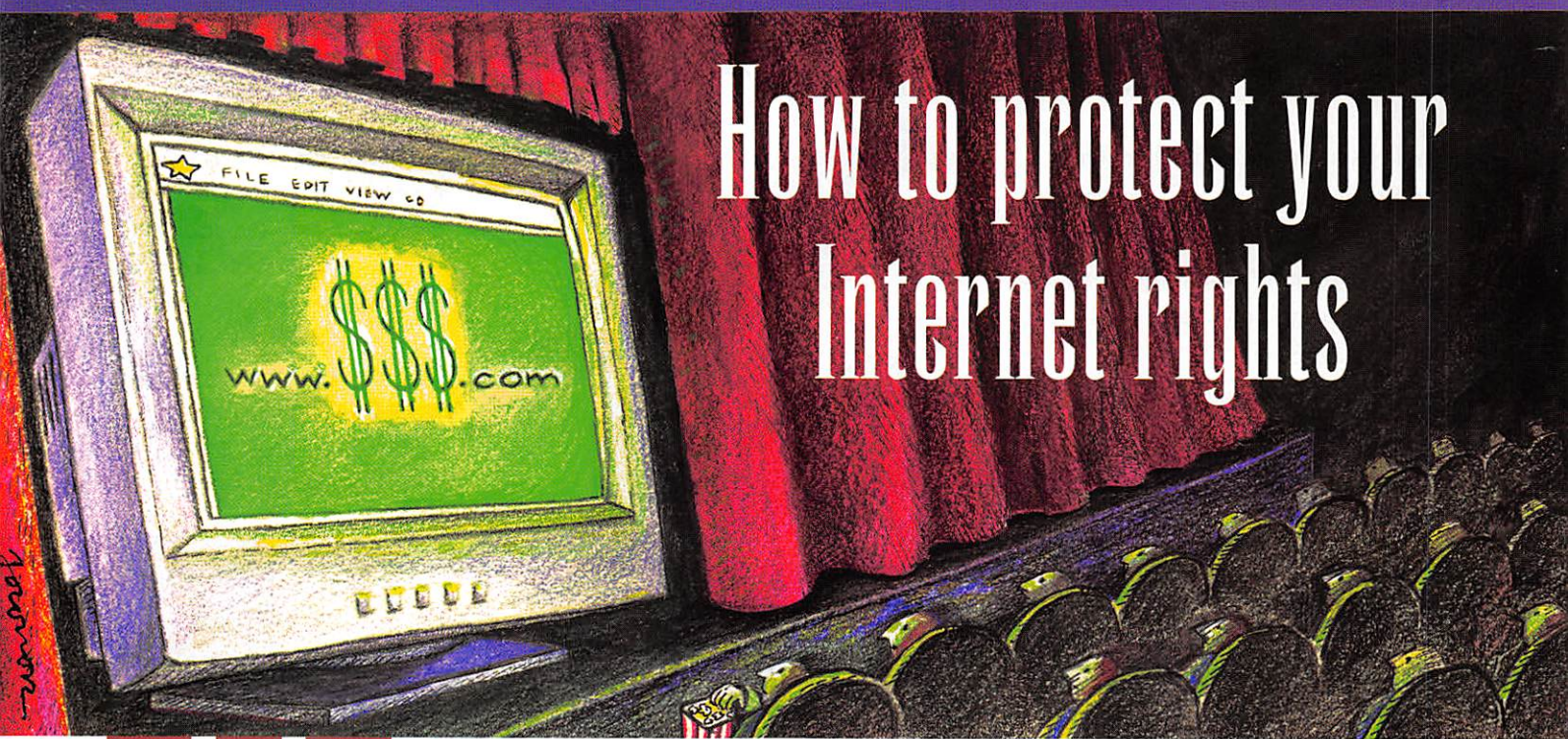


LET THE MOVIEMAKER BEWARE...

How to protect your Internet rights



W

ITH THE RAPID DEVELOPMENT OF WEBSITES designed to distribute motion pictures directly to consumers, many filmmakers and owners of motion picture rights are being asked to grant "Internet" rights to their films. Before granting such rights, a number of new and interesting issues need to be carefully considered. **by Mark Litwak, Attorney At Law**

First and foremost, the distribution agreement needs to define "Internet rights." Is the distributor merely trying to sell home video copies of motion pictures via the Internet? If so, the right granted is in the nature of a home video right—the Internet is just being used to market cassettes or DVDs. If you grant such a right, be aware of the problems that may arise. For instance, will the grant to an Italian company permit it to sell videocassettes to a buyer who logs onto the Internet from France? Might this conflict with your grant of home video rights to a French distributor?

Another "Internet right" is permission to promote and advertise a motion picture over the Internet. The widely reported success of the *Blair Witch* producers in building an audience for their film with a website is a tactic that is already being widely emulated by others. The right to promote a film over the Internet is an expansion of the existing rights distributors acquire to advertise and promote a motion picture. Typically, these clauses are written in broad terms, granting the distributor the right to promote a film in any and all media. Such a grant should cover Internet promotion.

A third "Internet right" is the right to distribute a motion picture via streaming media. Here the distributor is not selling a cassette, the distributor is actually transmitting the motion picture over the Internet so that it can be viewed on a computer monitor. This has been called "Netcasting," and is akin to broadcasting except that the Internet is the means of transmission, not signals broadcast over the air. Today, most computers connected to the Internet cannot display motion pictures with broadcast quality. The picture is often restricted to a small portion of the computer screen and the action appears jerky. That is because most computers are connected to the Internet with relatively slow modems. However, growing numbers of computer users are upgrading their connections with DSL lines, cable modems and other technologies with greater bandwidth. Moreover, new technological advances are improving picture quality. In the next few years an increasing number of computer users will be able to watch movies on their computers with viewing quality comparable to television. Thus, the Internet will enable film owners to distribute movies directly to the end user, bypassing the traditional intermedi-

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aries such as the broadcast networks, home video retailers, and cable operators.

The economic viability of Internet distribution is unproven at this time. Keep in mind that traditional distributors perform an important marketing function that an Internet distributor may not be able to replace. Even if you can sell your film over the Internet, there is no assurance that end users will visit your website and view your film. While Internet distribution is of questionable profitability, there is no doubt that the distribution of your film over the Internet can jeopardize agreements with traditional distributors. If HBO has paid you a large fee to premiere your film on its service, how do you think the cable channel will react upon discovering that you are simultaneously distributing your movie over the Internet? If a film is to be marketed over the Internet, when does it make the most sense for this window to occur? Should Internet distribution come before or after a home video release?

FOR THE AFOREMENTIONED reasons, and because Internet distribution can enable copyright infringers to pirate a film worldwide with a few clicks of a mouse, it is prudent for filmmakers to hold onto their Internet rights until the dust settles. If a distributor insists on obtaining Internet rights, or if you want to be a trail-blazer, you should consider the following issues in negotiating a distribution agreement:

EXCLUSIVITY: Will the grant of rights be on an exclusive or nonexclusive basis? There are a number of different sites attempting to distribute films over the Internet. At this time it is not clear which companies will prosper and which will crash and burn. If you grant exclusive rights to a company that goes out of business, your Internet distribution rights will be an asset of the company and may be tied up in bankruptcy proceedings. It may take considerable effort and expense on your part to reacquire those rights. Consequently, it is a good idea to have the Internet distributor grant you a security interest so that you will have preference over unsecured creditors. Make sure to register the security interest to perfect your rights.

TERRITORY: Territory becomes an almost meaningless term when applied to Internet distribution. Anyone with a computer anywhere in the world can log onto the Internet and download data from computer servers wherever they are located.



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The expense of shipping a product internationally becomes irrelevant when the product is Netcast. Even if you attempt to limit an Internet distributor to selling products in one country, how can they or you monitor distribution outside their territory?

Moreover, distributing your film worldwide subjects you to the laws of many different nations. What if your film is downloaded by computer users in India and the content of the film violates censorship laws there? Since there is no local distributor with the knowledge and incentive to comply with local regulations, are you exposing yourself to potential civil and criminal liability? As a practical matter, it may be difficult for a prosecutor in a foreign land to obtain jurisdiction over you, but if one day you visit such a country, you could find yourself the subject of legal proceedings.

Many producers erroneously assume that if an American producer makes an American film, American law will determine owner-

Internet distribution. A popular model for Internet companies is to give information away for free, and generate revenue from the sale of advertising and ancillary services. If your movie is being given away for free or a nominal sum, and the Internet distributor retains all revenue from advertising, then you are not receiving fair market value for your film. If you are entitled to share in ad revenue, how is your share determined? Do you share *pari passu* (at an equal rate) with other less commercial films?

The deals that have been concluded to date are all over the spectrum. The Broadcast.com deal to license 50 Trimark titles was part of a broader pact in which Broadcast.com acquired a \$4 million dollar stake in Trimark. Sightsound.com acquired a limited 30-day pay-per-view Internet window to Artisan Entertainment's *Pi* in a straight licensing deal. MovieFlix.com offers about 150 features acquired from indie distributors. The company pays a one-time

WHILE INTERNET DISTRIBUTION IS OF QUESTIONABLE PROFITABILITY, there is no doubt that the distribution of your film over the Internet can jeopardize agreements with traditional distributors.

ship and rights to the film. This is not the case. Copyright laws, for example, are applied territorially. This means French law applies in France to both French authors and to the exploitation of American authors' work in France. And French law differs from American law in many respects.

Under French law an author is granted certain "moral rights" including the rights of integrity and paternity. These rights are perpetual, inheritable, and inalienable. Thus, the heirs of an artist could object to the use of an ancestor's work, even if that work's copyright has expired. In *Huston v. Turner Entertainment*, the late American director John Huston was determined by a French court to be the author of the American film *The Asphalt Jungle*, although under American law Huston's employer was the author.

INSURANCE: Some Errors and Omissions Insurance carriers claim that they now cover liability arising from Internet distribution. Review the policy carefully. Some policies exclude coverage unless this use is specifically mentioned as an endorsement onto the policy.

ROYALTIES: No standard has been established as to how to divide revenue from

license fee. The site is advertiser-supported and sells movie memorabilia. Apparently, ancillary revenue is treated as the cyberspace equivalent of the theater concession stand; all revenues are reserved to MovieFlix.com.

GRANT OF RIGHTS: Do you have the authority to grant Internet rights? If your movie was acquired from a producer, did the producer obtain such rights from underlying property owners such as the screenplay writer? Note that many contracts don't explicitly grant "Internet" rights because when the contracts were drafted no one was thinking in terms of the Internet as a distribution medium. Arguably "video-on-demand" rights would encompass distribution over the Internet.

Whether a producer has the right to exploit a movie over the Internet will often turn on the language in the contracts that the producer used to acquire rights to works incorporated in the film. The case law in this area is confusing and somewhat contradictory. In one line of cases, the courts assume that a licensee may use a property in any manner that appears to fall within the scope of the contract granting those rights. In these decisions, the courts assume that a grant of

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rights covers new uses or new media if the words conveying the grant are susceptible to that interpretation, even if such new uses are not specified. Thus, an assignment of motion picture rights to a play has been held to include the right to broadcast the film on television, even though television did not exist at the time the contract was made.

In another line of cases, the courts assume that a grant of rights only extends to those uses that are clearly within the scope of the rights conveyed. In *Cohen v. Paramount Pictures Corp.*, a composer granted to a production company the right to use his music in the film *Medium Cool*. The grant included the right to use the composition by means of television, including exhibition by pay television and subscription television. The contract reserved to the composer all other rights. When Paramount began to distribute the film in the form of videocassettes, the composer sued on the grounds that his prior grant of rights did not include exhibition by home video. The Ninth Circuit Court of Appeals agreed.

CONCLUSION

IF, AFTER REVIEWING the above issues, you are inclined to license Internet rights, consider the following: many distributors requesting Internet rights have never distributed anything over the Internet and they may be completely unable to exploit these rights in the near future. Such companies may be warehousing your rights in the hope that they will become valuable some day. That day may not be soon. It bears noting that Artisan Entertainment's Netcast of *Pi* attracted an online audience of only 100.

If you must grant Internet rights, try to obtain a reversion clause so that these rights will return to you if they are not exploited in a timely manner. You could provide, for example, an initial grant of Internet rights for only one year, and if the distributor returns, let's say \$5,000 from Internet exploitation, the term is automatically extended for additional time. **MM**

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