

IMAGINE NEWS

LEGAL LENS: DISTRIBUTION DO'S AND DON'TS

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You've finally finished your feature film, and all you want to do is sleep. Unfortunately, once the film is "in the can" as it were, the real work begins. It's time to find a distributor, e.g. someone who wants to pay money to exhibit your baby. There are several pitfalls and misunderstandings on how the distribution process works. This article will focus on what to expect and what you should focus your counsel on negotiating in a distribution deal.

The first common error of filmmakers is in knowing who is a distributor. We all know the big ones: Disney, Universal, Paramount (and classics), Sony (and classics), Miramax, Warner Brothers and its recent offspring Warner Independent, New Line and Fine Line. There are also MGM, Artisan, Lionsgate and Dream Works. If you are fortunate enough to get an offer from one of the majors or mini-majors, then you should also understand that once you license your film to them (usually for both domestic and sometimes for worldwide rights), it will be difficult to get the film reverted back to you until the end of the term (frequently 15 years) unless they've done absolutely nothing with the film (in which case in California it will revert in seven (7) years). If a major has expressed interest, first ensure that you are getting some advance. If you're not, it's usually not a real offer. Second, ensure there is a reversionary clause within two years if they've not distributed in any market. If you're banking on a U.S. theatrical, this should also be guaranteed within a certain time with a certain minimum commitment of Prints and Advertising ("P&A") money dedicated to it. Think long and hard before giving a major your international rights. Not all majors are set up for focusing on foreign, and you may want to use a Sales Agent for this task.

For the majority of you, whose film is unable to secure a U.S. theatrical, there are two other kinds of distributors you will likely encounter: those companies who are more distribution agents (rather than actual distributors) and those who may be able to get you a limited theatrical in exchange for other rights. Be very careful of both these purported distributors. If a distributor offers you a limited theatrical, first, ask for a marketing plan, and make sure that they are dedicating some money (not from your pocket, but from theirs) for the P&A. How many screens will they break the film out on? Over what period of time? What is their success rate with other independent films? Were those films of similar style and genre as your own? Second, what other rights are they asking for? Many of these smaller distributors want worldwide rights. If this is the case, is the

distributor handling the actual sales, or are they just licensing your rights to a third party Sales Agent? If the latter is true, then you will be charged up to thirty five percent (35%) of the cost of the sale of the film with 25% usually going to the Sales Agent and 10% usually going to the Distributor. This is not a good deal, and you may want to cut your own deal with a Sales Agent who specializes in selling worldwide rights. Further, if your distributor is not paying for the theatrical (against ticket sales and U.S. video rights etc.), then it is not actually providing you with much, which is why such companies are not really distributors, but acting as a mere agent. Fees in this case should be no more than an agent fee of ten percent (10%), otherwise you should consider self-distribution of the film, and there are currently companies that can help you do this and are paid direct fees. Remember to budget for self-distribution of a film theatrically. This will entail a number of prints and money for a local publicist or advertising agency in the community where you'll exhibit. If the Exhibitors agrees to show your film, it will usually split the door with you 50-50. If you do well, then take the profits and buy more P&A for more screens. This is a simplified version of how the film MY BIG FAT GREEK WEDDING was distributed theatrically.

Most films should begin and end with the Sales Agent, not a "distributor". In other words, if it becomes clear that your film will not receive the coveted U.S. theatrical distribution deal, then you should look for a Sales Agent to help sell your film in the worldwide markets. The fees for Sales Agents ranges anywhere from 10% to 45%, averaging around 25%, and you will need to do your research very carefully before signing one on. First, find out what films it has represented and call the filmmakers of those films and ask them if the Sales Agent successfully sold the film and if they felt reasonably compensated for the sales. Second, does the Sales Agent handle your genre of film regularly and successfully? Don't sign up a Sales Agent (or distributor for that matter) that is known for horror films, when your film is an edgy art-house feature. Third, how long has the Sales Agent been in business. Sales agencies go out of business regularly (and miraculously reemerge as other entities). Make sure you're working with one that has been in business with a good reputation generally.

In negotiating either distribution or sales agent agreements, seek the following terms and make sure you've let this be known right from the beginning:

(1) Use a third party collector. For any of the larger U.S. distributors named above, a U.S. bank that works in the entertainment business such as LHO or Chase is the best choice to ensure that the distributor behaves honestly. For international sales, a company such as Fintage House, should be employed. Third party collectors keep distributors and sales agents trustworthy, and ensure you will get the profits you're entitled to. This does not mean you may not have to enforce compliance with your agreement (third party collectors generally don't do this), but by their very relationship in the business overall, they are usually very good at getting payment;

(2) Seek a bankruptcy clause in the agreement. If the sales agent or distributor goes bankrupt, then the film must automatically revert to you (and any deliverables you've made as well, which you'll probably have to go collect);

(3) Make sure you have regular audit rights (twice a year or quarterly) and that if you discover a discrepancy of more than 5%, that the cost of the audit and legal fees is paid for by the sales agent or distributor. This is one of the most important clauses. If you know that the territory of Spain has been sold, but you've seen no income, you will want to audit;

(4) Give the distributor or sales agent sales goals to meet. If a certain level of sales has not been accomplished within a period of time, then the film or certain territories should revert back to you;

(5) Make sure you have the right to use the film at festivals and that any prizes you may subsequently receive remain yours;

(6) Limit the expenses of the distributor or sales agent. This is key. Many of these entities put outrageous expenses for themselves to go to worldwide markets. Twenty-five hundred dollars is a fair amount if the sales agent/distributor is handling several other films. In any event, the cost should be split between all films represented at market;

(7) Deliverables are often the most contentious area in agreements for distribution. Go over the list carefully and identify what you can and cannot deliver, and let the distributor/sales agent know this up front. You may not be able to do the deal if you can't come up with the money to deliver all substantial items. Many such deals fall apart because there is no 35 millimeter print available, for example, an expensive item. Errors and Omission ("E&O") insurance is also a must-have for distributors. Try to get them to pay for anything you can't; and

(8) Get an arbitration clause in any agreements, rather than having to litigate with the party. If you're dealing with a foreign distributor or sales agent, make sure your attorney researches how arbitration is done in those countries and ensure that all arbitration is in English.

In negotiating deals with Distributors and Sales Agent, make sure you have allocated sufficient funds for counsel. These deals are complicated and there is simply no standard form. Negotiating time is frequently substantial. Ensure that you have budgeted at least \$10,000 for your attorney in the distribution phase, and never take these negotiations on yourself, or you may find yourself without a film or recourse to collect money you believe you are owed. Few attorneys will take these negotiations on contingency although some will work with an upfront flat fee plus a success fee (a percentage of the deal) if it closes. Making a movie is difficult, but selling it is ten times the challenge and time commitment. Make your lives easier by understanding the terms of the deal and ensure that profits will safely and securely flow back to you and your investors once distribution has been obtained.

Disclaimer: None of the material in this article is intended as legal advice, and if you require such legal consultation on a particular project or work, please contact an attorney. Vinca Liane Jarrett is the managing attorney of the Law Offices of Vinca Jarrett & Associates, a full-service entertainment law firm. She is also the owner of FILMPRO FINANCE and SKRIPTease Script Consulting, specializing in feature and television projects both on spec and in production. She is currently on the Board of Advisors to the Golden Trailer Awards. You can contact Vinca at JarrettBiz@aol.com and check out her web site at <http://www.vincajarrett.com>.