

# PIERCE - GORMAN LLP

## ***International Motion Picture Law: Finance, Distribution, and Intellectual Property***

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213 Queen's Road East  
Wanchai  
Hong Kong

Speaker: Patrick J. Gorman, Esquire  
*patrickgorman@piercegorman.com*

Pierce-Gorman LLP  
9100 Wilshire Boulevard  
Suite 225, East Tower  
Beverly Hills, California  
90212-3415  
Telephone: (310) 274-9191  
Facsimile: (310) 274-9151

**PIERCE♦GORMAN LLP** is an entertainment law firm based in Beverly Hills, California. The firm's practice consists of multiple areas of law that are relevant to the entertainment industry. These areas of law include securities law, corporate law, intellectual property, and employment law. All of these concentrations tend to overlap as they apply to the firm's core business of advising client's in the motion picture, television, and music industries worldwide.

International Motion Picture Law:  
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## PREFACE

### For Non-US Producers

This book has been drafted from the perspective of a California attorney and the intended consumers are California producers and production companies. Nevertheless, most of the concepts are international in scope. No matter where the motion picture is being produced there will be legal issues. Most importantly, the completed motion picture must conform to international business standards in order for it to be eligible for international distribution.

The specifics of this discussion about American and California securities laws may not affect a production that is not raising money in the United States, but the securities laws of whatever nation in which the company is raising money must be adhered to. The employment laws discussed herein are also specific to US and California law. Although the employment laws will vary from country to country and from state to state within the United States, the producers must comply with the employment laws of those jurisdictions in which they employ crew members or talent. The chapters that discuss clearance issues and music aspects of the film are certainly broad enough in scope to apply to all films regardless of the nation of origin of the motion picture or the nation in which the producers seek international distribution. The discussion of fictional characters/ real people chapter addresses the specific American and Californian legal standards that apply to this subject, but the issues are universal.

The purpose of this book is to educate producers about the legal issues that will arise during the production of a motion picture. The most important thing on which the producer must focus is obtaining distribution for the finished motion picture. Distribution is the ultimate target for which the producer is working when producing a film; the producer can not let legal technicalities interfere with distribution of the completed motion picture and the opportunity to exploit the finished motion picture and earn revenue from it. Similarly, as with the operation of any business, the producers must be conscious of minimizing their exposure to civil liability to private parties or government bodies that could result from their conduct in the production of the motion picture.

## INTRODUCTION

### An Overview of the Legal Aspects of Motion Picture & TV Production

This brochure is intended as an overview to introduce and familiarize the independent film producer with some basic issues, both legal and practical, that they will confront when starting a motion picture production company and when producing a motion picture. The full discussion of the motion picture production is capped with a discussion of how the television world works. The select articles and outlines that confront various legal issues are designed only as an introduction and are not intended to take the place of customized legal advice that can only be properly provided by a qualified attorney who is familiar with the facts of your situation.

Every motion picture production or television project develops with its own dynamic based on the content, the genre, the quality of the script, the talent involved, the projected budget, and the people promoting it. The energy that is amassed from the accumulation of these elements will determine whether the film gets shut down during production or whether it ends up being an Academy Award winner.

The financing stage of the film always seems to be the area in which aspiring producers take the most interest. The financing phase is the most nebulous and mysterious phase of producing. These materials discuss the nuts and bolts of the various methods of financing a motion picture.

The typical film production (even a relatively small independent film production) sprouts from the initiative of one or two individuals and overnight grows into a multimillion dollar company with scores of employees. The producer is now a “CEO” with all of the attendant liabilities and responsibilities. The producer’s responsibility in the legal aspects of the production are three-fold: First, the producer must make sure that the production company is in compliance with all applicable laws (whether local, state, federal, or international). Second, the producer must navigate the legal waters to minimize the production company’s risk and avoid all possible liability that could arise from the production company’s activities, i.e. the production of the film. Finally, after having satisfied the governmental authorities and having dodged any bullets of liability, then the producer must make sure that he has all of the *legal delivery requirements* that any distributor will demand before accepting the film for distribution.

The areas of law affecting a motion picture production can generally be lumped into the following basic categories: intellectual property, employment law, contracts, and often securities and lending laws. There is a wide body of both federal and state employment laws that govern agreements between employers and employees about the employees’ conditions of employment. In addition, various

collective bargaining agreements (such as the Screen Actors Guild, the Writers Guild of America, and the Directors Guild of America) dictate what is and is not permissible by employer producers. Employment laws are a critical aspect of a motion picture production company since so many employer-employee relationships are created in the production of a motion picture.

Just as there are specialized employment contracts between the production company and its cast and crew, there are a variety of other business contracts, such as those with vendors, locations, unions, and distributors. Each of these various types of contracts is laced with terms of art and peculiarities.

Documenting the rights of the film's investors will ensure that the investors fully understand the terms of their investment. Whenever the production company is raising funds from passive equity investors who invest money in the film with the hope of a financial return (as opposed to bank loan financing, for example) then the production company has to be sure to comply with federal and state securities laws. These laws dictate how those funds are raised and usually require that certain filings be made with state and federal agencies.

Films that utilize the concept of "pre-sales" to fund the picture obtain their money from bank loan financing that accepts the "pre-sale" documents and the yet-to-be made negative as collateral. The legal documents required for completing even a simple bank loan for a film can be as extensive and complex as all of the other contracts for the film combined.

When a film is completed, it is the producer's objective to sell or license the film to a distributor. But what is the producer actually selling? The most valuable asset that the producer is selling is the *bundle of rights* that make up the film. These rights are intellectual property rights and consist of the rights that the producer has to exploit the screenplay, the rights to use the names and likenesses of the actors, the rights to the music contained in the film, life story rights (if any), the rights to that unique collection of images and sound that make up the completed film, etc. Creating and recording these rights from the commencement of production will greatly enhance and expedite the producer's ability to deliver its finished film to a distributor.

Our objective of these materials is to educate the reader to know when to ask questions. It is important for the reader to know what they don't know. One should acquaint him or herself with laws that may affect a production in order to spot issues that might require a more in-depth legal analysis.

PIERCE-GORMAN hopes that this booklet assists you in the start of that education process.

## CHAPTER 1

### A Primer in Financing the Feature Motion Picture

#### *Introduction*

The worldwide hit motion picture *Crouching Tiger, Hidden Dragon* obtained its funding from numerous sources all over the world including studios in Hollywood, a bank in France, and distributors in Asia and elsewhere. Companies were formed in Hong Kong, Taiwan, China, and the U.S. and British Virgin Islands to funnel and collect the funds and channel them appropriately to produce the film. The tale of how these various funds were compiled for a “death at the box office” Mandarin-language period piece is harrowing. At various times funds came and went, but in the end the producers were able to pull it all together in a complex arrangement of international deals that closed simultaneously and added up to the \$15M budget required to produce the film. The co-producer and co-writer of this multiple Academy Award winning film, James Schamus, explained the skills and expertise necessary to construct such an intricate international co-production financing scheme this way: “using a telephone and begging for money - that’s what producing essentially is.”

#### *Studio Funding*

Most producers wish that a studio would just step in and finance their film. In fact, the conventional wisdom around Hollywood today is that the major studios are nothing more than financing institutions and distribution companies that are devoid of the spirit of their heyday. Most “studio” films are somehow produced outside of the studio system and very often a studio will not finance the entire budget, but may instead co-finance it with another studio or with other financing sources. Many producers try to avoid the studio system in order to retain more creative control of their product. Screenwriters very often have their screenplays optioned by studios only to never have them produced. Producers without A-list clout who bring projects to the studios, even after they get the project “set up” with a studio, will often be marginalized as bigger names get attached to the project. It is not unusual for the original producer who optioned the screenplay and brought it to the studio in the end to be relegated to an associate producer credit with little practical or creative influence on the producing process. In spite of these drawbacks that many independent producers explain as the reason that they do not seek to do studio deals, the one benefit is that those movies that are made by the major studios are the ones that more often make it to the big screen and experience a wide high-profile international theatrical release.

### *Distributor Funding*

Although the studios are distributors, what we are talking about here is the international distributors and the “independent” distributors like the type that are members of the American Film Marketing Association. These distributors will sometimes invest cash into a film in exchange for certain distribution rights as well as controls over the production of the film. The producer then will enter into a deal with the distributor that sets out the terms by which the distributor will invest money into the picture and what the distributor will get in return.

### *Passive Equity Money*

Passive equity money refers to investment money that is given to the film with no other expectation than a return on the investment. That is, the investor does not expect or demand distribution rights, creative controls, or other such prerequisites to the cash investment. Whenever passive equity investors contribute money to the production the producers must be aware of the necessity to comply with applicable securities laws. A more thorough discussion of the securities laws follows in a later chapter.

### *Bank Loan*

It is rare for a bank to loan money for a film without some sort of pre-sales or distribution agreements in place. On the rarest of occasions a producer has been known to put his house up for a second mortgage loan to obtain the financing needed to produce all or a part of the production of the picture. Mortgaging the house to finance the film is highly unusual and not recommended.

Let us say that a producer has a script with some “name” actors attached and maybe a director or some other elements. The producer goes to a sales agent with this package and the sales agent says “hey, I like the cast, the genre, and the script, so I will take it to some distributors and make some deals.” The sales agent goes to the distributors where he makes the following deal: the distributors enter into an agreement with the sales agent guaranteeing that the distributor will pay a certain amount of money to purchase the distribution rights when the finished film is delivered. The distributors are making their financial commitment based on the cast, the genre, and the script. However, the distributor does not pay anything until the producer and the sales agent deliver the finished film to the distributor. Thus, even though the producer and the sales agent now have a collection of these deals with distributors (called “pre-sale contracts”), they still don’t have the cash to finance the production of the picture. Therefore, the producer and the sales agent take the “pre-sales” and present them to a bank. If the bank considers these distributors to be credit worthy (sometimes requiring a letter of credit first) then the bank will offer a loan using those pre-sale contracts as collateral for the loan. After the film is produced and delivered to the distributors, the distributors will pay the pre-agreed amount based

on the pre-sales contract. Because the bank loaned the money to the production with that future revenue as the collateral, that money from the distributors will be paid directly to the bank to re-pay the loan. The pre-sale scenario is more fully discussed in the following chapter.

#### *In-Kind Contributions (i.e. contribution or investment of services)*

Sometimes vendors or service providers will provide their services for a reduced fee in order to accommodate the producer's budget constraints. However, it is not unusual for the vendor (for example, a visual effects design company) to affix a value to the services being provided and consider that amount an equity investment in the film. If a visual effects company decides to invest \$500,000 worth of visual effects services in the film for an "equity stake," this means that they want to be considered an investor in the film as if they had put in cash money.

#### *Government Grants & Incentives*

A number of governments have various programs in place that are designed to encourage the film industry in their country. The purpose is often multiple. Many countries try to bring productions into their country in order to achieve the economic stimulation that occurs when a production is in the country spending money and employing the locals. The countries also often have programs that reward films that involve a minimum number of their own nationals. Finally, the government may have a cultural agenda to pursue, such as the promotion of films that are made in the local language as opposed to English.

Government incentives come in the form of outright cash grants, tax incentives, tax credits, tax rebates, loaning of government property and personnel to the production, and other attractions that save the producers money by shooting in a certain country. For example, Canada has a favorable tax scheme for product produced in Canada with Canadian talent. Ireland has a tax scheme (called "481"), can provide government funds, and often loans government personnel (i.e. the military) to productions that shoot there.

#### *Co-Productions*

The term "co-production" has a very broad connotation. At its most literal, it refers to a collaborative effort between two or more producers to carry out the development, principal photography, and post-production of the motion picture. This can happen internationally. *Crouching Tiger, Hidden Dragon* is the classic example of an international co-production because producers were based and located in various countries (Hong Kong, US, Taiwan and China) and companies were created in several countries (British Virgin Islands, US, Hong Kong and Taiwan) and money came from yet other

territories (Asia, US, Europe).

Many nations have co-production treaties with one another that allow for mutual benefits between the nationals of different countries that wish to collaborate with one another.

*Bringing It All Together*

Any producer who is raising money for a motion picture will do extensive research (i.e. make phone calls and beg for money) to find every possible source of funds or method of getting goods and services for free in order to reduce the budget to help get the film made. Very often the producer will rely on many if not all of the sources described above. Let's take an example of a feature motion picture with budget of \$5M and see where the money might come from.

<u>Source of funding</u>	<u>Amount of funding</u>	<u>Amt. of budget still needed</u>
Equity investor	\$100,000	\$4.9M
Distributor cash	\$500,000	\$4.4M
Pre-Sale Loan	\$2.5M	\$1.9M
In Kind Investment		
(post-production services)	\$500,000	\$1.4M
Government grant	\$150,000	\$1.25M
Other government initiative	\$500,000	\$750,000
Gap loan	\$750,000	\$0
	<b>\$5M</b>	

*Conclusion*

A producer who is promoting a film from the ground up and must seek out and obtain funding to get the film produced faces a daunting task. There are no easy answers about how or where to obtain the necessary funds. No two films out there seem to have been financed the same way. As Paul Schreiber, the producer of the original 1956 Americanized version of *Godzilla*, used to say to me: "We do what we do and we just do it!"

## CHAPTER 2

### Bank Loans Via Pre-Sales

#### *The Film Loan*

Film loans are most analogous to construction loans. Unlike traditional loans for the purchase of a home or automobile, there is no existing collateral on which a bank can foreclose at the time the money is borrowed. Rather, with a construction loan there is only the hope and belief that the money that the bank lends will be sufficient to build a solid and attractive building that can generate rental income after it is built in order to pay back the loan. Similarly, in a film loan there is only the hope and belief that the money that the bank lends will be sufficient to produce a solid and attractive motion picture that can generate box office revenues after it is made to pay back the loan. In both the case of a construction loan and film loan the bank is relying on the reputation, honor, and skill of the craftsmen responsible for bringing the project to life so that a revenue stream can be produced. To permit the bank to have the level of trust and confidence necessary before lending the money to make the project, two things must be in place to serve as a surrogate for the absence of traditional tangible credit. These two things are: (1) a Completion Bond; and (2) Territorial Pre-sales of the yet-to-be-made film.

#### *The Completion Bond Requirement*

The Completion Bond is a contractual commitment similar in form to an insurance policy (but not actually insurance) that guarantees that a film will be completed and delivered pursuant to specific requirements, that is on schedule, within the budget, and without substantial deviations from the approved script. The completion bond provides protection against over-budget costs and is supplied by a third party guarantor (called a “completion bond company”). It is a surety instrument that authorizes the guarantor to take control over the production if the terms are not met. Completion bonds are covered in detail in the following chapter.

#### *Pre-Sales*

Pre-sales are agreements obtained on a territorial basis from distributors in various countries throughout the world wherein each distributor for each respective territory enters into a pre-sale contract with a producer promising that the distributor will pay a fixed fee set forth in the pre-sale contract as soon as the film is produced and delivered as promised to the distributor in exchange for the exclusive right to exhibit for profit the film in the distributor’s territory for a term of years. The assorted pre-sale contracts (which are similar to “letters of credit” or “I.O.U.’s due upon delivery of the film”) are then brought to the bank and presented as collateral for the film loan. Since the pre-sale contracts are only

promises to pay and not legal tender themselves, the face value of the pre-sale contract may be discounted by the bank to account for the risk of non-payment upon delivery.

### *The Sales Agent*

The pre-sales are accomplished by a sales agent. These sales agents are often specialists at licensing the distribution rights to various territories and assessing the legitimacy of the distributor in each territory and the strength of their commitment to pay as promised. The bank, in turn, assesses the ability of the sales agent to collect from the territorial distributor and further helps the sales agent determine the legitimacy of each buyer. If a sales agent becomes particularly astute at pricing various territories and predicting the marketplace and the distributors in each territory, the bank may even provide a portion of the financing based on the sales agent's forecast alone; this is known as "gap financing." In those rare circumstances where gap financing occurs, the producer and the sales agent are gambling that they will receive more money from a specific territory if they wait to sell the film after it is completed (in the hope of having a bidding war occur over a "hot property") rather than selling the rights before the film is actually made when such a commitment by a buyer is most risky.

### *Survey of Territories*

According to a 1999 AFMA Survey, foreign sales among the territories are split as follows:

Germany	=	17%
Spain	=	11%
Italy	=	11%
Japan	=	10%
All Other Asian Territories	=	10%
Other Europe Territories	=	9%
France	=	8%
Latin America	=	7%
UK	=	6%
Scandinavia	=	3%
Remaining Territories	=	8%
<b>Total</b>	=	<b>100%</b>

For a more recent detailed breakdown of foreign sales, view the complete 2000 AFMA Survey attached as Exhibit A hereto.

*Conclusion*

Ideally, enough territories will be pre-sold to cover the entire budget of the film (plus an excess dollar amount needed to compensate for “the discount on the paper” recognized by the bank). More often than not, films are financed by a combination of foreign pre-sales, plus some equity money, plus some foreign tax credits and/or government subsidies, and possibly other means.

## CHAPTER 3

### The Completion Bond

#### *Introduction*

Completion guarantees, or “Bonds”, as they are commonly known, were developed for the purpose of giving a guarantee to motion picture financiers that the film in which they invested would be completed. As a practical matter, producers have no interest in obtaining a completion bond unless required to do so by a financier, distributor, or some other interested party. Before the completion bond, banks were wary of lending to producers, as the banks had learned the hard way that unfinished films lacked any value. Since producers were unable to show how potential budget overages could be met, if at all, making banks more reluctant to loan money. As a last resort, producers would mortgage all they owned against potential budget overages in order to make a project more attractive to lenders. Although this method was a very risky way of completing a motion picture, this was practically the only remedy for the independent filmmaker to get the film financed. Completion bond companies provide financiers with a service that gives them the assurance that the film will be completed on schedule, and that the budget overages will no longer be the financier’s problem.

#### *The Completion Bond Process*

When the producer makes an inquiry into obtaining the completion bond from a completion bond company, the producer should be prepared for a “Production Evaluation.” In the Production Evaluation, the completion bond company will seek to gain a comprehensive understanding of the motion picture project. The completion bond company will require the producer to disclose all information relevant to the making of the picture. (See Bond Company Requirements contained in Exhibit B, hereto.) Three essential documents required to be given for review by all completion companies are: 1) the script; 2) the shooting schedule; and 3) the budget. Most completion bond companies prefer that these three documents have prior approval from the financiers and distributors of the picture, if they exist, prior to the completion bond company’s evaluation. These three documents will be thoroughly examined by the completion bond company, so the producer should pay attention to details when drafting these documents.

Sometimes the completion bond company will reject the request after reviewing these documents or request that the producer make revisions. If, however, the completion bond company approves the documents, they will move to the next stage of the Production Evaluation. In the next stage, the completion bond company will meet with the production team (e.g. director, producer, production supervisor, accountant, and/or art director, etc.). The completion bond company will interview these

people to assess their particular views and explanations about the film project. On the basis of these views and explanations, together with the script, shooting schedule, and budget, the completion bond company will determine whether or not to grant the completion bond.

Once the completion bond company performs the Production Evaluation, and is satisfied with the requisite documents, an evaluation will be performed by the completion bond company's legal department. If the completion bond is granted, then the completion bond company's legal department will draft what is known as a "letter of intent." The letter of intent is issued to the producer, in order to confirm the Guarantee of Completion based on certain conditions required by the completion bond company. These conditions are generally standard. Some examples are: satisfaction that finance equal to the approved budget of the film is available; that all personnel, artistic or technical, are available for the filming up to the completion of the project; and that the film is properly insured and has obtained the requisite studio and location agreements.

The letter of intent will also outline other costs, perhaps not contemplated by the producer in the original budget, such as legal, music and publicity costs. The letter of intent will specify the fee being charged by the completion bond company for providing the completion bond. Such fee is usually paid to the completion bond company upon completion of the legal documentation or no later than the first day of principle photography. Finally, the completion bond company will want to confirm that the proper rights have been obtained by the producer to the story, the screenplay, and/or the music that will be heard in the film - this is called the "chain of title."

### *Conclusion*

The completion bond is sometimes a necessary aspect of the financing of the motion picture. Obtaining a completion bond imposes a high standard of precision and performance on the producer who will be responsible for answering to the completion bond company if the production goes over budget. The completion bond company will want to form a very close relationship with the producer, as the company has invested money into the project and wants to make sure that the project moves according to budget and schedule. The producer should be aware of this close relationship, and choose a company that will work well with the entire production team. Many producers shy away from situations where a completion bond is required because of the scrutiny that the bond company imposes on production. However, that very scrutiny into the budget, script, releases, and all other aspects of the production, help ensure that the production foundation is solid.

## CHAPTER 4

### Money Raising: What are “Securities Laws” and Why Do I Need Them for My Film?

Whenever a producer is raising money for a film through private equity investors, then it is more likely than not that he or she is in a position requiring compliance with federal and state securities laws.

*What are “securities laws”?*

A “security” is an investment contract whereby a profit is intended to be earned from the use of the investment funds. Securities are, for example, stocks, bonds, shares in a corporation, or membership interests in a limited liability company. *Securities laws* are those regulations, statutes, and cases that govern the offer and sale of investments. Generally, unless there is an exemption from registration, securities offered or sold in the United States must be *registered* with the SEC and the appropriate state authorities before an offer or sale of a security can take place.

The foundation of U.S. securities laws is the Securities Act of 1933 (aka *the truth in securities law*), which has two basic objectives: (1) to require that investors receive financial and other significant information concerning securities being offered for public sale; and (2) to prohibit deceit, misrepresentations, and other fraud in the sale of securities. A primary means of accomplishing these goals is the disclosure of important financial information through the registration of securities. Again, securities offered for sale and sold in the U.S. must be registered unless there is an exemption to registration.

*Is there an exemption from registration for the Independent Film Producer?*

Most independent film productions are on a scale where, as a practical matter, an exemption to registration must be identified in order for the company to solicit investors for the film. The burdens associated with registration would otherwise make such a requirement prohibitive to obtaining investment financing.

There are numerous statutory and regulatory exemptions from federal registration. Which exemption applies will depend on a variety of circumstances including how much money is sought to be raised. All of the various exemptions place constraints on the number and type of investors that are allowed.

In addition to the federal registration requirements are the state registration requirements, again, in the absence of applicable exemptions. Most states have specific registration exemptions and many states

subscribe to the Uniform Limited Offering Exemption. There are often limitations on the number of investors (usually no more than 35 investors in any one state and very often the threshold is even lower). More often than not there is a prohibition of general solicitation and advertising. Usually the state exemptions roughly correspond with the federal exemption for which the company may be eligible. How the state laws interact with federal law will depend on which federal exemption applies.

*What do I have to do to comply?*

A typical film production that seeks to raise thousands or several million dollars from private investors must “jump through some hoops” in order to ensure the compliance with the federal and state securities laws. First, the company has to identify which federal and state exemptions are applicable. Then the company must appropriately structure itself and the marketing of its securities.

A typical motion picture production company that is set-up for the purpose of receiving investment funds is usually created as a limited liability company (“LLC”). The limited liability company will have an operating agreement that defines how the company is run, who runs it, how money will be spent, etc. The limited liability company will also issue *subscription documents* to the investors that the investors will complete and return to the company. Additional *disclosure documents* will provide details about the company’s business plan, officers, activities, financial history and structure, revenue distribution, and, in particular, about the film that the company intends to produce. All of these documents make it explicitly clear to the investors that there is no guarantee of a return and that the investment in a motion picture is a high risk investment.

Finally, although there may not be a *registration* requirement when an exemption to registration applies, there are *notice filing* requirements. The company must file information with the Securities and Exchange Commission in Washington, D.C. At the state level these filings are called *blue sky filings*. For the most part, both the federal and state filings are usually formalities that are submitted after investment money starts coming in. At the state level there is often a nominal filing fee.

*What if I just ignore the securities laws?*

As with any law, there are penalties for non-compliance. However, when it comes to securities laws, the company has an incentive for complying with these laws in addition to avoiding government sanction. The producer must keep in mind that by adhering to the regulations they are closing any door that an investor might have to seeking to recover their investment funds before a financial return is realized by the company. I always tell the story of the investor who showed up on the set on the first day of principal photography wanting his \$10,000 back from the producer so that he could put a down-payment on a new house. The producer had no documentation, no investment contract, no

filings with the SEC or the state authorities, and, thus, had nothing to support his argument that the \$10,000 was an investment and would only be returned to the investor if and when the film had earned adequate revenue. He ended up having to beg and borrow to come up with enough money to pay off this investor (plus the return that the investor was expecting) in order to avoid having a lawsuit on his hands or the SEC or the California Department of Corporations banging on his door. Proper documentation and filings could have prevented this situation and would not have made it so easy for an investor to strong-arm the producer into an inappropriate return on his money.

*Closing thoughts.*

The securities laws that govern the money-raising activities of any corporation can be complicated and require that the company be guided by a professional with specialized knowledge and experience. This discussion is designed as an overview to make the producer aware of the issues that arise when raising investment funds so that he or she knows to hire an attorney before soliciting investors.

## CHAPTER 5

### An Overview of Basic Employment Laws Affecting Production Companies in California<sup>1</sup>

1. Wage & Hour Laws (General Overview): California Industrial Wage Order 12-2000 governs Wages, Hours & Working Conditions in the Motion Picture Industry. All employers in the motion picture industry are required to post a copy of this Wage Order in a conspicuous place where employees can view it. All employers should familiarize themselves with these obligations owed to various categories of production employees and consult with counsel about these obligations as they can be quite complex.

2. Employees v. Independent Contractors: There is no one concrete definition for an independent contractor. A variety of tests for identifying the existence of a *bona fide* “independent contractor relationship” have been established by courts, the IRS, unemployment departments, the Department of Labor, and other government agencies. These different tests often place an employer in peril as one agency may find a *bona fide* independent contractor relationship exists while another unrelated agency may deem the independent contractor relationship a sham thereby resulting in liability of the employer.

While employers must pay payroll tax (both federal and state withholding), unemployment tax, workers’ compensation premiums, and comply with wage-hour laws for employees, none of these obligations exist when an individual is an independent contractor. The state and federal government impose substantial penalties for mis-classifying individuals as “independent contractors.” Not surprisingly, the government has a strong tendency to deny “independent contractor” status. The IRS follows a 20 point test for determining whether an individual is or is not a *bona fide* independent contractor, although the IRS does not state how many of the 20 points are needed to allow the individual to be a *bona fide* independent contractor. Thus, there is a certain element of subjectivity associated with the test. Generally, the question is whether the individual is providing a service that a separate company would provide and whether the individual is acting like a separate company rather than as an employee. Independent contractors work at an “arms length” basis with the company that hires it and the contractor must exercise a level of discretion and independent intellect in the manner that

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<sup>1</sup> The following information represents only a brief summary of certain employment laws and does not identify all laws confronting employers. This information is for the purpose of seminar discussion and should not be taken as legal advice. The subject of labor & employment law issues can be quite complex and all such questions involving you or your company should be presented to legal counsel before proceeding with any labor & employment related transactions.

he or she performs the contracted assignment. Generally, all of the various tests and definitions ask: Does the individual have the right to control both what will be done and how it will be done?

Substantial penalties exist when employees are mis-classified as independent contractors. The determinations are very fact specific and such decisions should not be made without first consulting an attorney well-versed in the subject.

3. Volunteers & Interns: An individual who qualifies as a volunteer is not an “employee” and therefore not subject to wage-hour laws. A *bona fide* “volunteer” is one who intends to work without contemplation of any pay for his or her services for (1) public service, (2) religious, or (3) humanitarian objectives, and the individual must not be a regular employee of the religious, charitable, or similar non-profit corporation which receives the services. The decision to work without contemplation of pay must be the clear voluntary choice of the individual and coercion must not be present. Alamo Foundation v. Secretary of Labor (U.S. Supreme Court, 1985) 85 L.Ed.2d 278; see also, California DLSE<sup>2</sup> Operations and Procedures Manual sections 224.10-11

No matter how lofty the subject or theme of a motion picture, rarely are for-profit production companies engaged in public service, religious, or humanitarian objects. It is almost impossible for a private for-profit motion picture production company to lawfully use volunteers who are exempt from the wage & hour laws. Similarly, an employer in financial difficulties who asks employees to work overtime without pay will be liable for overtime even if the employee is willing to lend such a helping hand. Such employees will be deemed to have been “suffered or permitted” (allowed either explicitly or tacitly) to work; therefore, the overtime is “hours worked” for which compensation is due. California IWC Wage-Order 12-80 “Governing Motion Picture Industry” section 2(H).

A *bona fide* “Intern” exempt from wage-hour laws is an individual who is working in an academically oriented program designed primarily for the benefit of the student. Dept. Of Labor Field Operations Handbook section 10(b)(21). If students are being used to perform work that would otherwise be performed by a paid employee, it may be determined that the work is not being performed primarily for the student’s benefit and, thus, the student may be deemed an employee. However, students that engage in film production work on student films will likely be viewed as merely participating in extracurricular activities as part of their overall education program. U.S. Dept. Of Labor Field Operations Handbook section 10(b)(03)(e).

Be aware that regardless of what type of “arrangement” you think you have with your crew, if anyone of them changes their mind about the relationship and attempts to bring a claim for back wages, it is

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<sup>2</sup> California Industrial Wage Commission, Department of Labor Standards Enforcement

unlikely that the production company will succeed in defending against such a claim.

Arrangements where individuals who work on the film work in exchange for an interest in the film as a “limited partner” or “corporate shareholder” will generally nonetheless be considered an “employee” entitled to minimum wage and overtime. That is, unless the individual is a *bona fide* “partner” with all rights and privileges associated with partnership or is within the controlling/management group of the corporation. U.S. DOL Field Operations Handbook section 10(c)(01)-(03).

4. “Loan Out” Corporations: Loan Out Corporations are generally established as S-corporations owned by an individual artist that provide the services of the artist to third party production companies. This set-up is designed to provide a framework for withstanding a challenge to the artist’s status as a *bona fide* independent contractor and to take advantage of tax benefits, such as writing-off items as business expenses of the corporation and the establishment of a pension fund.

In order to preserve the integrity of the Loan Out Corporation, all production contracts should be entered into between the loan out corporation and the production company, and the individual artist and his or her loan out should execute a “certificate of employment” and comply with the federally-required employment eligibility requirements mandated by Form I-9 (see discussion of I-9 Form’s in section 8 below). However, in order to protect the production company, the producer should also insist that the individual artist sign an “inducement acknowledgment” agreement for the benefit of the producer. This type of document provides privity between the production company and the artist, and will protect the producer by preventing the talent from “quitting” his own company and in effect breaching the employment contract with the production company without negative consequence. The inducement acknowledgment permits the producer to enjoin the artists from working for others in the event of such an occurrence.

5. Minors: A production company must petition a California court for ratification of a contract with a minor, or else the minor can disavow his or her contract at any time (even after the minor reaches majority). The minor need not return any money paid to him or her upon disavowal and the entire contract will be voided including, but not limited to, clauses relating to clearance releases and no injunction clauses. In addition, the California Labor Code sets forth additional rules governing working conditions and maximum work hours of minors. The Labor Code also requires production companies to obtain child labor permits and requires mandatory Studio Teachers on film and television productions. The Studio Teacher performs not only educational services, but also acts as a guardian to protect the child from any situation that the Studio Teacher determines may place the child at risk. The DLSE regulates and enforces child labor laws on film and television productions.

The relevant statutes concerning employment of minors include:

- Family Code section 6710 (formerly Civil Code section 35): “Except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards; or, in case of the minor’s death within that period, by the minor’s heirs or personal representatives.”
- Family Code section 6750-6753 “Contracts in Art, Entertainment & Professional Sports”: These sections set forth the framework for obtaining court approval of contract with a minor via earnings set aside and preservation in court monitored trust. Newly revised code sections effective 1/1/00.
- Title 8 CAC section 11750, *et seq* defines the scope of the regulations governing child labor on production sets.
- Title 8 CAC section 11753 sets forth the application procedures and requirements for work permits.
- Labor Code section 1308.7: “Minors-- Employment In Entertainment Industry."
  - (a) No minor shall be employed in the entertainment industry more than eight hours in one day of 24 hours, or more than 48 hours in one week, or before 5 a.m., or after 10 p.m. on any day preceding a schoolday. However, a minor may work the hours authorized by this section during any evening preceding a non-schoolday until 12:30 a.m. of the non-schoolday.
  - . . .
  - (c) Any person . . . who *directly or indirectly* violates or causes or suffers the violation of this section, is guilty of a misdemeanor punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000), or imprisonment in the county jail for not more than 60 days or both.
- Civil Code sections 60 *et seq.* sets forth the process for Emancipation of Minors.

6. OSHA Safety Laws: The federal Occupational Safety & Health Act (“OSHA”) requires employers with 10 or more employees to maintain OSHA records consisting of a daily log of occupational injuries and illnesses and supplementary information on the incident. See 29 C.F.R. 1904, *et seq.* Information must be posted in the log within 6 working days after the employer receives notice of an incident. There are a multitude of other record-keeping requirements under OSHA that a production company should discuss with production counsel prior to hiring employees. Remember, filmmaking is a dangerous activity. Employers must report to the Area Director of OSHA, any work-related accident requiring five or more employees to go to the hospital within 48 hours. Employer must also report to the Area Director of OSHA, any work-related death within 48 hours.

Twenty-one states have their own state-level OSHA-agencies that may impose requirements above and beyond that established by federal OSHA. California is one such state. Cal-OSHA requires production companies to have an Illness & Injury Prevention Program and to have regular safety meetings of 10 minutes in duration for crew members. Significant fines, in addition to criminal liability, can be imposed if a serious accident occurs on the set and the production company is found to not have a written Illness & Injury Prevention Program. The producer should speak with an attorney that understands both OSHA requirements and the unique aspects of motion picture production before production begins. Qualified production counsel can draft an appropriate Illness & Injury Prevention Program for your company.

7. Unemployment Compensation & Workers' Compensation: Unemployment insurance must be paid to the state by all employers. Producers should understand their obligations under their state's unemployment laws before hiring employees. Only "employees" are entitled to unemployment compensation, not "independent contractors." Problems often arise for producers after production wraps and an individual who was treated as an independent contractor files for unemployment benefits. The state will not have that individual listed in their records as an employee of the production company. If the state determines that the individual was not a *bona fide* independent contractor, a full audit by the unemployment department can be triggered, subjecting the producer to substantial penalties.

Employers are also required to provide workers compensation insurance for all employees. The workers' compensation laws are strict liability laws. Strict liability means that the sole question for determining liability is whether the injury occurred "within the course and scope of the employee's employment." It does not matter whether the company was negligent or acted with great care; the workers' compensation laws are only concerned with whether or not the employee was injured while working. The upside of this arrangement is that in exchange for the employer being strictly liable, the employee cannot sue the employer in civil court and can only seek remedies under the workers' compensation program.

Conversely, a company is generally not liable for the injuries of an independent contractor unless the company was negligent and that negligence caused the injury to the independent contractor. Just as the payroll tax laws and unemployment benefits are inapplicable to independent contractors, workers' compensation laws are also inapplicable to independent contractors. However, insurance carriers now offer special additional workers' compensation coverage for the purposes of covering independent contractors, provided the independent contractor is willing to agree to be bound by that arrangement.

States also impose significant penalties for failure to have workers' compensation insurance for your employees. Moreover, if an employee is injured on the job and there is no workers' compensation insurance, your company and any officer personally responsible can be subject to extreme liability.

Remember, movie-making can be a dangerous activity where people routinely get injured (and sometimes killed) on the set.

8. Immigration: The Immigration Reform & Control Act (“IRCA”) requires all employees to complete an “I-9” employment eligibility form. See 8 C.F.R. section 274(a)(2)(b)(iii). I-9 forms must be completed before a new-hire commences work. An employer has 3 days to verify the information and sign verification portion of the I-9 form. The employer is required to maintain the I-9 form for the duration of the employee’s employment plus 1 full year after the employee’s termination. However, in the event the employee worked two years or less for the company, the employer must maintain the document for at least 3 years from the date the document was signed.

Motion picture performers who are citizens of other countries must obtain a Form “O-1” visa to lawfully work on motion pictures in the United States. The O-1 visa is specifically designed for the entertainment industry. The petition process for this visa is performed by the production company and can often take a substantial period of time. A skilled immigration law attorney familiar with the O-1 process should be used to help navigate the maze of red tape associated with the process. Plan accordingly to permit yourself time to obtain this visa. If the United States government learns of a performer working on a film illegally (something easily demonstrated by the performer’s work being captured on film and presented in a theater near you), the performer can be prohibited from ever again working in the United States. The production company will also face penalties.

9. Discrimination and Harassment Laws: Production companies, like all companies, are subject to federal and state discrimination and harassment laws. California law further requires all employers to distribute a written no harassment policy to all employees and the statute sets forth specific information that must be included in that policy. CA Government Code §12840.

10. Unions: All of the Guilds (the Directors Guild of America, the Writers Guild of America, the Screen Actors Guild, IATSE (electricians & grips), and Teamsters) require that a producer become a signatory to their respective collective bargaining agreement prior to using the services of a guild member. The process of becoming a signatory can take several weeks, as there is a significant amount of paperwork that must be completed, submitted to the guild, and then reviewed and accepted by the guild. In addition, after becoming a signatory, your company will be bound by the rules and regulations of each guild’s Basic Agreement. Some guilds, such as SAG, will require the independent producer to post a security bond to ensure producer compliance with union rules. In the event of a grievance, penalties can be automatically deducted from the security bond on deposit with SAG.

Only production companies that choose to be signatories to a union collective bargaining agreement are subject to union rules. A production company is able to choose whether to sign with one union, all

unions, or selected unions. Union members are prohibited from working for production companies that do not sign with a union; it is the individual union member who works for a non-union production company that is penalized by the union (not the production company itself). “Financial core” membership in a union permits an individual to work for both union and non-union productions without penalty while still permitting the “Financial Core” member to enjoy most rights and privileges of union membership (such as participation in union health and pension plans). See Communications Workers of America v. Beck 487 U.S. 735 (1988); NLRB v. General Motors 373 U.S. 743, 742-744.

**Union Telephone Numbers:**

Screen Actors Guild (SAG): (323) 954-1600

Writers’ Guild of America (WGA): (323) 951-4000

Directors’ Guild of America (DGA): (310) 289-2000

International Brotherhood of Teamsters: (202) 624-6800

International Alliance of Theatrical Stage Employees (IATSE aka IA): (213) 627-4745

## CHAPTER 6

### Clearance Procedures & Guidelines

Clearance for a motion picture production requires a thorough evaluation of the screenplay, the film footage, all contracts, set dressing, wardrobe, and more. The following list of clearance procedures should be followed prior to final cut or first exhibition of a motion picture. This list should not be considered exhaustive as it may not cover all situations which may arise since every production presents its own unique issues. Filmmakers and attorneys should always review the following points carefully with one another and work together to continually monitor the production at all stages to make certain that the motion picture contains no material which could give rise to a claim. There are three main reasons why the producer must be aware of clearance issues: avoidance of liability, eligibility for E&O insurance coverage, and assurance that the film will satisfy the distributors' legal delivery requirements (See Exhibit C).

1. Pre-Production Review For Possible Actionable Script Content: Prior to the start of production, the screenplay should be read for the purposes of identifying and eliminating material that is defamatory, violates rights of privacy and publicity, or is otherwise potentially actionable.
2. Obtain A Clearance Report: A Clearance Report of the final shooting script should be obtained by a professional clearance research company. These companies perform a variety of tasks, such as, researching all story character names and places against the commonality of the names, street addresses, and business names in the general population. This will help the producer avoid possible invasion of privacy and similar type claims from people whom the film may have unwittingly portrayed. The clearance report will also identify the proper contact from which to obtain product placement clearances for any products, copyrights, or trademarks that are referenced in the screenplay.
3. Document Origins Of "Original" Unpublished Works: If the screenplay is an unpublished original, the producer should inquire into and document the origins of the work, such as the stimulus for the creation of the basic idea, sequence of events, and characters.
4. Document & Distinguish Similar Works In Producers' Hands: The producer should determine if any similar screenplay written by a different screenwriter has ever been submitted to the production company. If so, document the wholly independent manner in which the later screenplay came to the production company. Document and evaluate the circumstances as to why the owner of the earlier submission would not claim theft or infringement.
5. Evaluate "Chain of Title" & Potential Encumbrances: The producer must document the origin of the

work and each transaction that transferred the rights in the work up to and including the transfer to the producer; this is called “the chain of title”. Did the screenwriter’s engagement qualify as a *bona fide* “work for hire”? If not, is there an effective option or transfer of rights? Identify any potential rights-holders (particularly those who may raise a claim from earlier expired options, but whose contributions to rewrites may extend beyond the expired option). Did anyone contribute anything to the content of the script from whom a release was not obtained? Obtain “quitclaims” from any individual that may have an encumbrance to a clean chain of title.

6. Require the Writer To Provide An “Annotation Guide”: An annotation guide identifies every character, place, and event and states whether the item is purely fictional, real, or a composite of real and fictitious items. This will pin down whether and for what additional releases may have to be obtained.

7. Document Sources For “True Life” Stories: If the motion picture depicts actual events, it should be determined whether the screenwriter’s sources are independent and primary sources (contemporaneous newspaper reports, court transcripts, public records, etc.) and not secondary sources (another author’s copyrighted work, autobiographies, copyrighted magazine articles, etc.). If secondary sources were relied on, then the producers will most likely have to obtain a release from those sources.

8. Obtain Releases From Living & Deceased Individuals Depicted As Characters In The Script: Whether the motion picture is factual or fictional, it should be certain that no names, faces, likenesses of any recognizable living persons or deceased persons or locations are used unless written releases have been obtained. The term “living persons” includes thinly disguised versions of living persons or individuals who are readily identifiable because of identity of other characters or because of the factual, historical, or geographic setting. Releases from all recognizable or identifiable deceased persons in the screenplay should be obtained from the personal representative or heirs of such person. Insurance companies issuing “Errors & Omissions” insurance will insist on such releases unless the production company can demonstrate, to the insurance company’s satisfaction, specific reasons in writing as to why such releases are unnecessary.

9. Obtain Releases From All Performers & Recognizable Extras: Releases from living persons should contain language which gives the production company not only the right to use the person’s image and name, but also the right to edit, delete material, juxtapose any part of the film with any other film, change the sequence of events, fictionalize persons or events, and to make any other changes in the film that the production company desires in its sole discretion. If the person is a minor, consent must be legally binding. In California, a minor’s contract of employment should be ratified by the court to ensure validity.

10. Obtain Releases From All Behind The Scenes Contributors: Written agreements must exist between the production company and all creators, writers, performers, and any other persons providing or owning material (including quotations from copyrighted works) or on-screen services. Likeness releases should be standard language in all contracts, even in the contracts for off-camera crew. You never know when a crew member may become an extra or captured in “behind the scenes” footage.
11. Obtain Location Releases: If distinctive locations, buildings, businesses, and/or personal real property are filmed, written releases should be secured. This is not necessary if non-distinctive background use is made of real property.
12. Obtain Prop & Product Clearance: Obtain releases for all props, set dressings, and wardrobe items bearing distinctive logos if such items are to be featured. Remember, it is often difficult to anticipate the prominence of a prop in a final cut, thus it is best to apply an abundance of caution in attempting to clear these items. Caution: Do not assume that items coming from prop houses or that have been used in other films have been properly cleared. Also, be especially cautious of major league sports apparel and other trademark names.
13. Obtain Releases and Clearance For All Artwork: Extreme caution is necessary when dealing with artwork. Abundance of caution demands that all artwork, even those items not featured or in focus be cleared. Do not rely on production designer’s representations without some form of documentation to support the representations. Find out who was the artist. Is the artist alive or dead? When did he or she die? When was the artwork first published? Most importantly, who holds the copyright? A qualified art director will be trained in how to avoid clearance problems and should be able to provide props and set dressing that are pre-cleared.
14. Be Extra Careful with Photos & Posters: A multitude of ownership issues arise in clearing photos and posters. Obtain releases from the photographer, any person in the photograph, and the copyright holder of the photograph or poster.
15. Obtain Music Licenses: If music is used, the production company must obtain all necessary synchronization and master use licences. The composer of the score must have entered into a composer agreement that releases the rights of the score to the production company.
16. Obtain and Verify Clearance For “Stock Footage” & “Film Clips”: If the production contains any film clips, the production company must obtain clearances for the second use which are to be obtained from the owner of the clip or those who have the right to grant such authorization who are supplying on-screen services or supplying material. Make sure that there is an indemnification clause binding the stock house or supplier of the clip. *Note: Special attention should be paid to music that is*

*contained in such clips, as rights holders (record companies or publishers) may assert that a new synchronization or master use license is required.*

17. Use All Encompassing Releases For All Technologies: If the motion picture is intended for video tape, discs, DVD, Internet or other new technology, rights to manufacture, distribute, and release the motion picture in such media should be obtained from all writers, directors, actors, musicians, composers, etc.

18. Obtain a Copyright Report: Obtain a copyright report. A copyright report is always required by the distributors and will verify that there are no problems with the chain of title. Check both domestic and foreign copyrights and renewal rights. The party acquiring a completed film should perform a similar review of copyright and renewals on any underlying property.

19. Obtain a Title Report: Obtain a title report prior to final title selection. The report should set forth prior uses of the same or similar titles, and if there is a conflict, the title should be changed. For an additional fee the title report company will provide a legal opinion to the production company about whether the title is clear. The distributors will require a title report.

20. Beware of Evolving Law Of “Right Of Publicity”: Aside from living persons, even dead persons (through their personal representatives or heirs) have a “right of publicity” especially where there is considerable fictionalization. Clearances should be obtained where necessary.

21. Check & Recheck Before Public Exhibition: Prior to any public exhibition of the motion picture, the production’s attorney should preview the film to assure that the above-listed clearance procedures have been followed.

22. Perform a Separate Analysis For Trailers & Commercial Tie-Ins: Make sure that all clearance licenses and releases extend to using the item or person in advertising and publicity.

*The following are examples of recent legal disputes over Clearance issues which demonstrate the volatile situations that may arise from this area.*

C 2002: The owners of the building at 2 Times Square filed a lawsuit in Manhattan federal court alleging that in the film *Spider-Man*, Columbia Pictures digitally replaced a Samsung advertisement on the side of their building with an advertisement for USA Today which appears three times in the film. *See Spider-Man Caught in Legal Web, available at <http://apnews1.iwon.com/article/20020411/D7IR0NN03.html> (April 11, 2002).*

- C 2001: USA Films paid an undisclosed sum to a private school in Ohio for the unauthorized use of the school's name in the motion picture *Traffic* and agreed not to use the school's name in any re-release of the film. No lawsuit was filed. See Makers of Hit Movie 'Traffic' Pay Out to School, available at <http://news.findlaw.com/entertainment/s/20010427/filmtraffidc.html> (May 2, 2001).
- C 2000: The Warner Brothers film *Batman Forever* depicted sculptural designs which were part of a building in downtown Los Angeles utilized as the fictional Gotham Bank. The sculptor sued Warner Brothers, however, the Court held the artwork was part of the architecture and thus copyright protection was eliminated by a 1990 amendment to the Architectural Works Copyright Protection Act. See *Leicester v. Warner Brothers*, 2000 Daily Journal D.A.R. 12637 (9<sup>th</sup> Cir. 2000).
- C 2000: The granddaughter of silent film comic Harold Lloyd filed a \$50 million lawsuit for violation of federal copyright law against Walt Disney, alleging that its 1998 Adam Sandler film *The Waterboy* was a copy of Lloyd's 1924 film *The Freshman*. See Janet Shprintz, 'Freshman' Fracas, VARIETY 7 (October 31, 2000).
- C 1999: A man named Michael Costanza unsuccessfully sued the producers of the television show *Seinfeld* for invasion of privacy, false light publicity, and defamation, claiming that the character George Costanza was based upon him. See *Costanza v. Seinfeld*, 27 Med. L. Rptr 2177 (NY 1999).
- C 1998: 10 copyrighted photographs appeared in the film *Seven* for a total of 35.6 seconds. The court found the *de minimus* use had not been surpassed because the photographs were out of focus and unidentifiable. See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).
- C 1997: Warner Brothers was sued by a sculptor and the Protestant Episcopal Cathedral Foundation of the District of Columbia on copyright, Lanham Act, anti-dilution, and federal moral rights grounds over a religious sculpture, *Ex Nihilo*, a copy of which appeared in the film *The Devil's Advocate*. See *Fredrick Hart and The Protestant Episcopal Cathedral Foundation of the District of Columbia v. Warner Brothers, Inc. and Time Warner, Inc.*, Civ. No. 97-1956-A (D.C. E.D., Va. 1997).
- C 1997: A copyrighted poster of the "Church Picnic Story Quilt" could be seen in an episode of the television series *ROC* for a total of 26.75 seconds. Although the poster was never in perfect focus, the court concluded that the *de minimus* use had been surpassed because the

poster was “plainly observable.” Established use of *de minimus* defense as a separate issue that must be considered before, and separately, from the fair-use defense of Section 107 of the Copyright Act. *See Ringgold v. B.E.T. Inc.*, 126 F.3d 70 (2d Cir. 1997).

- C 1996: The artist, Lebbeus Woods, obtained an injunction against a motion picture for infringing his copyrighted drawing "Neomechanical Tower (Upper) Chamber," in the Universal film *12 Monkeys*. In the opening scenes of the film, the main character is brought into a room and seated in a chair attached to a vertical rail, which bears striking resemblance to Woods' drawing. Terry Gilliam, the director of *12 Monkeys*, admitted he had seen a copy of Wood's drawing and had discussed it with the film's production designer. *See Woods v. Universal City Studios*, 920 F. Supp. 62 (NY 1996).

**Remember: Failure to follow the proper clearance procedures may (1) prevent the production company from obtaining errors and omissions insurance; (2) deter a distributor from acquiring the film; and/or (3) expose both the production company and the distributor to liability to third parties.**

## CHAPTER 7

### Fictional Characters / Real People

If the public might mistake fictional characters in a film for living individuals, then the producer and any distributor could be liable if the film defames the living individuals, invades their privacy, or infringes their rights in some other way. Grounds for an unauthorized portrayal are defamation, invasion of privacy, violation of the right of publicity, and unfair competition.

There are simple ways, however, to avoid liability for a claim of defamation, invasion of privacy, violation of right of publicity, unauthorized portrayal, or unfair competition. First and foremost, every producer should consult with their attorney who is competent in this area before commencing production in order to obtain guidance on how to avoid clearance problems. Second, releases should be obtained from everyone who appears on camera or who is portrayed in the film. Third, a clearance report of the script should be commissioned in order to determine if any of the character names and profiles match living people. Fourth, if the screenplay is based on real-life events, then an annotation of the script should be provided by the screenwriter to act as a guide for the company. Such an annotation would verify facts and indicate whether certain characters are real or fictional and whether releases have been obtained for the real-life characters. Finally, every production must obtain errors and omissions insurance that will provide liability coverage in the event of any claim by a third party.

The following is a cursory outline of the various laws and causes of action related to possible claims by third parties against the producer for an infringement of their rights for the manner in which they are depicted in a motion picture.

- A. Defamation:** Defamation is a communication that harms the reputation of another so as to lower him in the opinion of the community or to deter others from associating or dealing with him. (Expose the individual to hatred, ridicule, or contempt, or reflect unfavorably upon his personal morality or integrity.)
1. Elements of defamation:
    - a. Publication, i.e. communicated by some method or means, such as through a motion picture
    - b. Matter must be understood by the recipient to be defamatory
  2. Types of defamation:
    - a. Libel: printed works or in physical form
    - b. Slander:
      - i. spoken words

- ii. special damages must be proven unless the slander is related to:
  - A. a loathsome disease
  - B. a criminal offense
  - C. sexual misconduct
  - D. a matter incompatible with proper exercise of your business, trade, profession, or office
- 3. Defenses to defamation:
  - a. Truth (which is an absolute privilege)
  - b. Judicial, legislative, and executive proceedings
  - c. Conversation between husband and wife
  - d. Fair comment and criticism
  - e. Public official - Public figure
    - i. Public official (e.g. U.S. Senator)
    - ii. Public figure
      - E. Pervasive fame or notoriety (e.g. sports celebrity)
      - F. Voluntary inject themselves into public controversy (Reality show contestant)
    - iii. Actual malice required for public official or public figure
      - A. Intentionally defamed
      - B. Acted with reckless disregard for the truth
  - f. Mass media

**B. Invasion of Privacy:**

- 1. Intrusion into one's private affairs:
  - a. E.g. wiretapping, surveillance
  - b. Highly offensive
  - c. Might even be illegal (e.g. wiretapping)
- 2. Public disclosure of embarrassing private facts:
  - a. Highly offensive to a reasonable person
  - b. No legitimate concern to the public, i.e. not newsworthy
  - c. Defenses:
    - i. Consent
    - ii. Media defense: newsworthy
    - iii. Truth is not a defense
- 3. Appropriation:
  - a. Definition: action for appropriation of another's name and likeness seeking

- compensation for the emotional distress, embarrassment, and hurt feelings.
    - b. Defense: newsworthy incident not used for commercial gain.
  - 4. False light:
    - a. Definition: publicity placing a person in a false light is actionable if the portrayal is highly offensive. Harm to reputation is not required.
    - b. Defense: constitutional privilege for media; newsworthy statements not actionable unless made with knowing or reckless falsity.
  - 5. Defenses to Right of Privacy infringement:
    - a. Consent
    - b. Media defense: newsworthy
    - c. Truth is not a defense
- C. Right of Publicity:**
  - 1. Definition: Right by an individual to control the use of their name and likeness (including voice and signature) in a commercial setting. Typically exploited by celebrities who earn fees for endorsing products.
  - 2. Damages: Seeks to ensure compensation instead of remedying embarrassment or hurt feelings. Seeks to compensate the plaintiff for the commercial value arising from the exploitation of one's name and likeness.
  - 3. Problems: Right of publicity or privacy vs. 1<sup>st</sup> Amendment (protected expression)
  - 4. Statutes:
    - a. California Civil Code section 990 - right of publicity descends to heirs for products, merchandise and goods, but does not descend in regard to books, plays, articles, television, and movies.
    - b. California Civil Code section 3344 - prohibits the unauthorized use of name and likeness of living persons on products. News and public affairs uses are exempted.
- D. Unfair Competition:** Filmmakers, TV Producers & Web Designers should take note that if they portray people or products in a way that is likely to confuse the public as to the origin of a product, they may be liable for a claim of unfair competition.
- E. Misappropriation and Lanham Act:** False designation of goods. The Lanham Act is U.S. law that gives the claimant access to U.S. Federal Courts for prosecuting their claim.
- F. Copyright, Trademark & Patents:** Rights created by Federal law protecting the creators of

intellectual property. See full discussion in Text on definitions & distinctions. A character created by another may be subject to copyright and/or trademark. Computer programs may be subject to copyright or patent.

**G. Tips for Avoiding Liability:**

1. Consult with legal counsel
2. Obtain releases (Depiction Release for stories about real people)
3. Fictionalize the story
4. Get a clearance report to check the identities
5. Add a disclaimer for fictional characters
6. Be careful of real life private individuals
7. Be able to prove the truth (annotate the script)
8. Obtain Errors and Omission Insurance

## CHAPTER 8

### Music in Film

The producer of a motion picture is required to obtain a license for every piece of music used in that motion picture. There are few exceptions to this rule. This essay will discuss the various types of licenses required when using music in film and review other concepts and agreements that are essential to the music aspect of the motion picture.

*Composer Agreement.* Most motion pictures commission a composer to create an original score and music for the motion picture. In such a case, the composer enters into a Composer Agreement with the production company. Pursuant to the composer agreement, the composer creates original music specifically for the film on a “work for hire” basis for the production company. “Work for hire” means that the production company will own the copyright in that music when the composer creates it. Because the score is a “work for hire” and the company owns it from the inception, the production company will not license this music from the composer. However, the Composer Agreement is an essential document since all “work for hire” agreements must be entered into in writing in order to be effective. So, in a sense, this satisfies the rule that every piece of music in a film must be accompanied by a license. In fact, in order to accommodate our exception to the rule, in the Composer Agreement the composer represents and warrants that the music that he has provided for the score is wholly original and was created by him or is music that is in the public domain. Even if the composer asserts that the music used is in the public domain, it is essential that the production company obtain a list of such “public domain” compositions. Inexperienced or irresponsible composers may include music in their score that was presumed by the composer to be in the public domain, but, in fact, was not. A composer on a film will earn his or her income from a variety of sources, including the composer fee (which may include cash, deferred, and “back-end” points), a portion of the soundtrack advance and royalties, and any performance income earned when the completed motion picture is shown around the world.

*Master Use License.* A master use license must be obtained in order to use the recording of a composition in a motion picture. The master use license is usually obtained from the record company, since it is the record company that typically owns the copyright to the master recordings. The artist who performs the song on the recording may not grant the master use license unless he or she owns such master recordings. In the scenario where an actor or actress sings a song on camera, then a master use license is not required since no master recording is being used.

*Synchronization License.* While a master use license must be obtained in order to use the recording of a composition, a separate synchronization license must be obtained in order to use the underlying

composition. The synchronization license is so-called because the music is used in timed synchronization with visual images. The synchronization license is obtained from the rights-holder of that composition, which is often a publishing company, such as Warner-Chappell Music, Windswept Pacific, Peer Music, or EMI. When seeking to license the composition from a publisher, it is important that the production company conduct adequate due diligence in order to identify the rights-holder. It is not unusual for more than one party to hold the publishing rights to a single composition. Further, publishing rights sometimes change hands from one owner to another. Finally, the catalog of compositions of a single artist may be broken up and owned by various parties, so that the rights-holder to one song by that artist might not be the same party that owns or controls the rights to another composition by that artist. As a matter of demonstrating the distinction between a master use license and a synchronization license, a scenario wherein the actress sings a song on camera would require a synchronization license for the composition that the actress is singing (assuming that the composition is not in the public domain), but not a master use license since a pre-existing recording of the composition is not being used.

*Mechanical License.* A mechanical license refers to the license required in order to include a composition on a soundtrack album. This license fee is negotiable, but often the publisher/copyright owner charges a fee close to the “statutory rate” which is currently 7.55 cents (per song under 5 minutes in length). This statutory rate is regularly adjusted upward in accordance with the Copyright Act. While the rights to the mechanical licenses are often held by the same party from whom a synchronization license is obtained (i.e. the publisher of the composition), most mechanical licenses are administered and issued by The Harry Fox Agency, which is based in New York.

*Performing Rights Societies.* The main performing rights societies in the United States are the American Society of Composer Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and The Society of European Stage Authors and Composers, Inc. (SESAC). ASCAP was the original performing rights society, having been founded in 1914. In 1941, ASCAP staged a strike and withheld performance licenses for its members’ music from broadcasters, preventing the broadcasters from playing ASCAP affiliated music on the air. The broadcasters banded together and sought out music that was not affiliated with ASCAP and began to license that music for broadcast; this music was mostly “black” music, country, and western music. This opened the door for BMI, which was created by the radio owners to compete with ASCAP. SESAC was created in 1930 focusing on European and gospel music, but has diversified since then. The performing rights societies issue the performance licenses, as described below. These performing rights societies in the United States are affiliated with performing rights societies around the world from whom they collect international performance royalties on behalf of their members.

*Performance License.* The performing rights societies issue blanket licenses to broadcasters of music,

such as radio stations, television stations, restaurants where music is played, nightclubs, etc. These venues pay a fixed fee to the performing rights societies, which in turn compensate their membership directly for the performance of their compositions in these venues. Performance income is a type of publishing income since it is generated from the exploitation of the composition and has no relationship to a particular recording or recording artist.

*Soundtrack Deal.* Films often release soundtrack albums which traditionally contain score and music featured in the film. In certain instances, music on the film's soundtrack album is not featured in the film itself. In these cases the soundtrack album is actually a compilation album, often with a common theme (e.g., rap, hip hop, country). There may be songs featured in the film that fail to make it on the soundtrack for various reasons, ranging from a creative decision, to a lack of money in the soundtrack budget, to failure to obtain the licenses. The producers of the motion picture typically hold the "soundtrack rights" and then make a deal with a record company that will release the soundtrack album. The record company will pay the producers of the film a royalty based on the sales of the soundtrack album, as well as, an up-front advance against those royalties. The producers then are often obligated to share a portion of the royalty (and sometimes the advance) with the artists and record companies whose tracks appear on the soundtrack album, with the composer whose score appears on the soundtrack album, and with any third party (usually the music supervisor) who may have secured the soundtrack deal with the releasing record company. As described above, mechanical royalties must be paid separately on each composition included on the soundtrack album.

*Music Supervisor.* Music Supervisors are hired by production companies to handle a variety of duties, such as, finding, licensing, and securing the rights to music for film. A music supervisor works closely with the film composer, producer, and production counsel to secure the appropriate music for the film. In some cases, such as on a lower budget film, the duties of a music supervisor may be assumed by the film composer. A music intensive film must have a qualified and experienced music supervisor to ensure that the proper music is selected and cleared within the confines of the film's budget. An experienced music supervisor is expected to have creative instincts for choosing music that is suitable for the film, to know what type of music is available for what price and where to get it, to know how to prepare and submit cue sheets, and to have the business skills needed to negotiate the music license fees.

*Independent Artists.* Independent recording artists that are not "signed" to any record company or publishing company are ideal sources of recordings and compositions for use in film. Because all of the rights are often held by one party (i.e. the artist him/herself), the production company does not have to seek out the record company for the master use license and the publishing company for the synchronization license. Independent artists are often so eager to license their music that their license fees are usually substantially less than those charged by the major companies.

*Public Domain.* Songs that are not protected under copyright law (usually because of their age) are said to be in the public domain. Songs in the public domain may be used without obtaining a license from the music publisher. However, there are instances when public domain songs still must be cleared. For example, a master use license from a record company will still be required when using a public domain composition that was recorded by another artist. It is imperative that the status of a song be thoroughly researched before presuming that it is in the public domain. Just because a song is “old” or commonly used does not mean that it is in the public domain. A good example is the song “Happy Birthday,” which must be licensed by the copyright holder.

## CHAPTER 9

### The Movie Distribution Deal: Maximizing The Value

When the film has been produced without distribution in place beforehand then the producer has to shop the finished product to distributors, sales agents, and various acquisitions executives in the quest for distribution for the film. The following is a discussion of important topics with which the independent producer must be familiar. These tips are intended to help educate the producer to avoid common pitfalls when shopping for and negotiating the distribution deal. However, the best advice for protecting your film and assuring that the producer gets the best deal is to retain the help of professionals who solicit and negotiate these deals on a regular basis.

#### **Getting the Deal:**

*Selectively Screen the Film.* Do not give sneak previews to distributors in a piecemeal fashion. It is best to screen the film in a theater for as many distributors all at the same time. This will better foster competitive bidding. Hopefully, after such a distributor screening the distributors compete with one another for the rights to the film. When they all see it for the first time at the same time then they all fear that their competitors will obtain the rights to the film before them, so they may rush to close a deal with the producer all at the same time. Video screeners are the least desirable way to market a film to distributors since the quality of the video is lower than a theater screening and the viewing environment is less forgiving.

*Keep Budget Information Confidential When Marketing the Film.* No acquisition person who is contemplating picking up a completed film needs to know the budget of the film. By keeping the budget of the film confidential, the producer makes sure that the offer being made for the rights to the film is based solely on the quality of the film, the market for it, and hopefully some healthy competitive bidding among acquiring companies courting the rights. If the acquisitions people know the budget of the film they may find that the budget is less than the production value of the film would reveal and is less than the amount that they may be willing to offer had they not known the true budget.

*Research the Buyer.* Investigate the distributor, sales agent, or other buyer before entering into a deal with them. Make sure that the company is reputable and solvent. The best way to do that is to talk to producers who have done business with that company before. Ask around. Ask questions.

*Get Everything in Writing.* The producer should never make commitments to a distributor except in writing - and get the distributor's commitments in writing. All aspects of the deal must be in writing. It

is not uncommon for a distributor to pressure the producer into releasing the elements of a film to the distributor without taking the time to negotiate a contract so that the distributor can meet some upcoming deadline, such as a film market like Cannes or the AFM. The producer should never succumb to these types of pressure tactics and must always take the time to deliberately and carefully negotiate the entire deal in writing without haste.

*Retain An Attorney to Review and Negotiate the Contract.* The producer must never sign anything without having an attorney review it. Motion picture distribution contracts are particularly complex. These contracts are subject to terms of art and industry standards. It is important to have an attorney who is well-versed in these types of contracts and the related negotiations represent and counsel the production company through this phase.

### **Deal Points:**

*Advance.* Is there an advance? How much is it? How will it be paid to the producer? How and when will it be recouped by the distributor? In today's market distributor advances, if any, are usually less than the producer would need to make the producer whole with their investors. The advance is usually paid in installments with the installments being tied to execution of the distribution agreement and delivery to distributor of all delivery materials.

*Distribution Fee.* The distribution fee is usually in the range of 25-30%. Sometimes the producer can negotiate for the distribution fee to drop after a revenue benchmark has been reached.

*Territory.* The producer usually makes two distribution deals: one for North America (Canada and U.S.) and another for the rest of the world. Very often the deal for the rest of the world is made with a foreign sales agent who will then make distribution deals with other distributors (sub-distributors) in each of the territories around the world. Sometimes, however, the producer will make several deals. For example, if investment money for the production of the picture comes from Brazil then the Brazilian financier may want to retain the Brazilian distribution rights leaving the producer to now make a deal for the rest of the world excluding Brazil and another for North America.

*Rights Conveyed.* The distribution media at stake are: theatrical, home video (rental, sell-through, videocassette, DVD), television (free, pay cable, satellite, pay-per-view, digital), multi-media, and Internet. Soundtrack album rights, prequel/sequel/remake rights, and merchandising rights may or may not be conveyed. Airlines distribution rights are often negotiated separately. Sometimes rights are split by language as well.

*Term.* The "term" is the amount of time for which the rights are granted to the distributor. Distribution

rights can be granted for as little as seven years, but the term usually extends much longer and often for up to 21 years. Sometimes the producer can negotiate for a clause that allows reversion of the distribution rights to the producer if certain revenue benchmarks are not met within a certain period of time.

*Limiting Expenses.* The biggest problem with a motion picture distribution deal is the fact that most, and usually all, of the gross revenues that the motion picture earns are eaten up by costs and expenses related to the distribution. Thus, it is often rare that the producer who sold the rights actually sees any “back end” money. This can be controlled to the extent that the producer is able to put caps on the amount of the marketing and distribution expenses that the distributor can charge back to the producer. The limitation on and the negotiation of the “expenses” definition in a distribution contract can be very difficult to negotiate unless the bargaining position of the producer is strengthened by competing offers from other distributors. Such things that the producer will want to limit in the definition of distribution expenses are the payment of the distributor’s employee salaries, the payment of the distributor’s attorney’s fees for negotiating the distribution agreement, general overhead, interest on any advances paid to the producer, etc. The definition of marketing expenses should be sure to have caps on the amount of money that the distributor can spend on such things as travel, posters, one sheets, and duplicates. Finally, the producer must make sure that expenses incurred by the distributor in marketing other films that the distributor represents are not charged back to your film; this is sometimes called “cross-collateralization.”

*The Producer’s Creative Say.* Does the producer or the director seek to retain any creative input in the film even after it has been distributed? Distributors will always object to this, but may allow consultation rights. The distributor may often require the assistance of the producer and director to promote the film and for that reason may allow them some creative say in order to ensure their cooperation in the marketing of the film. The creative input might be in the form of the director being allowed a final cut or in having approval over the promotional artwork.

*Marketing Commitment.* How will the film be marketed and how important is this picture to the distributor? Contractual obligations that the producer may try to extract from the distributor after negotiation could require a guaranteed marketing budget commitment, special promotions, advertising expenditure minimums, film festival submissions, pre-negotiated release patterns, and fixed release dates.

*Audit Rights & Arbitration Clause.* The producer always wants the right to audit the books of the distributor at least annually. Such a clause should provide that the distributor has to pay for the cost of the audit if the audit reveals of a discrepancy of more than 10%. Similarly, the producer may want to have an arbitration provision that requires that any claim that the producer has against the distributor go

to arbitration instead of the court system. The reason for this is that arbitration proceedings usually cost less and proceed more quickly than a lawsuit filed in the court system meaning that pursuing a claim against the distributor will not be cost-prohibitive to the producer.

*Be Wary of Warranties.* The producer should try to limit the extent of any warranties made about the film or its contents. It is in the producer's best interests to represent and warrant only "to the best of [the producer's] knowledge and belief."

*E&O Insurance.* The distributors always require that the producer have errors and omissions insurance in place and paid-in-full by the producer before they will accept delivery.

*Lab Access Letters.* The distributor should never be given the actual negative to the film in a licensing deal. Instead, the negative and all other necessary technical materials should be left with a reputable laboratory and the distributor should be given access to those materials from which to make copies. The lab access letter is the document that the producer gives to the distributor that authorizes the distributor to order any necessary copies from the laboratory.

## CHAPTER 10

### Television: A Whole Nuther Animal

#### *Types of Television*

The term “Networks” refers to the major television broadcasters in the United States. There used to be three major networks (ABC, CBS, NBC), but now there are three additional national networks that are in most major markets in the United States (FOX, WB, UPN). These six broadcasters have affiliate stations all across the U.S. which serve as the distribution channels for the networks. The affiliate stations in some cases are independently owned, but in many major markets the network owns and operates the affiliate. Cable channels used to be easily distinguishable because they were delivered to American homes via coaxial cable; however, that distinction has been less clear since the majority of American households receive their “on-air” network channels through cable. Cable is regulated and licensed by individual localities and cities all throughout the U.S., but in most instances the operation of these cable companies is the same. They carry the network stations and then package the cable channels in tiers. Basic cable includes channels that have commercial advertising (ESPN, MTV, LIFETIME). Pay cable refers to channels that are commercial-free (like HBO, Showtime, TMC) and for which the cable subscriber pays an additional monthly fee.

Basic cable channels increasingly are operating in much the same manner as their network counterparts. They derive revenues from advertising sales, yet they also make additional revenue from fees from cable operators. Pay channels get their revenues primarily from subscription fees collected by the cable operators. Satellite television is another variation of the free and pay cable models.

#### *Financing & Syndication*

Most American television shows are co-financed between the production entity (e.g. Spelling Entertainment, Warner Bros.) and the network broadcaster (e.g. ABC, CBS, NBC). Technically the producer finances the show and the network pays a per episode licensing fee which, in most cases, is less than the production cost of the episode. For instance, NBC may pay Warner Bros. \$900,000 per episode for a sitcom that costs Warner Bros. \$1,000,000 per episode to produce. The network, along with this per episode price, makes a commitment of how many shows they will order. The order may be as few as six to thirteen or as many as three full seasons of a proven show. The producer accepts the deficit in hopes that the network will carry the show for the requisite number of years to enable the production company to sell the show in syndication where the producer will make his deficit back plus an incredible return on his investment through syndication in various markets. Syndication revenues for popular American shows may be in upwards of a \$100 million dollars or even a billion dollars as in the

case of *Seinfeld*.

This generally-accepted scheme of the producer taking the risk for shows that never make it to syndication makes sense only when the successful show revenues pay for the many “flops” that have very short lives. In many instances, producers spend hundreds of thousand or even millions of dollars developing pilots for television shows that are rejected by networks and never make it to air. Even if the show is picked up, it must generally be on the air for least three full seasons before it can be sold into syndication. The longer the show has been on the air, the greater value in the syndication market.

Some networks produce their own shows, but many popular shows are produced by a Studio/Production Company that then licenses the show to the highest bidder. For example, *ER* is produced by Warner Bros. Television and is aired on NBC in the United States even though Warner Bros. owns its own network “the WB.” The production entity in the U.S. must enter into arms-length negotiations with its corporate parent and sister company network. Thus, a show developed at Warner Bros. has as much chance as ending up on ABC as it does ending up at the WB.

### *Producing for Television*

Generally, in order for a producer to get a show considered by a major television network in the United States (ABC, CBS, NBC), the producer must first pitch and “sell” the idea of the show. If the production entity does not have a track record in television, they usually must attract and attach to the show someone with whom the networks have already done business. This person is very often a *showrunner* who has had success with previous television shows and thus is trusted by the network. The term *showrunner* in television is equivalent to a *producer* on a movie. John Wells, the executive producer of *ER*, describes his job as the showrunner of *ER* as the CEO of a “small manufacturing company.” An experienced showrunner has the relationship with the studio to be able to walk a new television project into the development offices and have the pitch taken seriously by the networks. The showrunner is the person responsible for shepherding the script, actors, and other assorted elements on a day in day out basis. When someone has developed a good reputation as a showrunner, they then have the clout necessary to bring a new show to the network.

A producer may assemble a *presentation piece* to use as a selling tool for their show. A presentation piece is used in lieu of a pilot and is similar to a movie trailer. The only benefit of having a presentation piece as opposed to a pilot is the lower cost of production of the presentation piece. Much shorter than a full pilot, a presentation piece may get the interest of a network, financier, distribution company etc. to either invest in or order a pilot and/or a series.

### *The Television Markets*

Television programs, whether at the concept stage or syndication stage, are bought and sold for worldwide consumption at the television markets. The two biggest such markets are NATPE and MIPCOM. These television markets are very similar to film markets because of the activity that takes place: territorial rights to television projects are sold to distributors.

***EXHIBIT A***

**AFMA 2000 MEMBERSHIP SALES SURVEY**

**Total Sales (In US\$ 000)**

for Calendar Year Ending December 31, 2000

	THEATRICAL		VIDEO		TV		TOTAL	
	Sales	% of Total	Sales	% of Total	Sales	% of Total	Sales	% of Total
<b>EUROPE</b>								
<i>Western Europe</i>								
U.K. (including Ireland)	\$86,552	3.30%	\$59,534	2.27%	\$149,515	5.71%	\$295,601	11.28%
France (including Fr. Belgium)	\$73,843	2.82%	\$49,355	1.88%	\$115,099	4.39%	\$238,297	9.10%
Germany (including Austria)	\$146,748	5.60%	\$90,273	3.45%	\$205,348	7.84%	\$442,369	16.88%
Italy	\$70,705	2.70%	\$47,095	1.80%	\$116,635	4.45%	\$234,435	8.95%
Spain	\$68,118	2.60%	\$41,057	1.57%	\$90,747	3.46%	\$199,922	7.63%
Benelux	\$21,583	0.82%	\$14,075	0.54%	\$33,341	1.27%	\$68,999	2.63%
Scandinavia	\$21,069	0.80%	\$13,796	0.53%	\$35,740	1.36%	\$70,605	2.69%
Other (Greece, Portugal, Switz.)	\$20,922	0.80%	\$12,894	0.49%	\$37,289	1.42%	\$71,105	2.71%
<i>Sub-Total</i>	\$509,540	19.45%	\$328,079	12.52%	\$783,714	29.91%	\$1,621,333	61.88%
<i>Eastern Europe</i>								
C.I.S.	\$2,479	0.09%	\$2,279	0.09%	\$7,397	0.28%	\$12,155	0.46%
Poland	\$5,289	0.20%	\$3,744	0.14%	\$12,676	0.48%	\$21,709	0.83%
Other Countries	\$6,897	0.26%	\$4,276	0.16%	\$14,336	0.55%	\$25,509	0.97%
<i>Sub-Total</i>	\$14,665	0.56%	\$10,299	0.39%	\$34,409	1.31%	\$59,373	2.27%
<i>Europe Total</i>	\$524,205	20.01%	\$338,378	12.91%	\$818,123	31.23%	\$1,680,706	64.15%
<b>LATIN AMERICA</b>								
Argentina	\$9,174	0.35%	\$6,007	0.23%	\$13,523	0.52%	\$28,704	1.10%
Brazil	\$11,228	0.43%	\$18,008	0.69%	\$17,992	0.69%	\$47,228	1.80%
Mexico	\$9,262	0.35%	\$6,288	0.24%	\$18,710	0.71%	\$34,260	1.31%
Other Countries	\$15,210	0.58%	\$7,109	0.27%	\$23,950	0.91%	\$46,269	1.77%
<i>Latin America Total</i>	\$44,874	1.71%	\$37,412	1.43%	\$74,175	2.83%	\$156,461	5.97%
<b>ASIA / PACIFIC</b>								
Hong Kong	\$2,804	0.11%	\$1,763	0.07%	\$3,563	0.14%	\$8,130	0.31%
Japan	\$125,200	4.78%	\$82,320	3.14%	\$119,526	4.56%	\$327,046	12.48%
Korea	\$21,652	0.83%	\$13,883	0.53%	\$21,036	0.80%	\$56,571	2.16%
Taiwan	\$9,642	0.37%	\$6,176	0.24%	\$11,275	0.43%	\$27,093	1.03%
Other Countries	\$14,871	0.57%	\$9,512	0.36%	\$17,052	0.65%	\$41,435	1.58%
<i>Asia / Pacific Total</i>	\$174,169	6.65%	\$113,654	4.34%	\$172,452	6.58%	\$460,275	17.57%
<b>OTHER</b>								
Australia/New Zealand	\$27,628	1.05%	\$17,436	0.67%	\$43,535	1.66%	\$88,599	3.38%
Canada	\$3,407	0.13%	\$8,156	0.31%	\$29,145	1.11%	\$40,708	1.55%
India	\$2,872	0.11%	\$877	0.03%	\$624	0.02%	\$4,373	0.17%
Middle East / Israel	\$18,031	0.69%	\$10,600	0.40%	\$25,649	0.98%	\$54,280	2.07%
South Africa	\$6,566	0.25%	\$4,945	0.19%	\$10,959	0.42%	\$22,470	0.86%
Turkey	\$11,005	0.42%	\$5,366	0.20%	\$16,460	0.63%	\$32,831	1.25%
Other Countries	\$36,417	1.39%	\$16,997	0.65%	\$25,957	0.99%	\$79,371	3.03%
<i>Other Total</i>	\$105,926	4.04%	\$64,377	2.46%	\$152,329	5.81%	\$322,632	12.31%
<b>TOTAL SALES</b>	<b>\$849,174</b>	<b>32.41%</b>	<b>\$553,821</b>	<b>21.14%</b>	<b>\$1,217,079</b>	<b>46.45%</b>	<b>\$2,620,074</b>	<b>100.00%</b>

**Survey Methodology:**

The figures in this report are based upon a confidential survey of the Membership of AFMA conducted by the management of AFMA (under the auspices of its U.S. Export Trade Certificate) and compiled by KPMG LLP. An approximate 33% response of the AFMA Membership was obtained. The reporting Member companies were grouped into several strata according to sales. Separately, non-responding AFMA Member companies were asked to assign themselves to the appropriate sales strata. Based upon these responses, there was a total participation of approximately 50%. The remaining 50% of the AFMA Membership were assigned by the management of AFMA to their appropriate sales strata based on a best estimate of prior year annual sales. The average sales figures for each strata were then used to extrapolate total sales figures by media and market for the entire grouping.

Note: Neither AFMA nor KPMG can represent that these figures are accurate or complete, and these figures should not be relied upon as such.

***EXHIBIT B***

### **Bond Company Requirements:**

1. Title of Picture
2. Literary property from which the Picture is to be based, including title(s) and author(s)
3. Description of chain of title to #2, and copies of chain of title documents
4. Copyright Report and Title Report
5. Copies of all financing agreements, production services agreements, etc. in connection with the Picture
6. Name of the production company, its place of incorporation, address, phone number and contact person
7. Location production office address, phone number and contact person
8. Name of the financier(s)
9. Copies of:
  - (a) final approved budget
  - (b) final approved screenplay
  - (c) final approved production schedule
  - (d) approved cash flow schedule through to delivery
10. Name of insurance broker, address, phone number and contact person:
  - (a) schedule of all insurance coverage
  - (b) certificates of insurance coverage (with bond company as an additional beneficiary or loss payee, as appropriate)
11. Copies of:
  - (a) director agreement
  - (b) producer employment agreements
  - (c) performer agreements
  - (d) crew deal memos
  - (e) key location agreements
  - (f) inducement letters from producer, director, actors
12. Place(s) Picture is to be produced
13. Date of commencement and anticipated date of completion of principal photography
14. Post production schedule
15. Delivery date and applicable *force majeure* provisions, if any, and schedule of delivery items covered in the approved budget.
16. Production bank information details (including any location production accounts, if any)
17. Name and address of film and sound laboratories

18. Names of significant personnel:
  - (a) Screenplay writer(s)
  - (b) Directors
  - (c) Producers
  - (d) Executive Producer(s)
  - (e) Principal performers
  - (f) Film Editor
  - (g) Director of Photography
  - (h) Unit Production Manager
  - (i) Auditor
  - (ii) Production Designer
  - (iii) Other key personnel
19. Budget information:
  - (a) Aggregate of above and below the line cost
  - (b) Contingency amount
  - (c) Bond company fee
  - (d) Excluded items/amounts, if any
20. Details of recoupment position
21. Union agreements
22. Arrangement for music. Name of composer and other details as well as copies of agreements, deal memos or other evidence of the deals with composer, etc.

Related documents:

- Interparty Agreement - entered into between all relevant parties (producer, distributor, bond company)
- Notice of Assignment
- Pledgeholder Agreement

***EXHIBIT C***

Standard Delivery Requirements  
for  
(the "Film")

These Delivery Requirements shall be deemed incorporated into that certain agreement between ("the Distributor") and ("the Producer") dated as of ("Date") (the "Agreement"). You will make full and complete physical delivery of each and every item listed below to ("the Distributor") or its designees in ("Location") or elsewhere in the Territory as we may designate at your sole cost and expense. If delivery of any of the picture, video or sound material (Sections A, B and C) is to be via access, you shall use the form of the laboratory access letter attached hereto, three original copies of which shall be signed by the laboratory and producer. All publicity materials and documents (Sections C and D) are to be provided along with English translations if they are in a foreign language. All picture, video and sound material shall be first generation (e.g. unused) elements and shall be of commercially acceptable technical quality.

\*\*\*\*\*

D. DOCUMENTATION MATERIAL:

1. E&O Insurance

(i) Company is to be listed as an additional named insured under a motion picture producer errors and omissions insurance policy naming the following as named insureds:

*"(The Distributor)", including all majority owned subsidiaries and newly acquired companies within the term of this policy; its parent companies, licensees, sub-distributors and affiliates but only as respects to the operations of (The Distributor), and its officers, directors, employees, within the scope of their duties; and any independent (non-owned) film production companies declared to this policy, including their officers, directors and employees but only with respect to their duties as officers, directors or employees"*

Said policy shall have limits of at least \$1,000,000 with respect to any one claim relating to the Picture and \$3,000,000 with respect to all claims relating to the Picture in the aggregate, and a deductible of not more than \$10,000. Said policy shall be for a term of not less than three (3) years from Delivery of the Picture to Company together with evidence indicating that the premium for such policy has been paid in full for the term. The endorsements attached to said policy shall clearly indicate that there are no exclusions (e.g. music, title, video, or other unique circumstance). Said policy shall include a provision that it may not be revised, modified or canceled without the written consent of Company and shall include a provision that it shall be deemed to be primary insurance and that any insurance obtained by Company shall be excess insurance not subject to exposure until the insurance coverage of the delivered policy shall be exhausted. Company to be delivered a full text copy of the complete policy, including all endorsements and a full copy of the originally-executed application submitted by the producer to secure the policy.

(ii) In addition to the foregoing, Company to be provided with an original certificate evidencing the fact that its Canadian sub-distributor has been afforded coverage as an additional insured, as follows:

*“(The Distribution Company’), its parent, its related companies, subsidiaries, affiliates, licensees, sub-licensees and the agents, employees, officers and directors of each, and such other persons as (‘The Distribution Company’) shall designate”*

2. Shooting Script - The final shooting script of the Picture.

3. Dialogue Continuity/Spotting List - Physical delivery of a combined dialogue action continuity and spotting list containing all spotted dialogue, narration, sound vocals, all opening titles and complete end credits appearing in the Picture, as well as a cut-by-cut description of the action of the Picture in its final form, with footage and frame counts showing footage in, footage out and total duration of each line of dialogue.

4. Credit Information - Physical delivery of the following:

(a) Billing Block

Final approved billing blocks for posters, video packaging, paid advertising and trailers, approved by all parties, as well as discs containing all logos required to be included in the billing block.

(b) Credit/Likeness/Approvals/Dubbing/Cutting Requirements

A Statement summarizing the following contractual credit and other information (If there is no contractual obligation to accord any credit which has been accorded on screen or in the billing block, the "obligation" should be stated as "Producer's Discretion"):

(i) All main and end title screen credit obligations and restrictions;

(ii) All paid advertising credit obligations and restrictions;

(iii) All restrictions and obligations applicable to the dubbing of any player's voice into another language;

(iv) All restrictions and obligations as they apply to the use of the likeness of any talent in any advertising, promotions, etc.;

(v) All restrictions and obligations as they apply to talent travel; and

(vi) All talent approval rights as they apply to stills, artistic renderings, biographies, credits, merchandising and tie-ins, and any related matters.

(c) Final Screen Credits

(i) One (1) typewritten copy of the final main and end credits as they appear on the composite print, along with complete credits on Microsoft Word diskette.

(ii) WGA - If the Picture is produced under the jurisdiction of the Writer's Guild of America, a copy of the Notice of Tentative Writing Credits, and if the credits were submitted for a WGA Credit Arbitration setting forth the final writing credits as determined by the WGA Credits Committee.

(iii) DGA - If the Picture was produced under the jurisdiction of the Director's Guild of America, a copy of the letter from the DGA approving the list of screen credits for the Picture submitted to the DGA pursuant to article 8-201 of the DGA Basic Agreement.

5. Cast/Talent/Personnel Agreements - Copies of fully executed agreements for the all cast, crew and other entities and related personnel who have been accorded credit in the billing block and main screen titles, as well as for all actors, the music supervisor, casting director and unit photographer(s). (Should agreements for any of cast members not exist, then signed releases for those individuals). All contracts (including but not limited to day-player employment contracts) in which a minor agrees to render services *must* be (i) consented to in writing by the minor's parents, and (ii) approved by the appropriate court prior to performance of services.
6. Releases/Other Agreements - Delivery of a letter granting ("The Distributor") access to (and copies of, upon request) all other permissions, waivers, releases and other documents relating to the Picture, including but not limited to all employment agreements, clearances, releases, product placement agreements, location agreements (and evidence of payment in full with respect to all such agreements).
7. Affidavit - Delivery of an affidavit sworn to by an officer of Production Company that all costs of production have been paid for and there are no liens, encumbrances or claims as of the date of the Affidavit.
8. Music Cue Sheet - Delivery of a Music cue sheet stating for each composition in the Picture: the title, the composer(s), publisher(s), master recording owner(s), copyright owner(s) (if different from publisher(s)), performer(s), arranger(s), usage, performing rights society(s), duration of each cue, as well as film footage at the beginning and end of each cue.
9. Music Licenses - Delivery of copies of fully executed long form synchronization and performance licenses, master use licenses, library licenses and executed agreements for each composer of original underscoring used in the Picture in form acceptable to Company, authorizing the use of all music contained in the Picture on a full buy-out basis in all media now known or hereafter devised, including the right to use the music in advertising and publicity. Said licenses should allow for the use of each cue used in the Picture in perpetuity throughout the universe without any future payment obligations (e.g. box office bonuses or so-called "step-ups"). In addition, evidence of full payment due under all of the aforementioned licenses and agreements. All licenses and agreements shall contain language which prevents the licensor/publisher of any of the music licensed for use in the Picture from seeking injunctive or other equitable relief in

connection with any breach or alleged breach of the terms of such agreement(s)/ license(s), along with other terms and conditions customarily contained within such documents according to industry standard and practice. . The foregoing requirement shall be deemed to include copies of all AFofM (or foreign equivalent) contracts for union members, and SAG (or foreign equivalent) contracts for any singers hired through the guild whose performance is utilized in the score or on camera

10. Clip Licenses - If any clips from other films or other programs are used in the Picture, Producer shall provide (a) a list of all such clips and copyright owners thereof; and (b) fully executed copies of all necessary licenses, or permissions granting the rights to use the clips in the Picture, as well as evidence of payments due thereunder.
11. Chain of Title - All documents evidencing proof of ownership and all documents evidencing proof of payment in connection with any transfer of rights, including but not limited to: (i) information necessary for (“The Distributor”) to complete the application for U.S. Copyright Registration for the Picture; (ii) a Title Search and accompanying legal opinion as appropriate dated within sixty (60) days of Delivery; and (iii) a Copyright Search dated within sixty (60) days of Delivery;
12. Mortgage of Copyright & Security Agreement - Two (2) originals of a Mortgage of Copyright and Security Agreement, in form to be provided.
13. Instrument of Transfer - Two (2) originals of an Instrument of Transfer in form to be provided.
14. International Documentation–Intentionally deleted.
15. Final Certified Negative Cost Report - A report prepared by an independent certified public accounting firm or production accountant setting forth - in detail - the final actual negative cost of the Picture. The Report shall be accompanied by a proper signed and notarized certification statement from said firm or person, attesting to the fact that the firm has reviewed all the books and records, and that, based on that information, the cost in the report is accurate.
16. Dolby/SDDS/DTS License - A copy of the executed license agreement in full force and effect between the producer and Dolby Laboratories, Inc. in connection with the Picture, as well as a copy of the license with the appropriate digital entity (e.g. Sony Digital/SDDS or Digital Theater Systems), if applicable.
17. MPAA Rating– Information necessary for (“The Distributor”) to file for and receive a paid rating certificate from the Motion Picture Code and Rating Administration of America, Inc., no more restrictive than R.
18. W -8 BEN- intentionally deleted.

19. Residual, Re-use and Future Payment Obligations

If ("The Distributor") has assumed any residual payment obligations, A complete list, verified as true and accurate by Producer, of all actors (including stuntmen, on camera singers, airplane pilots and puppeteers), screenplay writers, composers, musicians, orchestrators, copyists, master recording producers, directors and other personnel appearing in or rendering services in connection with the Picture, together with:

- (a) Their respective social security numbers, addresses, W-4 and INS Form I-9 information and industry-man numbers;
- (b) Their respective individual cash compensation (not including living or travel expenses) and evidence of payment in full;
- (c) For all actors, the number of days worked as well as the number of days guaranteed;
- (d) The total amount of all compensation paid to each class or group of personnel; and a statement as to whether or not each such person is subject to any union, guild or federation agreement, and the name of such union, guild or federation, along with evidence, to the extent applicable, that such persons were employed and fully paid at not less than union, guild or federation scale;
- (e) A SAG final cast list (providing compensation and days worked);
- (f) Any applicable foreign guild or union contracts along with all service agreements with provisions for equivalent residuals;
- (g) AF ofM Scoring Session Reports, if applicable;
- (h) IATSE Proration list, if applicable;
- (i) The name and contact information of the payroll company; and
- (j) DGA Contracts and deal memos (1<sup>st</sup> AD, UPM, 2<sup>nd</sup> AD etc..)

20. Archive Assets

- (a) one original final shooting script signed by author(s) only; and
- (b) two original final shooting scripts signed by the author(s), director, principle cast and producers.

AFFIDAVIT  
[SPECIMEN COPY - DO NOT EXECUTE]

\_\_\_\_\_, being duly sworn, deposes and says:

1. I am \_\_\_\_\_ of \_\_\_\_\_ (the "Company").

2. I am authorized to make this Affidavit in connection with the motion picture entitled \_\_\_\_\_ (the "Picture").

3. I attest to the fact that all costs in connection with the Picture have been paid and there are no liens, encumbrances or claims in or to the Picture, and that ("The Distributor"), its successors, licensees and assigns shall have quiet enjoyment of all of the rights acquired by ("The Distributor") from the Company.

By: \_\_\_\_\_  
Dated:

On \_\_\_\_\_, 200\_, before me, \_\_\_\_\_, a Notary Public in and for the State, personally appeared \_\_\_\_\_, known to me personally (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument, as the \_\_\_\_\_ of the corporation that executed the within Instrument, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws and consent of its board of directors.

WITNESS my hand and official seal

\_\_\_\_\_  
Notary Public

INSTRUMENT OF TRANSFER  
[SPECIMEN COPY - DO NOT EXECUTE]

For good and valuable consideration, receipt of which is hereby acknowledged, \_\_\_\_\_ ("Licensor") hereby grants to ("Distributor"), solely and exclusively, the "Rights" throughout the "Territory" for the duration of the "Term" (all as defined on the attached Schedule 1) in and to the theatrical motion picture currently entitled " \_\_\_\_\_ " (the "Picture") and as further specified in that certain agreement, dated as of \_\_\_\_\_, between Licensor and Distributor (the "Distribution Agreement").

Subject to the aforesaid, the Distributor will be empowered to bring, prosecute, defend and appear in suits, actions and proceedings of any nature, concerning any copyright in and to the Picture, or any infringement of such copyright or violation of any of the rights granted to Distributor herein. Any recovery of damages, penalties, costs or otherwise arising by reason of infringement of any such copyright(s) or violation of the rights transferred to Distributor herein has been assigned, and shall be paid, to Distributor.

This Instrument of Transfer is executed pursuant to and is subject to all the terms and conditions of the Distribution Agreement and all terms used herein shall have the same meanings as provided in such Agreement.

IN WITNESS WHEREOF, Licensor hereby executed the within Instrument of Transfer as of \_\_\_\_\_, with effect from \_\_\_\_\_.

PRODUCTION COMPANY  
("Licensor")

By: \_\_\_\_\_

Its: \_\_\_\_\_

On \_\_\_\_\_, 2001, before me, \_\_\_\_\_, a Notary Public in and for the State, personally appeared \_\_\_\_\_, known to me personally (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument, as the \_\_\_\_\_ of the corporation that executed the within Instrument, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws and consent of its board of directors.

WITNESS my hand and official seal

\_\_\_\_\_  
Notary Public

**MORTGAGE OF COPYRIGHT AND  
SECURITY AGREEMENT**

For good and valuable consideration, receipt of which is hereby acknowledged, the undersigned, ("Debtor") hereby grants to ("Distributor") a security interest in and to the "Rights" throughout the "Territory" for a duration of the "Term" (all as defined on the attached Schedule 1) as security for the rights granted to ("Distributor") pursuant to the agreement between Debtor and ("Distributor") dated as of \_\_\_\_\_ (the "Agreement") (such rights being hereafter referred to collectively as the "Distributor's Rights") in the motion picture entitled \_\_\_\_\_ (the "Film") including, but not limited to:

- (i) Insofar as they relate to the Distributor's Rights, all literary property rights and subsidiary rights relating to the Film, including without limitation all right, title and property upon which the same may be based; and
- (ii) Insofar as it relates to the Distributor's Rights, the copyright in and to the Film; and
- (iii) Insofar as they relate to the Distributor's Rights, all contract rights of Debtor relating to the Distributor's Rights or to any of the elements referred to in clauses (i) and (ii) above; and
- (iv) Insofar as they relate to the Distributor's Rights, all proceeds derived from the exercise of the Distributor's Rights, and of the elements referred to in clauses (i) through (iii) above, including, without limitation all income and receipts derived from the marketing, distribution, exhibition, exploitation and sale of the Distributor's Rights and of said elements thereof and all proceeds of insurance covering or relating to the Distributor's Rights and said elements thereof.

This Security Agreement is subject to all of the terms and conditions of the Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Mortgage of Copyright and Security Agreement (which may be executed in counterparts) this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ with effect from \_\_\_\_\_.

DEBTOR NAME

By: \_\_\_\_\_  
Its:

On \_\_\_\_\_, 2001, before me, \_\_\_\_\_, a Notary Public, personally appeared \_\_\_\_\_, known to me personally (or proved to me on the basis of satisfactory evidence) to be the person who executed the within instrument, as the \_\_\_\_\_ of the corporation that executed the within Instrument, and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws and consent of its board of directors.

WITNESS my hand and official seal