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## Why You Need A Production Attorney

By Mark Litwak

Many independent low budget filmmakers try to conserve their funds by not retaining a production attorney to handle their contracts and releases. They often rely on forms from prior productions and assume that these agreements will suffice to secure all the rights they need. Sometimes they are lucky, and the forms are sufficient. Most of the time, however, the forms are not suited for the circumstances and are deficient. Actor agreements, for example, vary significantly. There are different templates for union and non-union deals. There are diverse terms for principal players, day players and extras. Moreover, releases may be needed for non-actors in the background or interview subjects for a documentary. If a producer does not use the proper agreement, she may belatedly discover that they have not adequately secured rights to their film in a manner that is acceptable to distributors.

Filmmakers may not realize that today virtually all distributors in the United States require Errors and Omissions (E & O) Insurance before they will release a motion picture. A producer can create a fabulous award-winning movie and find themselves pursued by multiple distributors bidding to acquire their films. But if the producer cannot secure E & O insurance, no deal will be made. Almost all distributors require this insurance. This includes not only distributors that release films in theaters, but also smaller home video companies and aggregators who license motion pictures to digital platforms like Amazon or iTunes.

When filmmakers apply for E & O Insurance, they will see a line on the application asking for the name of their production attorney and his/her phone number. That is because insurance companies want your premium dollar but don't want to take on any unnecessary risk. They want to make sure your contracts have fully secured all necessary rights. They will often call the production attorney to ensure that she understands the insurers clearance requirements and has made sure that the production has complied.

E & O Insurance, sometimes referred to as Filmmaker Malpractice Insurance, is a type of insurance that protects a filmmaker (and distributors) if the filmmaker negligently fails to secure rights to a film. It protects against copyright and trademark suits for infringement, as well as action claiming defamation, invasion of privacy, violation of rights of publicity and other violations of intellectual property. If a filmmaker has violated a third-party's right, such as using music that has not been properly licensed, not only will the filmmaker be liable but everyone in the chain of distribution may be liable as well. That means sales agents, distributors, exhibitors

and retailers can each be sued even if they had no role in producing the movie. A theater owner, for example, does not have a good defense by blaming the filmmaker for his failure to license music on the soundtrack. The filmmaker may be the individual who dropped the ball, but everyone who has duplicated or exhibited the film is also liable. Statutory damages for copyright infringement can be as much as \$150,000 for a single infringement of one work.

The distribution contract will usually provide that if a filmmaker fails to fully secure all rights, and the distributor is sued, that the filmmaker must indemnify (reimburse) the distributor its legal fees and any award rendered against it. But distributors understand that most independent filmmakers have limited resources, and after a film has been completed, they are often broke. The indemnity may not be worth much practically speaking. That is why distributors want the filmmaker to add them as additional insureds under their E & O insurance policy to ensure that the insurance company assumes any liability and pays attorney fees to defend against a suit.

The Law Offices of Mark Litwak & Associates provides affordable legal services for many low budget filmmakers. Contact us if you would like to discuss your production legal needs.