

A FOREIGN AFFAIR

Watch for “screwgies & switcheroos” when selling your film internationally

IN THE LAST ISSUE of *MovieMaker*, we discussed some basic points to consider when entering into either a sales agency or distribution contract (be it for theatrical, DVD, television or worldwide rights). In this issue, we'll explore some specific pro-producer deal terms that should be vigorously fought for when dealing with sales agents. Many of these same issues exist for domestic distributors, too, but for the purposes of this article we will focus on sales agency contracts.

RECAP OF THE BASICS

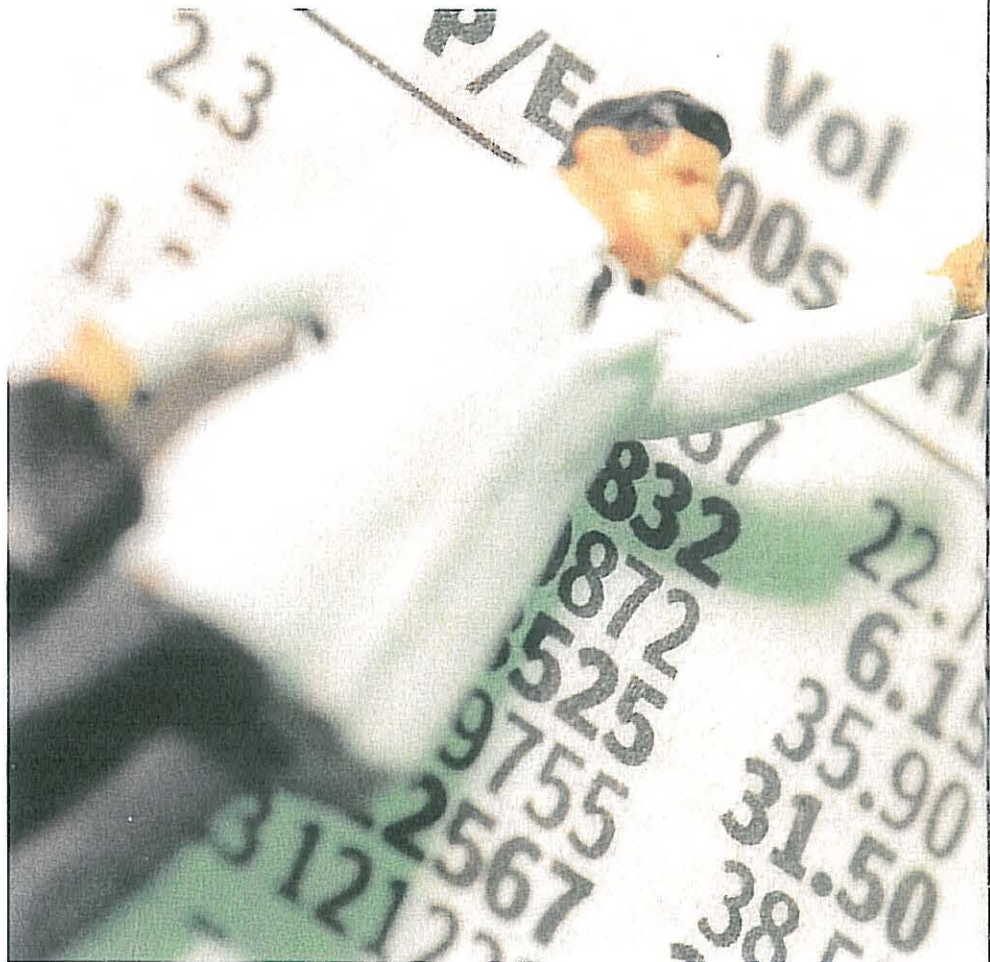
In the Winter 2006 article, moviemakers were encouraged to remember six fundamental rules:

1. Understand the difference between producers' reps, sales agencies and distributors.
2. Create a buzz around screenings for films seeking theatrical distribution.
3. Research the company with whom you are considering going into business.
4. Keep budget information confidential to allow the sale price to rest on the merit of the film itself, not the cost of making it.
5. Get all promises—big and small—in writing and negotiate the important details of those promises and their meanings.
6. Understand what you are giving away with regard to the contract, always keep the copyright (unless the sale price is extremely generous and accounts for the outright sale of the copyright) and give away only those specific rights that the particular distributor needs (e.g. if you are entering a DVD deal, the distributor should not be given the right to produce sequels). Finally, employ an experienced entertainment attorney to negotiate and review the deal. You wouldn't let your line producer perform a root canal, so why would you allow him to act as your attorney?

TERRITORIES, TERMS & RIGHTS

A SALES AGENCY IS a company that travels to worldwide film markets and brokers deals with distributors located in foreign countries (known as territorial buyers) for the purpose of exhibiting your film in international theaters and on foreign television and DVD.

When entering a deal with a sales agency, you are granting an agent the right to license your film to others for a set period of time in



certain media in certain territories around the world. Since the sales agency is only acting as your licensing agent, the company should not be assigned the copyright to your film. Rather, the agreement should merely recognize that you are giving them a license for a term of years while retaining the copyright ownership. The sales agency may require certain provisions to ensure their ability to enforce the copyright on your behalf and to register their exclusive license with the copyright office, but it is essential that the exact language of those terms be carefully reviewed and negotiated by an attorney so that you do not inadvertently give away more than you anticipated.

Every sales agent will attempt to take all of the exploitative value of your film for

as wide a territory for as long as they can. Do not allow sales agents that traditionally engage in licensing international rights to sell your film domestically, unless they have a proven track record in the domestic arena. In addition, such rights should be granted to the sales agent only after you have already ruled out the numerous domestic theatrical, television and DVD distributors who can be contacted without the extra layer of a sales agent as your intermediary. Reduce the sales agent's authority to reflect only the right to license the picture in international markets, excluding the U.S., English-speaking Canada and territories controlled by the U.S. Now more than ever, producers should attempt to reserve their rights to control new methods of distribution that have yet to be created

or which are still being developed, such as mobile content and digital downloads. (Be forewarned: foreign sales agents are generally reluctant to abandon these unchartered rights without a fight.)

The first draft of a sales agent's contract may state that the sales agent has the right to exploit your film in any and all media (presently known or hereafter created) throughout the world for a term of 20 years—in other words, the entire lifespan of a picture's potential profitability. A savvy producer will have that term reduced to as little as seven years. In addition, even when a producer obtains a reduced term of years, the producer must be sure to incorporate language that prevents the sales agent from having the ability to grant licenses to the film in foreign territories of a greater duration of time than the sales agent's own term of years.

For example, you may grant the sales agent a 10-year term in 2006. The sales agent may then license your picture to Germany for 25 years. In 2016, the sales agent is no longer permitted to sell your picture, but neither you nor your future sales agent can license Germany until 2031.

Some concessions will need to be made. Sales agents often do need the ability to license pictures for a period of time beyond the agreed upon term as, among other reasons, certain foreign territories insist on obtaining rights for a longer period of time. However, the sales agent's abilities cannot go unchecked and limits need to be in place. There are several ways to rectify the sales agent's needs with the needs of the producer. For example: Certain known territories that insist on 20-year contracts can be specifically referenced. If those territories are sold late in the licensing term, the sales agent must obtain the producer's permission to make the sale.

Another important provision in a good contract is an "escape clause," which allows for early termination of a contract if the sales agent fails to perform as anticipated. For example: If the producer fails to receive \$750,000 from the sales agent's activities within 18 months of the agent receiving full delivery of the picture, the producer should have the right to terminate the agreement and all outstanding licenses (minus the sales agent's fee) should automatically transfer to the producer. The contract can provide for more than one escape clause, with different threshold requirements arising at different points in the life of the contract.

SETTING PRICES, CAPPING COSTS & PREVENTING "THE OLD SWITCHEROO"

THE SALES AGENT IS compensated by receiving a percentage of the money received for each territorial license sold. It is important that an agreement incorporates terms that encourage the sales agent to obtain the most money for each territory. At first blush, you would think a sales agent would always want to obtain the most money possible for each territory, but situations can arise where that is not the case.

For example, if the sales agency's term is coming to an end, the company may want to dump the picture as quickly as it can for whatever money it can get before it loses its rights. Another situation where your interests and the sales agent's may differ involves circumstances where the sales agent may license your picture to a distributor for a lower price than it should because, in addition to money paid, the distributor credits back to the sales agent an amount equal to a refund that sales agent owed the distributor on a totally unrelated picture. This results in financial gain for the agent, but no benefit to you.

Another example is when the sales agent engages in "the old switcheroo," which plays out as follows: A crooked foreign sales agency licenses your picture to an English thief distributor whom the agency tells you is a bona fide distributor in England. The distributor pays the agency \$40,000 for the right to distribute your film throughout the U.K. The agency takes its 25 percent fee plus expenses and gives the remainder of the money to the producer. What the producer does not know is that the distributor is not an actual distributor based in the U.K., but rather a sub-sales agency secretly owned and/or in some type of partnership with your agency, whereby the distributor in turn licenses the picture to a *real* distributor in the U.K. and collects \$80,000. The distributor and agency walk away with an extra \$40,000—of which the duped producer does not see a penny or, in classic con artist terms, is left with "the screwgy."

An additional means by which sales agents can profit at the expense of the producer is through the sales agent's recoupment of costs and expenses. Every contract should contain a maximum limit on the amount of expenses a sales agent can be allowed to attribute to the picture and deduct from the definition of gross revenues. The sales

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agent should be able to recoup a reasonable sum for marketing and other expenses incurred in their international sales efforts. However, your film is likely not the only one that the agent will be selling when it travels to markets in places such as Cannes and Berlin. Therefore, you should not foot the bill for the agent's airfare, hotel, etc. single-handedly. Likewise, the cost of the sales booth at these markets should not be allocated solely to your picture.

Similarly, the costs incurred by sales agents for such items as DVD replication and manufacturing must be closely examined, reviewed and addressed prior to the execution of the contract.

Producers need to work with experienced entertainment attorneys who understand exactly which technical delivery requirements are absolutely essential for the sales agent's needs. Generally, sales agents will provide producers with a delivery list of technical elements that must be provided. This list will usually include every possible element and technical specification. However, these lists can be negotiated and items that are not really mandatory can be easily stricken. For example, if you know that your film is only intended for distribution on DVD and television, a 35mm interpositive might not be necessary for delivery.

Likewise, there should be discussions concerning the costs of dubbing the film in foreign languages. When the sales agent is made responsible for creating certain delivery items, contract terms should strive to ensure fair market value rates are charged. If a producer fails to negotiate such terms, they should anticipate his or her sales agent charging the highest possible rates. In fact, many sales agents charge a "servicing fee" above and beyond the actual cost of the materials that they personally create, so negotiating the delivery schedule prior to the closing of a deal is extremely important.

IMPORTANT CLAUSES TO PROTECT PRODUCERS

HOW CAN YOU PREVENT getting the screwgy by way of the old switcheroo and the other common traps described above? It's often very difficult for producers to understand what international transactions are actually occurring on their behalf, what money is being properly collected and what expenses are rightfully being incurred. However, here are a few contract provisions that can increase your ability to get a fair shake from the sales agent and better assist you

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in monitoring what is actually occurring in regards to the distribution of your picture:

1. Define "gross receipts" carefully and include not only money paid to the sales agent, but any sum credited as well.
2. Establish minimum territorial prices for each territory.
3. Incorporate language that prohibits sub-foreign sales agents
4. Ensure your right to be present in market booths, subject to reasonable time and manner restrictions
5. Ensure your right to see the actual foreign sales contracts and research the companies that are entering those contracts
6. Attempt to incorporate language requiring the sales agent to warrant the propriety of the company's conduct in an ethical manner and to not engage in conduct that is contrary to the good faith intentions of either party.
7. Provide for proper accounting procedures, supporting documentation and audit rights.
8. Provide for recovery of attorney fees in the event you sue the sales agency and win.

BEWARE OF YOUR SAG SIGNATORY OBLIGATIONS

ONE FINAL ISSUE PRODUCERS should be aware of concerns the obligation to have your sales agent sign a SAG Distributor Assumption Agreement. Every time a producer signs on to the SAG collective bargaining agreement, the producer warrants and represents that it will have all sales agents and distributors sign an assumption agreement, which places the burden of collecting and paying SAG residuals on the agent or distributor. If a producer fails to have an assumption agreement signed, the producer is solely liable for paying residuals to SAG members and those residuals are calculated on the gross sums collected by the sales agent without regard to how much is actually received by the producer.

Presently, SAG is aggressively pursuing producers who fail to obtain assumption

agreements and make residual payments. SAG's remedies include SAG's ability to foreclose on the lien it holds on your film and take complete possession of your film (much like the way in which a bank can foreclose on a home).

To make matters worse, your sales agent could have a cause of action against you if you signed the routine representation and warranty contained in most sales agency agreements that states "the film is free and clear of any liens," when in fact a SAG lien exists. Therefore, even if you are incapable of persuading your sales agent to sign an assumption agreement (which is often the case), you should at the very least ensure that the contract reflects the sales agent's understanding that a lien in favor of SAG exists on the film.

CLOSING THOUGHTS

THIS ARTICLE HIGHLIGHTS only some of the many traps that lie waiting for unsuspecting producers. Many of the clauses found in distribution and sales agency agreements can be very confusing, and even the slightest change in wording can lead to a very different outcome.

The bottom line is: If you're lucky and talented enough to complete a finished film which a distributor is interested in, you have achieved the equivalent of running the ball all the way down the field to the one yard line. Don't fumble the ball and miss the opportunity for a touchdown by simply signing the first deal placed in front of you. All deals are subject to negotiations, and if the distributor or sales agent claims the terms are not negotiable, you should probably run far away. Most importantly, don't attempt to negotiate these terms alone. Hire a qualified entertainment attorney who can protect both you and your film as you search for the company that will help to make you a household name! **MM**

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