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Entertainment Law Circular
January 2019

PierceLLP.com

(310) 274-9191

Headed To Park City? Let Us Know, We'd Love To Meet Up With You.



Sundance Film Festival runs from January 24, 2019 through February 3, 2019 and Slamdance Film Festival runs from January 25th - Jan. 31st.

Pierce Law Group LLP will once again be at the Festivals and will be conducting **Daily Legal Clinics** at the Slamdance Headquarters at **Treasure Mountain Inn** (255 Top of Main Street). The clinic runs **Jan. 25 - 29 from 10am - 11:30am**. **Admission is free**. Meet your favorite Pierce Law Group attorneys in person! Pastries, Hot Cocoa & Cool Advice available daily.

No RSVP needed, just pop in any day or multiple days! But, if you'd like to give us advance notice and tell us what film issues you'd like discussed on the day you attend, contact us at: [Client Liaison PLG-LLP](#).

Pierce Law Group LLP will also be hosting its **annual Friends & Clients Sundance Steak Dinner** (*yes vegetarian and seafood options exist*) on **Monday, Jan 28** starting at **6:30 pm** (*so you've got time to make that screening*). If you qualify as a client or friend of the firm and will be at Sundance and you would like to [join us for our invite dinner](#), please contact us via email: [Client Liaison PLG-LLP](#) or call (310) 274-9191. Seating is limited. We will confirm your RSVP subject to availability and provide location and further details via a separate reply to your RSVP request.

Need to reach David at the Festival? Call or text his cell phone: (310) 770-0400.

On **January 17, 2019 from 5:30 pm - 9 pm**, the **Beverly Hills Bar Association's Entertainment Law Section** presents its annual **Entertainment Law in Review** which is a 3 hour program discussing the major litigation, transactional and ethical developments occurring in 2018. Three hours of CLE credit, including 1 hour of mandatory ethics credit will be awarded.

David Albert Pierce is the **Chair of the BHBA Entertainment Law Section** and will be introducing the panels. **Pierce Law Group's Litigation Department Head John Baldivia** is a **Program Chair** of this event and John prepared the voluminous year in review litigation panel materials.

For further information and registration, go to: [BHBA Entertainment Law Year In Review](#)

Each day from **January 25 - January 30, 2019 from 10 am - 11:30 am**, **Pierce Law Group** will be presiding over a daily **Entertainment Law Legal Clinic** at the **Slamdance Film Festival Headquarters at Treasure Mountain Inn in Park City, Utah**.

Pastries, Hot Cocoa and Cool Advice for filmmakers will be provided along with a different seminar presentation each morning. If you are in Park City, please stop by and say hello. **Admission is free.**

For further information go to: [Slamdance Legal Clinic Info](#) or contact us directly at [PLG Client Liaison](#).

On **Sunday, January 27th from 3:00 pm to 4:00 pm**, our **Litigation Department Head John Baldivia** will be lecturing on "**Ethics in Entertainment Litigation**" at **Southwestern Law School** as part of the California Bar's requirement for law students in legal extern programs to have a certain number of ethics classes as part of that curriculum. This event is a closed event for Southwestern Law students only.

Pierce Law Group's Trea Tran Lachowicz is a **faculty lecturer** for **Loyola Marymount University's Business of Film Certificate Program**. The certificate program is ten modules long with each module consisting of two four hour Saturday morning sessions. Individuals can register for all the entire program or module by module depending on their interests.

Trea will be teaching three of the modules, including, Module 1 which covers the topic of **Business Entities & Development / Prep-Production Legal Issues** and consists of two four hour classes on **Saturday February 9th and Saturday February 23rd from 8 am until Noon**. Enrollment for Module 1 of the ten module Loyola Marymount University's Business of Film Certificate Program is now open and **registration ends February 7th**.

Other subsequent modules as part of the Certificate Program will cover Accounting, Finance, Production Legal, Distribution Legal, Business Plans, Pitching, Tax Incentives, Financing Alternatives and Physical Production.

For more information and to register, please go to: <https://execed.lmu.edu/bof/register/>

Securing Rights? Don't Do It Wrong. By David Albert Pierce, Esq.

[The following is an article scheduled to be published in the Sundance issue of MovieMaker Magazine set to be released on January 24, 2019. This advanced copy is permitted courtesy of MovieMaker Magazine]

In the documentary, *The Kid Stays In The Picture*, legendary producer Bob Evans explains early and often that the key to success in Hollywood is to strive to hold on to the rights to a project when all around you are trying to obtain those rights for themselves. Time and again we see unrepresented creators fail to understand the true nature, scope and value of their rights. That results in those creators giving away their one lottery ticket to financial success. It is only after your project becomes a success that many first realize what they unwittingly gave away and in so doing threw away their own winning lottery ticket.

Money is always tied to rights.

If your project becomes a success that is when the true value of your project agreements are determined. When the ancillary rights become in demand, that is when you may discover those missing key points from your contract and whether or not you have the ability to profit long down the line as the sequels and merchandising brings money into the revenue waterfall. You need to strive to always be a part of that waterfall. Step one: Strive to stay attached to your rights.

You can become attached to rights in a number of ways. If you draft a wholly original screenplay based on nothing other than your own imagination, then you own 100% of the rights in that screenplay and all of its potential ancillary rights. "Ancillary rights" is everything that is derivative or inspired by the screenplay. Everything- that means all sequels, prequels, spinoffs, remakes, merchandising, books based on the film, theme park rides, video games, stage plays, etc.

When you are the original screenwriter, it is important to give away only those rights that are absolutely necessary to the producer who is ultimately acquiring your project. Where possible the original screenwriter should strive to "reserve" as many rights as possible. Typically, if you are dealing with an established player in the industry only a very few items will be capable of being reserved. For example, you should strive to reserve your right to draft the first re-write if the producer wants changes to the script. You should

likewise reserve the right to draft the sequel, prequel, spinoff. You might also try to reserve the right to draft traditional books (including books published online) and you may also be able to reserve the right to convert the story into a stage play. Although, today, as more projects from all different types of genres morph into stage plays, the most you may be able to do is give the producer acquiring the project a right of first refusal to do a stage play before you go forward and do it on your own.

When you are the screenwriter but the work is based on an existing property, such as a pre-existing book or a videogame (or if you are the person that found the great existing project and is planning to hire a screenwriter), your rights may be further limited by what the existing property owner is willing to give you beyond the mere right to draft only a screenplay based on the property as part of a single picture deal. But, that is not what you want. You want to follow the great business models that many producers have followed before you. For many producers, success has arisen through a plan to secure the rights in pre-existing properties, and like Bob Evans, insist that if someone wants to exploit those properties as a film and beyond, they need to take you along for the ride as the guy or gal who controls those underlying rights.

Maintaining your hold on rights requires an ability to convince buyers that they need you to remain attached to the project.

Producers need to secure rights. Sometimes, producers will "find rights" that perhaps if people were more diligent and questioning would realize those rights are tenuous at best and wholly unnecessary at worst. Think about every time a group gets stuck in a cave. The story plays out on every newscast, everyone knows the story, but inevitably Disney will make a broad public announcement that it has secured the rights to all of the trapped cave people almost instantaneously with their release. In reality anyone could produce a film about that story which all the world was aware of with multiple reporting sources no one single source which could take credit. But, by securing the life rights of the folks in the cave, Disney tells the world, "Back off, we are doing it first." Many people in the industry will believe holding the life rights of the folks in the cave means no one else can do the story. Others will simply take the announcement as a declaration that if Disney is going to make it chances are that's the one audiences will want to see. And yet others in the industry will realize all that the life rights contract means is that those particular cave folks can't give interviews or share their diaries with anyone other than Disney.

Recall, over 20 years ago, the sordid love triangle in which Amy Fischer "the Long Island Lolita" shot her much older lover Joey Buttafuoco's wife in the face. Every new outlet covered the story. Three different television movies were made by three different television networks. One secured Amy Fischer's life rights, one secured Joey Buttafuoco's life rights and one secured the rights of the newspaper columnist that covered the story more extensively than anyone else. Anyone could have made a film, does having rights help in any way? Well the real value is supposed to be that you are getting the inside information that no one else is getting from the person with who you have contracted to obtain their life rights. But in a more practical sense, studios simply feel at ease when some rights-any rights- have been secured. When you enter a pitch and begin by stating you hold rights, third party buyers naturally have their ears perked up and they take the pitch more seriously.

Case Study: New Line Cinema.

Bob Shaye the founder of New Line Cinema adopted a different business plan on his path to become a Hollywood mogul. Rather than securing rights from others, he focused on bona fide "out of copyright" public domain rights that he didn't need to secure from anyone. Anyone can exploit public domain works. Bob Shaye just happened to be the guy smart enough to figure out how to do it and keep others from exploiting the public domain works themselves. Bob realized that the 1920s film *Reefer Madness* was a public domain work that anyone with enough sense and desire could go to the Library of Congress, check out the master print, make a copy of that print and then distribute it around the country.

Bob Shaye realized this film originally made as an anti-drug film played as a crazy comedy in the eyes of modern generations and he marketed the film at late night screenings and screenings on college campuses. Sure, anyone of those college campuses or theaters that ran *Reefer Madness* could have flew to Washington DC and secure a copy of the print that was deposited with the Copyright Office in the Library of Congress. For the cost of duplication, they too could have distributed the public domain work without paying Bob Shaye's distribution fee. But, that wasn't what happened. Theaters and colleges liked the ease with which Shaye made the film available. So, they were happy to pay his distribution fee just like they would pay any other distributor that came to their town. Some no doubt had no idea they could have duplicated the film themselves. Other may have known, but thought why go through the hassle when Shaye's New Line will make it so easy and simple to screen.

Bob Shaye would then go on to further his business model by focusing on producing inexpensive horror films with great looking inexpensive unknown actors knowing that audiences would come not for the actors name but for the scare that was in store for them. Several producers have utilized this type of business plan. Today Jason Blum has perfected and mastered the art of capitalizing from low budget horror films.

Moreover, if people were frightened once, Shaye understood that a franchise could be born and those audiences would come back to be frightened by sequel after sequel. Of course, that only works if you as the producer do not foolishly give away the rights to the sequels!

Rights are therefore a commodity in this town. Make sure you are always aware what's at issue and what you are giving away.

If a big company is providing the financing for your project, then they are justifiably going to want to secure the entire copyright, including all ancillary rights to the project that they are funding. Your goal is to carve out little pieces to make sure that you are a part of those ancillary rights. But what is always shocking is when a small distributor or say a foreign sales agent presents an independent filmmaker with a sales agency contract and the language in the contract grants that foreign sales agent all "rights in all media and formats presently known or hereafter created, including ancillary and derivative rights throughout the universe in perpetuity." While this language makes perfect sense in a situation where a studio is fully financing your project, it is absurd when the sale agent is merely picking up the film after its been made and only for a term of years during which he tries to find different territorial buyers for your film. Under these circumstances, why would the sales agent have any rights to a sequel or remake? Yet uninformed producers will sign such deals if they enter a deal without a competent attorney who can more carefully tailor the contract to cover only the single picture at

such deals if they enter a deal without a competent attorney who can more carefully tailor the contract to cover only the single picture at issue which the sales agent did not finance and thus none of the ancillary rights should be on the table with that type of buyer.

Valuable Rights can be found in places that others may never think to look. Go exploring and you will find them.

Many savvy producers have profited from adopting a business model that involves securing rights from many different sources. As illustrated above, the world is filled with interesting life rights from individuals with unique experiences worthy of having a film made about them or story rights tied to existing literary properties both big and small. There are countless books and stories out there waiting to be converted into a film script. Often the original people that control those rights have no connection to Hollywood and will appreciate a call or letter from even an unknown producer looking to inexpensively option their story with the hope of a more lucrative payday once the story is developed into a screenplay and produced as a film.

As Bob Evans said, "Securing the rights is everything."

I had the privilege of representing Charlie Wachtel and David Rabinowitz, the primary screenwriters of "Black Klansman." More than that, Wachtel & Rabinowitz have both a mastery of artistic creativity permitting them to write amazing screenplays, as well as, a keen business savvy that allows them to spot potential great story ideas and secure those rights early for themselves. Wachtel & Rabinowitz found the obscure autobiography of Ron Stallworth which never particularly created much buzz amongst literary critics or the best seller lists. But, the screenwriters recognized that this book would make a great film and more importantly they were able to reach out to the book author directly and secure the rights ensuring them the ability to take the first crack at writing the script and obtaining co-producer credits for both them.

David Klawans is another producer who has developed a winning business model by securing rights to compelling but somewhat obscure stories and often when those stories aren't even a part of an actual book but rather a mere intriguing magazine article. For example, it was Klawans who found an article in Wired Magazine which he optioned and that ultimately become the box office hit "Argo." Presently, he has multiple films in development which all stem merely from interesting magazine articles he read and for which he then acquired the rights. These development projects include, "Uncatchable" based on an article about a modern day Robin Hood, and "Jailhouse Rock" based on an article about a prison guard that organized a singing contest for inmates. By finding these diamonds

in the rough and developing them or having the knack to sell industry financiers on a unique vision as to how these projects can be exploited, success can result; and the only thing the producer had to do was spot the right projects and fight to hang on tight to his or her control of the project as it gets further and further developed down the line.

Ok, so how do you go about securing rights?

Purchase Rights upfront.

If possible, you can always outright purchase the rights from the original rightsholder. If a small author or magazine writer has story and you approach them wanting to convert it into a screenplay, some people are so tickled by the notion that they may outright sell you those rights for cheap. Perhaps, they are willing to sell all rights for \$20,000 plus 5% of the profits you make from the film. Perhaps they want a bit more or perhaps you can remarkably buy it for less. The fact is if the writer does not have savvy representation nor tied to a big publishing house that understand what traditional Literary Option Purchase Agreements look like, you may be able to carve out terms for a straight out Purchase of the Rights for a dollar amount that is in your reach. The advantages of a straight out purchase is that you will forever control those rights until you decide to option or sell them and you will never be under a time limit for which to make the film, as is otherwise the case when dealing with a traditional Option/Purchase Agreement. With more and more books being self-published each year and the ease with which the internet helps authors engage in self-publishing, straight out purchases are more viable today than they have ever been.

Of course, if the author has a business savvy agent or attorney, or if the author is tied to a traditional publishing company with experience in participating in the process of a book ultimately becoming a film, a straight out purchase price for peanuts is not likely to occur. Rather, the more traditional way of securing those rights is through an Option/Purchase Agreement.

The trusty Literary Option/Purchase Agreement.

Under a Literary Option/Purchase Agreement, a producer pays an upfront fee for the writer to give the producer the exclusive assignable right to produce a film based on the property being optioned. If the producer is successful and capable of commencing production (or is otherwise ready to pay the purchase price) before the option expires, then the producer (or his assignees) will own the project. Options usually have an initial term for one year and that term can be subject to multiple extensions in exchange for more option payments. The initial option payment is usually applied against the ultimate purchase price but the extended options are generally not applied against the ultimate purchase price (and constitute additional windfall money to the rightsholder). The WGA mandates that the minimum option payment which is paid upfront must be at least 10% of the ultimate purchase price. So, if the purchase price is \$100,000 the Option Payment must be \$10,000. The WGA has some exceptions for low budget films under their low budget agreements.

Case Study of Option/Purchase Agreements in action: Nine pages of notes can equate to a hefty six figure deal.

I had a client who simply created a nine page treatment based on a real life event which he had certain knowledge of. During a 10 year period from 1998 to 2008, the client earned over \$150,000 in option money and "set-up" bonuses alone. The project would be optioned and then the option would be renewed for an additional year or two, and then the option would expire and another producer would immediately option it. And, so it went. Then, in 2008 when a producer finally pulled the trigger and paid the mid-six figure purchase price (which was separate from the \$150,000 in option payments paid over 10 years, of which only \$10,000 was applicable against the purchase price). Plus, our client received an executive producer credit. Not bad for simply writing down nine pages of recollection about a real life event.

Shopping Agreements: The ugly bastard child of the traditional Literary Option/Purchase Agreement

For those producers whom a \$10,000 Option Payment might as well be a \$100,000 Option Payment, the industry has to the chagrin of the WGA developed a producer cost savings technique that is the ugly bastard child of the Option/Purchase Agreement, which is called either a "Shopping Agreement" or a "Producer's Attachment Agreement." These agreements usually give a Producer a certain

exclusive amount of time to try and find financing for the project in exchange for little or no upfront money paid to the Owner of the Rights.

Shopping and Attachment agreements are usually for less duration of time than Option/Purchase Agreements (say 6 to 9 months, but producers always seek to extend that longer if they can). Shopping and Attachment Agreements also should differ from Option Agreements in that there generally should not be a purchase price set at the start of the Shopping or Attachment Agreement, rather a proper Shopping Agreement should permit the Rights Holder to negotiate his own deal with the ultimate financier, but with the condition that no deal can be entered unless the producer is attached and generally all parties must negotiate in good faith and based on industry custom and with reference to the ultimate budget of the contemplated film.

Collaboration Agreements & Joint Ventures are a great way to secure rights when short on cash.

Finally, if a straight out purchase or traditional option/purchase is not something that a producer can afford due to cash limitations, then the producer should consider pursuing securing rights to existing stories and developing them into film projects, based on a business model that utilizes "Collaboration Agreement" or a "Joint Venture Agreement." These types of agreements recognize that the person with the great story has as much to offer as the person looking to produce that story.

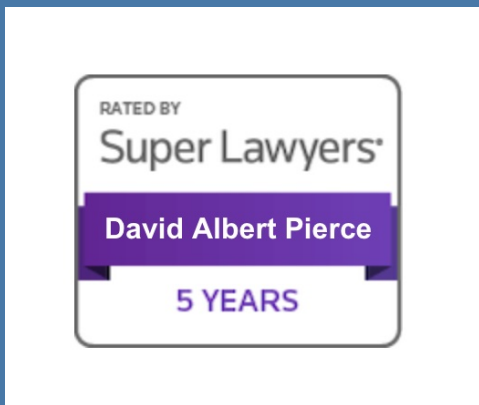
Therefore, if money is not going to be paid out for the exclusive option to control the property for a certain time period, then the parties should essentially act as partners. The person who holds the rights contributes those rights to the collaboration or joint venture, and the producer contributes his producing skills and financing abilities to the collaboration or joint venture. In turn both parties will be deemed 50-50 rightsholders of the property and the sale of the property to a third party will be split 50-50 with each side being fully aware and fully involved in the transaction. The writer will usually get some type of producer credit and profits will be equally shared. Yes, the producer is giving up more than he would otherwise give up if he could afford a traditional straight out purchase or traditional WGA governed Option/Purchase agreement. But, since the producer is unable or unwilling to pony up the proper dough upfront, he or she needs to make things balance out for the rights holder in other ways. By asking the rights holder to not accept cash upfront but instead try to work with the producer to create something that will sell, the producer is in effect asking the rights holder to be his partner.

If I need help with my law practice, I either hire an Associate who is a salaried employee or I contract with a Partner who shares in both the profits and the losses. I can't expect an attorney to be an employee but have an understanding that he won't get paid unless we win the case. And if I do offer an attorney such a deal with equal risk and reward, then that attorney is going to be seen as my partner. Thus, the analogy should hold true with a rights acquisition. The producer can either pay the rightsholder a proper meaningful option payment or alternatively he can offer to be in partnership with the rights holder and in turn allow the rights holder to profit just at the same time and in a similar proportion as the producer.

While I have always viewed such collaborations as incredibly fair to both sides and believe good karma will come to such productions that utilize this method instead of seeking to improperly exploit the rightsholder, the fact is many agents and attorneys presented with a fair 50-50 deal are not accustomed to seeing fair deals and their initial reaction is often to put the kibosh on it. Nonetheless, if the producer is a novice and brings little or nothing more to the table than the rights holders themselves, these types of collaboration agreements make sense.

Anyone interested in acquiring the life rights of an entertainment attorney who has written for MovieMaker Magazine for close to 20 years? There could be a great story there. If so, feel free to contact me with this or any of your entertainment law related questions at david@piercellp.com

Pierce Law Group LLP recognized as an industry leader by peers and professional associations:



About Pierce Law Group LLP

Pierce Law Group LLP is a full service, boutique entertainment law firm that provides both transactional and litigation legal services. Our practice areas include entertainment law, intellectual property (copyright, trademarks, right of publicity), film finance, securities law, production counsel, and labor & employment issues affecting the entertainment industry, with an emphasis on film, television, and new media. We represent production companies and other creative businesses as well as artists including producers, actors, writers, directors, comedians, and other entrepreneurs. Our client list includes both Academy Award and Emmy Award winners. We utilize an academic and analytic legal approach to accomplish creative solutions to our clients' goals.

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