Hitting festival paydirt – Inking your first distribution deal

By Diana Cafazzo

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Congratulations - your film’s a big hit at the festival! The public adores it and a distributor wants to make a world-wide deal.

All of this is great news, and exactly what you wanted to happen. Now everyone wants to rush to sign a contract so that the deal can be announced while the press is still around and paying attention.

In all the excitement though, don’t forget to watch the fine print. Remember - once you’ve signed that contract, it will be your only legal “link” to your film.

Here are some key areas to look out for:

What are you promising to do?

Most of your job’s done – you’ve made the film. What you need to do now is to deliver the materials that the distributor needs in order to distribute the film. This will likely be a long list of both technical film materials and paperwork – some of which are negotiable, and some of which are essential.

You’ll provide some of the technical elements by physically delivering them to the distributor, but some you’ll provide by giving the distributor a “lab access” letter. Read this letter carefully to make sure that the distributor doesn’t have access to elements that aren’t needed or appropriate or that will interfere with the rights of any other distributor that you might have. Finally, if you didn’t create all of the technical elements that the distributor needs as part of the production budget, you’ll need to negotiate who’s now going to pay for them to be made.

The paperwork you’ll need to provide will include everything from credit lists and cast bios, to still photographs, to music contracts and music cue sheets. You’ll also probably need to deliver an “errors & omissions” insurance certificate. This form of insurance will protect the distributor against potential copyright, defamation and similar lawsuits. If you didn’t already obtain it as a part of the production process, you’ll likely have to go through the sometimes difficult process of getting it after-the-fact. Again, you’ll have to negotiate who’s going to pay for it.

The financial deal

The basic financial deal works like this. The distributor will make sales and collect all of the revenues. Then the distributor will deduct a percentage of the revenues as a fee for itself. Then the distributor will deduct its expenses. Whatever remains of the revenues will be paid to you.
Your distributor may also be paying you a guaranteed amount of money, as an “advance” or a minimum guarantee”. This is great news. Remember though, that the distributor will then also deduct from any revenues any amounts needed for the distributor to “recoup” the advance or minimum guarantee (and sometimes charge interest, too), before paying any revenues out to you.

**Fees**

The fees or commissions that distributors charge can range from 20% to 50% of gross revenues, depending on the medium and territory in which a sale is made.

But these fees could end up being higher. Many distributors ask for the right to engage a sub-distributor to sell a film in territories or media where the distributor doesn’t have established expertise. If you give your distributor this right, you should negotiate a “cap” on the total of the fees that are going to be charged by both your distributor and the sub-distributor.

**Expenses**

The most critical area of any distribution agreement may be the definition of the expenses that your distributor can deduct from the revenues that the film earns, so read this part of the agreement carefully. You need to understand clearly what kind of expenses your distributor will be entitled to deduct. Expenses can vary from the obvious costs of creating posters and film prints, to less intuitive costs of throwing promotional parties, attending international markets and paying for memberships in industry associations.

You should try to eliminate to the extent possible any general language that permits the distributor to deduct undefined expenses “customarily incurred in the motion picture industry”, and limit the list to out-of-pocket expenses that are directly related to the promotion and distribution of the film. Sometimes you can negotiate a “cap” on expenses. This is a difficult area, because of course you want the distributor to spend money to promote the film, but at the same time you want to ensure that those costs are reasonable and that costs that your distributor spends to promote a group of films aren’t unfairly allocated to your film.

Distribution agreements usually allow the distributor to “cross-collateralize” the profits of the film from different media and from different territories. This means that when calculating the amount of revenues due to you as the producer, the distributor can deduct expenses incurred in one medium from revenues earned in different medium, and expenses incurred in one territory from revenues earned in another territory. Some of your financiers may not want territories to be “crossed”, so make sure that you’re clear on what your financiers are going to require.

**What rights should you give your distributor?**

In setting out the rights you’re granting to the distributor, you need to deal with 3 basic things: the media, the territory and the term. Naturally enough, most distributors will want to maximize what they get on all 3 fronts, especially if they’ve paid you an advance and want as many rights as possible as a means of recovering their money.

The description of the “media” will often include long lists that include theatrical distribution, television, home video, “non-theatrical” (airlines, schools etc.) and the newly-arrived “internet”
or “on-line” rights. Internet rights in particular can be tricky if you have more than one distributor (e.g. a Canadian distributor and a foreign distributor). The distributor may also want to extend the “media” to include merchandising, print publishing, music soundtrack and similar rights. These rights may or may not be important in the case of your film, but if they might be, consider carefully whether your distributor has the expertise to be dealing with each of these rights.

Defining the territory you’re giving to the distributor is fairly straight-forward, but watch out for issues that can arise if you are dividing up the world territories among more than one distributor – e.g. internet spill-over, satellite signal spill-over and language issues.

The term that you give to your distributor can range anywhere from about 5 years to 15 years to 25 years to perpetuity! A critical factor here is whether the distributor is paying you an advance or paying out significant amounts of money to promote and distribute the film. If so, the distributor will want to have as long a period of time as possible to earn enough money to recover the amounts paid out and to be rewarded for the financial risk that it has taken. One other point. Even if you give your distributor a relatively short term – say 7 years – remember that right until the last day of the term the distributor can enter into agreements with third parties like broadcasters that extend for many years beyond the 7-year term. You should negotiate a reasonable limit on this.

Finally, your distributor may want the right to distribute and sequels and spin-offs to your film, or maybe even to distribute the next film that you direct or produce. Whether this is reasonable depends on how big a role the distributor is to play in the success of your current film.

**What’s the distributor actually promising to do with the film?**

Many standard form distribution agreements don’t actually impose on the distributor any obligation to actually distribute the film or to spend any money promoting it. Some will include a clause that says the distributor will use its “reasonable efforts” to distribute your film. If you have any third-party financiers involved in your film, they may require the distributor to promise a minimum theatrical release, make a minimum commitment on “prints and ads”, and possibly to prepare a written distribution plan.

This may seem grim, but remember the basic economic model. If your distributor has paid you an advance (or puts out a significant amount of money in paying for expenses), the distributor is going to have a big incentive to get out and promote and sell the film so that the distributor can recover these monies.

It’s unlikely that the agreement will offer you any role in the distribution process or any approvals on how it’s done. Often distributors feel that your job was making the film, and their job is selling it. You may want to negotiate at least the right to be consulted about the marketing and distribution plan for the film, and any poster or trailer. You may also want to try to limit the distributor’s rights to make changes to the film (except for the usual censorship or broadcast requirements) or to its title (at least its English-language title).

**Representations & Warranties**
The distributor is going to want you to give certain “representations and warranties” (i.e. guarantees) about the film and your ownership of it. You should review these carefully to make sure you can accurately give these.

Generally, you’ll be required to promise that: you own all the rights that you’re granting to the distributor; there aren’t any liens or claims that might impair the distributor’s ability to distribute the film; the film doesn’t infringe any copyright or other right, and isn’t defamatory or obscene; you’ve obtained all of the necessary permissions for the music in the film.

The representations and warranties usually also deal with the issue of residuals and royalties that might need to be paid to your actors, writer and/or director in the future. This can be a contentious point, but it’s critical that your agreement clearly set out who’s responsible for paying these amounts.

**Reports & Audit Rights**

A distribution agreement will set out how often the distributor must provide you with reports and payments – this ranges from quarterly to semi-annually to annually. The reports should set out the revenues earned, the fees and expenses deducted, any amounts deducted to recoup an advance or minimum guarantee, and the amount to be paid to the producer (if any).

Since this may be your only connection to the film’s commercial progress, you will want to get as much detail as possible, and to get reports as frequently as possible. You’ll find, though, that distributors are reluctant to provide you with anything more than their reporting system provides to other producers.

You should also make sure that the agreement gives you the right to examine and audit the books and records of the distributor as they relate to your film. This will give you some back-up protection in case you ever need to confirm that the revenues and expenses being reported to you are accurate.

**Getting your film back if things go wrong**

What happens if your distributor stops sending your reports, stops paying you or goes bankrupt? Many people would assume that this means you can cut off the distributor and get your film back.

Unfortunately, the way the laws in this area work, this isn’t all that easy. But you should at least give yourself a fighting chance by negotiating language into the agreement that will allow the rights to the film and all of the physical elements to become yours again if something goes wrong.

**Financier approval**

Don’t forget that you may have already promised the financiers of your film that they have the right to approve all distribution agreements. This right is taken very seriously, so make sure you involve these financiers in your negotiations with your new distributor as early in the process as possible.
The Bottom Line

These are just the basics.

Distribution agreements are complex. They’re also critically important to your ongoing connection with the economic fate of your film.

So if you can, take your time. And get whatever advice you need from more experienced filmmakers and from a lawyer familiar with these types of deals – and do it before you sign on the dotted line.

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