

QUESTIONS ABOUT CONTESTS & CLEARANCES

Frosty: Navin, cheer up, you have taken in \$15 and given away 50 cents worth of crap, which gives us a net profit of \$14.50.

Navin: Ah! It's a profit deal! Takes the pressure off! Get your weight guessed right here! Only a buck! Actual live weight guessing! Take a chance and win some crap!

—**STEVE MARTIN**, *The Jerk*

CAN SOMEONE RUN A CONTEST to raise money? Such as a screenplay contest with an entry fee, where the money will go toward the expense of making the winning screenplay into an independent or other movie? Just something I have been tossing around and do not know where to look to for the answer. I definitely do not want to do anything illegal. Thanks for your time and help.

—*Joe S.*, LOS ANGELES, CA

SHORT ANSWER: Financing a film can be done by operating a contest whereby the participants pay an entry fee PROVIDED (1) the winning is based on skill and not solely chance and (2) the contest is run in compliance with state laws governing contests of skill. Games of chance, as opposed to skill, are lotteries and generally constitute a punishable crime unless you're a state government, Native American tribe or a "wiseguy" who has taken the Code of Omerta.

THE EXPLANATION BEHIND THE ANSWER: The California Business Code defines a "lottery" as "any scheme for the disposal or distribution of property by chance, among persons who have paid or have promised to pay any valuable consideration for the chance of obtaining property or a portion of it." By contrast, a "contest" is defined as "any game, contest, puzzle, scheme or plan which holds out or offers to prospective participants the opportunity to receive or compete for gifts, prizes or gratuities as determined by skill or any combination of chance and skill and that is, or in whole or in part may be, conditioned upon the payment of consideration." Many other states adopt similar definitions, but some may differ.

Although both lotteries and contests require participants to provide consideration (i.e. money) to enter, a "lottery" is based solely on chance, whereas a "contest" requires at least some skill to win the prize. Under California law (and other states that share California's definition), a contest for the "best screenplay" which requires an entry fee would satisfy the definition of a "contest," because writing a screenplay requires some skill (although those who saw *The Day After Tomorrow* may question this assertion).

To operate a lawful contest, the organizers must also adhere to state laws governing how the contest is run and what is divulged to the contestants. As in the case with fundraising via the sale of stock to passive investors (see *MM* Issue #55, Vol. 11), the state governments demand that fundraisers tell the truth! If you can't handle the truth, then running a contest is not for you. Ever notice all that small print at the end of an advertisement for a contest or the fast-talking disclaimer on the radio concerning your favorite DJ's prize giveaway? Many of those statements and disclaimers are generally mandated by statute,

and they will apply to your screenplay contest.

Prior to organizing a contest in California or any other state, you should check with an attorney to learn about the specific details of these laws. If you conduct a contest in multiple states, you must comply with each state's laws. Most contest operators include the statement "except where prohibited by law" to potentially help protect themselves from a contestant outside the laws of their own state.

In addition to the generic contest rules, special disclaimers and application submission forms should be drawn up to prevent the screenwriting contest operator from subsequent claims of idea theft and copyright infringement. This disclaimer language should be similar to the type of disclaimer language utilized by most legally sophisticated production companies and studios that receive screenplays from outside sources.

Now, all you need to do is establish yourself as a lofty organization whose screenwriting prize will actually mean something to someone, collect a boat-load of submission fees and your below-line-budget will be halfway funded!

We can stand here like the French, or we can do something about it.

—**MARGE SIMPSON**

I'VE BEEN SPENDING THE LAST FEW YEARS writing a book about classic French films that were never released in the United States—the best foreign films that Americans have never seen. It's a treasure hunt to find some of these old, lost movies and I will be traveling back and forth to France to see some films I can't see here and to interview some movie people. I have a question about still photographs: Ideally, I would like to get one or two still photographs from each film. How do I go about it properly? If I ultimately make a documentary or fictional film, will I also need releases to use these objects as props or set dressing?

—*Sean O.*, BOSTON, MA

Both of your questions pose a rather simple clearance issue, although the procedure for identifying the proper rights holder and securing clearance from French rights holders may prove somewhat time-intensive. Clearance is easy; finding rights holders is hard.

America and France are treaty partners to the Berne Convention, which gives reciprocity to French and U.S. copyright laws. Your use of still photos in a book published for profit is a use that requires a license from the copyright holder. This same rule applies whether you intend to use the movie poster or photo as set dressing in a movie or as illustrations in your book. Most likely the studio that distributed the movie will hold the copyright, although the original producer might hold the copyright instead of the distributor. If the same company distributed many of the movies, you can probably do one standard deal for a bunch of photos at one time. In some situations, if the photos are not movie posters or actual stills from the movie, but rather behind-the-scenes photos, the individual photographer may hold the copyright.

In addition, the individuals depicted in the still photographs may have

retained their right to control their "right of publicity." If this is the case, a separate release from those individuals may also be necessary before the photo can be used.

I would suggest that you find a publisher first and let the publisher's attorneys put in the hours associated with locating and these licenses. By waiting until you have a publishing deal in place, you can use the publisher's resources. Even if the license to use the photo is free (which might be the case because the owner of the book could want your book to promote the film), the time and expense associated with tracking down the copyright holder can be considerable.

TIPS FOR MOVIEMAKERS: Movie makers looking to acquire a license for props and set dressing do not have the luxury of waiting for the distributor to secure a license because if a license cannot be secured, all scenes containing the poster or photo would need to be re-edited to omit use of the unlicensed work. This is a far more costly endeavor than an author simply omitting photos for a book proof before it goes to print.

In the course of my practice I regularly see inexperienced movie makers including posters (particularly movie posters) as set dressing without obtaining the proper clearance for those works. What the indie movie maker sees as an homage to his or her favorite films, Miramax and Fox see as willful copyright infringement. If the indie movie maker secures distribution, both the distributor and the Error & Omissions insurance carrier will demand proper licenses be secured from the copyright holder and additional releases from each actor depicted on the poster.

Here in the U.S. each major distributor has a specific department established for the purpose of granting permission for use of its films and their ancillary creations (such as movie posters). If you want to use a movie poster, clip or other such items from a U.S. distributor, contact the distributor's Clearance Release Department with your request in writing. You'll need to send a copy of the script with the pages which reference the licensed work clearly identified for their review. They will then direct you to which actors (if any) must give their approval for the use. There is no guarantee the

distributor will grant you the right to use their materials (nor is there a guarantee that the actors portrayed in the materials will grant their approval). In addition, the distributor or the actors depicted in the materials may or may not demand payment for the use. If you are using a film clip, SAG will require that you compensate the actor for the re-use of the footage in your film. Finally, the distributor that granted the release will request a copy of the finished film or the scenes from the finished films which incorporated their work to ensure the use was in keeping with what they believed it to be.

Another point to consider is that your distributor may ultimately not be keen on depicting a movie poster of a rival distributor's film in your movie anyway. If it doesn't advance the plot, your distributor may want the scenes depicting the other work deleted.

If you're short on time or money, you may want to skip using that classic *Reservoir Dogs* poster in your main character's bedroom and opt for using an original piece of art by a local artist who would be thrilled to have his or her artwork included in your movie. Of course, make sure that said artist signs a clearance release memorializing your permission to use the work. Good luck and bonjour! **MM**

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PIERCE
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