does not protect story ideas, concepts or themes. Such elements are not protected whether they are in a writer's head, written down on paper, or published. Ideas are as free as the air. Ten authors can write a story about a doomed romance between lovers from different backgrounds. This could be Romeo and Juliet, or West Side Story, or a variation on the theme. Likewise, multiple authors can write biographies about George Washington. Each is free to tell the story of George Washington's life in the writer's own words. Each can borrow facts and historical incidents written by prior authors.

What copyright law protects is the "expression of the author." This is the particular manner in which the writer tells the story, his approach to the material, his voice. In other words, what is protected is the embellishment on the idea, not the idea itself.

Consequently, others are free to borrow those elements in your work that are not copyrightable, such as ideas, themes and historical facts. If your film is finished, you should register it with the Copyright Office by sending in Form PA with a copy of the film and an attached synopsis describing the film. If you are still at the script stage, you can register the script now and register the film when completed. Additional instructions on how to register your copyright can be found at the copyright office website: <http://www.copyright.gov/> and on my website, Entertainment Law Resources at: www.marklitwak.com.

What is a chain of title?

Chain of title refers to all the documents needed to demonstrate that the filmmaker owns all rights to his or her film and any component parts, such as music or stock footage, so that the film can be freely distributed without fear of being sued for infringing another's rights. The documents that comprise the chain of title vary depending on whether the film was produced as a work for hire for a production company, or made by one or more individuals who then transferred their rights to a producer or production company. The documents typically include a script acquisition agreement or writer employment agreement, depiction releases for all those who appear in the movie, licenses to use music, photographs, artwork and stock footage, and employment agreements for cast and crew.

What does work-for-hire mean?

This is when a copyrighted work is created for another. Under Copyright law, this means either a work prepared by an employee within the scope of employment; or a specially ordered or commissioned work in one of nine categories of works, one which is movies, if the parties expressly agree in a written agreement signed by both before work begins. In other words, sometimes the artist who creates a copyrighted work is not the author for copyright purposes. This occurs when the artist is employed by a company, and the work is created as part of the employee's job. The second situation where the copyright vests in another party is when the artist is hired as an independent contractor and it is one of nine types of work, and the parties have a written agreement saying it is a work for hire.

What is the AFMA?

AFMA was the name for the trade group representing independent producers and international distributors. The organization runs the American Film Market, provides arbitration to resolve industry disputes, and offers educational programs. The organization recently changed its name to the Independent Film and Television Alliance (IFTA) to reflect the fact that a significant number of its members are now not based in the United States.

What is script clearance and how does a filmmaker get it?

Script clearance is the process of reviewing the script and making sure there are no legal problems that the filmmaker will encounter in making a movie based on the script. An experienced attorney will read the script to determine if anything in it infringes the rights of third parties. If the script defames another, invades their privacy, infringes a copyright or trademark, or otherwise violates someone's rights, the attorney will advise the filmmaker to

revise the script. Often minor changes, such as modifying the name of a character, adding a disclaimer, or changing the brand name of a product can resolve the concern. Such changes are easy and inexpensive to make in pre-production but can be very costly if you make changes after production and to go back and re-shoot scenes. Insurance carriers often require that the script be cleared before they will issue an Errors and Omissions insurance policy.

What is a Producer's Rep?

A producer representative, or rep, is a marketing and distribution consultant to a producer. The producer rep is also a salesperson who takes on the responsibility of finding a distributor for a film. This function may entail a variety of different tasks, depending on the nature of the film. For a film with the potential of garnering good reviews and critical acclaim, that might mean orchestrating a strategy to exhibit the film in festivals. The rep may also advise the filmmaker on preparing collateral materials such as press kits and key art for a poster. For a more commercial film, the rep might solicit distribution executives to attend an industry screening. The goal is always to create competition among buyers for the film that will ultimately lead to a bidding contest, and better terms for the producer. The producer rep can also advise the filmmaker as to the comparative strengths and weaknesses of distributors and which ones to avoid.

Why does a filmmaker need a Rep?

Filmmakers often focus their energies on mastering their craft. To be an accomplished filmmaker one has to know a lot about cinematography, writing and acting, as well as developing good interpersonal and organization skills. That may not leave much time to learn the business aspects of marketing and distribution, including the fine points of complex distribution agreements and the time needed to build relationships with festival directors and distribution executives. So a good rep can bring expertise to the team that the filmmaker lacks or does not want to invest the time to learn.

How is a Producer's rep different from an Agent or Manager?

Agents are licensed by the labor department, and they focus on selling their clients services or scripts to producers and studios. They essentially are in sales. You could say they are a form of employment agency. A good agency will know what kinds of scripts Warner Brothers is looking for and what kinds of projects their clients are seeking. Most agents work within the mainstream studio system and major networks, not in the independent film world. There are some agents that specialize in independent film, and a few that serve as both agents and producer reps.

Where should a filmmaker go to seek out representation?

Filmmakers should seek the advice and recommendations of other filmmakers. IFP West has a list of producer reps they give out to their members. There are only about a dozen experienced reps, and they are concentrated in New York or Los Angeles. How can the filmmaker check the rep's credentials and reputation?

If the rep is a lawyer, you can check with the state bar to see if any disciplinary actions have been taken against the lawyer. If the rep is an agent, you can check the labor department to see if the agent is licensed, and check with the guilds to see if they are

franchised. A franchised agent signs a contract with the union assuring certain protections to union members. But perhaps the best way to check on a rep is to speak to other clients of the rep.

What is the standard fee for a lawyer to represent a film?

Depends on what tasks the lawyer is being asked to handle. Many lawyers work on an hourly fee for general legal work, and for experienced lawyers this may be three to four hundred dollars per hour or more. Of course, a novice lawyer who charges one hundred dollars an hour and takes ten hours to draft a contract that a more experienced lawyer can draft in one hour is no bargain. For production legal work, which is drafting the contracts to produce a film, a rough rule of thumb is one to one and one half percent of the budget. But that rule does not apply to very low budget or high budget films.

Producer reps have traditionally received most of their compensation as a percentage of the revenue that comes back to the producer. This fee is usually in the range of five to fifteen percent of the producer's gross revenue, which is the sum, if there is any, after the distributors take their fees and expense reimbursement. This is why reps are very selective in which films they agree to rep if they are working on a contingency basis. There are thousands of independent films produced each year, and my guess is that less than one-third obtain distribution, and only a minority of those films generate significant revenue.

Does a producer's rep help in finding funds?

Some producer reps will help develop a project, including raising financing. This is most likely to occur in the case of a filmmaker with a track record of having made at least one solid feature film. Producer reps will be more inclined to help with raising financing if there are other impressive elements attached, such as stars committed to the project, some financing in place, or a script by an acclaimed screenwriter. For first-time filmmakers, it is very difficult to get a rep or a studio interested in a project. Most first-time filmmakers finance their films out of their own pockets or with finds from family, friends and MasterCard.

Does the filmmaker get to help make the decision of what distribution companies their film will be submitted to?

The filmmaker should always have the final word on which distribution agreements are concluded, whether represented by an agent, producer rep or attorney. If the filmmaker wants to be involved in deciding which companies will be approached, that is fine, but the more important decision is which company to conclude a deal with.

Once a distribution agreement is made, the distributor may have the authority to enter into sub-license agreements without the filmmaker's review or approval. So if filmmaker strikes a deal with Miramax for all North American rights in all media, Miramax will usually insist that they be able to market and distribute the film as they see fit, without having to seek permission of the filmmaker.