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LEGAL LENS: THE FIVE STAGES OF SUCCESSFUL DEVELOPMENT OF YOUR FILM PROJECT

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Most first time filmmakers finance their own films using personal funds, credit cards and donations from family and friends. Their project is personal, and issues of commerciality and profitability usually don't arise until after the film is finished and it's too late. Once you've gotten your "baby" in the can and are ready to pursue the business of filmmaking, not just the fun of it, there are certain strategies that can be implemented to help you make a film that will sell both domestically and internationally. Each of these steps requires careful planning, an initial development budget and legal documents to ensure that you protect yourself and the property, ensuring the future success of your project. This article will discuss the steps necessary to get a film financed up until the commencement of pre-production. There are five major stages of development that will help you find investors and distribution for your project: (1) Identifying and obtaining the rights to the Project; (2) Partnering with skilled producers and executive producers; (3) attaching talent (director and actors); (4) attaching a sales agent; and (5) identifying and securing non-equity sources of finance.

STAGE 1 -- IDENTIFYING THE PROJECT: First, you must identify a property worth making. This is no easy task. A well crafted screenplay which is either original or based on an existing story must be discovered. The property must be of quality and marketable. You should think about: who will want to hear/see this story?; who is the target audience?; what is compelling and original about the story that will attract the target audience?; and most importantly, why do you want to tell this story? This is harder with an original script, since it has not been tested in the marketplace, while a novel already published has a built-in audience.

Original Stories If you have an original story, the first thing is to get it written into an original screenplay. Many filmmakers attempt to write the first draft of the screenplay themselves, but ultimately a professional should be brought onto get the script into condition sufficient to attract talent to the project. If you plan on using a script consultant, the first legal document you will need is a Work for Hire agreement, which states clearly that the consultant has no ownership of the story and relinquishes all such rights in exchange for a fee. If you hire a screenwriter to either (a) write the initial screenplay or (b) polish your screenplay, you will also need a Work for Hire agreement assigning all rights in the material back to you. This latter document is more complicated if you do not have the funds to pay in full to the writer up front. Many non-union writers will work for a small retainer fee and an agreed upon fixed price once the project is funded. This is a significant deal memo that needs careful drafting and should not be treated lightly. Ultimately, each and every person that comes onto your project that gives feedback to your script must sign a Work for Hire agreement to ensure that you and you alone own the rights to the project under copyright law.

Option/Sales If you know of a book or short story you wish to use, you must secure an option agreement from its author. Options by independent filmmakers should be negotiated for as little as possible up front for the first six months (a year if you can get it). This allows time for you to complete the rest of the stages until funding is secured. The option should allow automatic extensions up to two (2) more years (more if you can get it) for a fee, which increases per option period. If you exercise the option, you are paying a set fee for the rights to make the film from the property.

This is usually a large amount of money tied to the budget of the project. If the option is not for an existing screenplay, but just the underlying novel or short story, the amount should not exceed \$20,000 for an independent project under \$10,000,000 in budget (unknown works should

go for no more than \$10,000). Remember, once the option expires, you have no further right to develop the project, and if the author refuses to extend the option, exercising (buying the property) the option is your only choice or you will lose the project and all your work to date. Don't bother attempting to option the latest bestseller, you can't afford it unless you personally know the author. These books are generally looking for big studio dollars and the sale price can be as much (or more) as a million dollars. A carefully crafted option agreement that includes the sale price (a separate document) and an assignment of all rights (also a separate document) in the property for feature film including ancillary rights for television series development must be crafted and secured before anything else occurs. Once you have secured the rights to the book, you then still need to hire a screenwriter to craft an original screenplay as noted above. If you can afford to use a screenwriter in the union called the Writers Guild of America (WGA), you will have to pay for each and every draft the writer does at union prices. This could run into hundreds of thousands of dollars. Generally independent films are not written by WGA members, unless that member is a writer-producer of the project, something you could consider if you want an established screenwriter. There are new rules allowing WGA members to write for independent films and receive some deferred payment, but these fees are still quite high for the average independent project and should only be considered if you have a personal relationship with the writer. Once you have a great screenplay (which can take a solid year or more to create with multiple drafts), you are ready to move onto the next phase (all which can be in progress during the script drafting phase in terms of pitching people and making connections).

STAGE 2 – PARTNERING WITH OTHER PRODUCERS: If you are a (first time) producer without significant contacts in finance, talent or distribution, you will need the help of other more experienced producers. Identify what you cannot bring to the project and then search for these partners at film markets or through friends in the industry. Your first job is getting others excited in your project (after you own the rights to it or you will risk having the rights swiped out from under you) by putting together a proposal. The proposal can include a brief description of the project (including a tag line), a proposed budget (if you don't know how to do a budget, then you will need to partner with someone who can provide this as well), a copy of the script, biographies of anyone attached to the project of note (for example, perhaps your best friend is a major composer or musical performer that can add cache to your credibility as producer and to the project). Finally, you have to be able to pitch the project and get others excited to be a part of it. Those producers that will bring either talent or finance, but will not help in producing the film from beginning to end, might be signed as executive producers. Once someone expresses real interest, a co-producer agreement must be completed. This is a very important document and must allow the agreement to terminate if the co-producer does not deliver on what he says he can in a certain amount of time, since success of your project is contingent on this. Many of these co-producers will take significant fees for their participation, and if you are inexperienced and bring nothing other than the project itself (i.e., no money, not talent and no distribution), they may take the lion's share of producer fees for their participation, which is why you must be able to get out of all such deals if they don't deliver. As the key producer, you may be able to reserve the lion's share of the backend, but as we all know, most independent films don't go into profit, so producer fees must be carefully monitored, and usually don't exceed 5% of the total budget. Once you have secured agreements with each participating producer, it's time to move onto Stage 3.

STAGE 3 – ATTACHING TALENT: Many inexperienced producers throw up their hands in dismay at the idea of attaching talent. Talent is key to securing finance and distribution. Without it, you will likely need to go back to begging, borrowing and stealing your production funds for that soon-to-be-unreleased festival-only film. Few movies defy this stage of necessity, and in the U.S. domestic market the statistics are significantly against you. Everyone student of film knows that BLAIR WITCH PROJECT was a unique marketing strategy, which has never been duplicated. The more recent MY BIG FAT GREEK WEDDING was produced by Tom Hanks and his wife, who helped to finance its distribution, and again is a bad example as to why your film without known talent will succeed. Movies like TAD POLE got distribution ultimately, not because they were wonderful, but because Sigourney Weaver was attached. If you don't have these relationships, then there are two ways to get talent attached. First, is the right co-producer. Such a co-producer might have once done casting or been an agent or produced successful films, but regardless, they can get talent (and their agents or managers) to read the script. The second person is a casting agent. A well-regarded casting agent must like your project to

become attached and will usually take a retainer up front (deferring the rest of their payment until funding is secured). Casting agents cost in the area of \$5,000 to retain on independent projects. Choose your casting agent carefully. Make sure they'll be available to you and will provide you with lists of talent for each part that can help sell your film. Also make sure they have provided casting to released films and have good relationships to the kind of talent you need for your project. Unknown actors or mid-level t.v. actors will not help your film for a U.S. feature distribution or finance. This is not help. Again, an agreement must be crafted that sets out what the casting agent will achieve for you. Secondly, letters of intent from talent stating that they are interested in the project and available on your currently projected shoot date at a specific offering price must be secured to include in your proposal to financiers and sales agents. These letters are simple and non-binding, but will help give your project enormous credibility. If you plan on directing the project yourself or have a first time director attached, you'd better ensure that talent will work with you. If not, you should reconsider such plan of action. A good director is key to securing talent. Once a salable ensemble cast is secured in at least two or three parts, or A-list in one part, you can proceed to Stage 4.

STAGE 4 -- SECURING A SALES AGENT: Many U.S. independent producers simply don't understand this very important stage. You secure a sales agent by demonstrating that you have a marketable project with talent interested in performing and directing it. Sometimes sales agents will only come on once you've demonstrated that some financing has been secured (see Stage 5). A sales agent is necessary for three things: First, providing sales estimates that demonstrate that your project has potential at its proposed budget to net profits. This is critical, since smart investors will want to see this prior to investing in your project; second, sales agent can help pre-sell one to three territories internationally based on the project and talent attached, which indicates the future success of your project to investors and to any bank that might provide gap financing; and third, good sales agents can frequently bring finance to the table from post-production to co-production investment if a British or Canadian co-pro is sought. You find a sales agent by going to film markets and pitching your project. You should research which sales agents are right for your project and try to set meetings at markets such as AFM, Berlin or Cannes in advance (or as soon as you arrive). A sales agent will give you a letter expressing interest in your project contingent on your securing the rest of your finance and talent. Once the latter has been secured, a sales agreement will need to be negotiated establishing the sales agent's fees, again a very complex document. You may also want to attach a third party collector to the project (or if you are hopeful of a U.S. theatrical distribution, a U.S. bank that may provide gap) at this stage that will collect all the income from the film and distribute such funds according to a schedule, rather than allowing the sales agent to do this. Once you have a good sales agent attached, you're ready to finish your finance.

STAGE 5 -- FINANCE: Perhaps you are lucky, having many wealthy friends that banked money during the internet era (and kept it after the crash) or in real estate that will provide you with 100% equity finance to make your film once you have secured the right project, talent and sales estimates. Better to attach some amount of funds that come from non-equity sources, and may not even have to be returned to those that provide it increasing your backend potential. Such funding includes location tax incentives, such as those provided currently in Louisiana, New Mexico and Hawaii, as well as international hot spots such as Great Britain, South Africa and New Zealand. Canada has just renewed and revised its incentive as well, but the cost of shooting there is currently higher than it's been in years thanks to the declining U.S. dollar. Many of these tax funds can provide up to 35% of your funding if you shoot on location and use local crews. Sometimes such funds are also tied to using specific international talent. So if you're hoping to access one of the Super Leasebacks in England now, you will need a significant amount of your cast to be British. Rules for securing tax funding must be reviewed carefully with counsel prior to pursuing. Once you believe you can qualify, then you will need a financier (usually a bank) to advance the money to allow you the funds secured by the tax. A letter is usually sufficient from the tax authority and financier to include in your package to demonstrate the viability of these funds. Other non-equity sources of funds include production houses, post-production houses or music producers that want your business, who may provide as much as 10% of your budget. Finally, if you're your sales agent as agreed to do presales, you can usually get up to 10% in the current economy in pre-sales advanced by the sales agent. A bank may also be willing to gap up to 15% of your production cost as well (you must have a producer that

guarantees delivery of the picture and an insurance policy to get this, which should be included in the budget as well). Thus, if savvy and flexible as to where you shoot, you may be able to get 50% or more of your funding from non-equity sources. Once you have this in place, you can begin the final homerun (which you have of course pursued from day one) of getting equity. Various equity funds exist which you may find at film markets or individual investors if you can find them on your own. Equity investors usually receive their money in first position (after any bank gap finance) from the sale of the film plus between 10% and 25%, followed by a substantial percentage of the back end (usually the percentage of the film financed). Once you have identified 100% of your financing, complex legal papers must be prepared to secure the money and ultimately deposit into a production account so that pre-production may commence.

While these stages may go on simultaneously, and the order is contrived only in an ideal world, it is key to understand that ultimately all of these items must be achieved and legal documents drafted to secure the rights to the film and your success as a producer. Your key development funds are for securing the rights to the project, hiring of a casting agent and your attorney who must prepare all the above critical documents, and you should plan on a budget of between \$10,000 and \$100,000 to achieve the success of financing and making your film, all which will be reimbursed if you are successful in gaining finance for your project.

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>.