

# SELLING OUT SMART



NEGOTIATING AT THE 2013 AMERICAN FILM MARKET, SANTA MONICA, CA. IT'S TIGHT WORK, BUT SOMEONE'S GOTTA DO IT.

Courtesy of the American Film Market

## A DISTRIBUTION DEAL IS A SLIPPERY GRAIL, SO IT'S ESSENTIAL THAT YOU NAIL IT DOWN THE RIGHT WAY

**S**enario One: Your film has made it to Sundance (or Cannes, or Tribeca, or Toronto). Congratulations! If you produced the film without distribution in place, now it's time to shop it to distributors, sales agents, and acquisitions executives in the quest for distribution and the almighty payment it generates. Your entrance into elite festivals means that all the big (and little) distribution players that *should* be interested in your film, will be—and *will* all have an opportunity to render offers at the same time. Now how do you capitalize on the industry's attention?

**Scenario Two:** Didn't make it into a world premiere festival? Fear not. There are still a number of great ways to place a spotlight on your film and get the attention of acquisition executives. These include novel publicity campaigns, submissions to regional or genre-focused festivals, and 'crowd-sourcing' your audience (i.e. aggregating audiences beforehand to create a buzz with potential distributors). Still,

the same advice about the right way to seal a deal applies.

**1. Select a Producer's Rep with Caution:** A producer's rep might be a talent agency or attorney specializing in independent film, a former acquisition executive turned filmmakers' friend, or any other industry player capable of building up that all-important contact list. They attempt to secure deals with domestic distributors and foreign sales agencies. Domestic distributors might cover only U.S. & Canadian theaters, or they might specialize in one form of media such as DVD or VOD. The distributor might also take on all international territories, but if not, a foreign sales agency is needed to broker individual deals with the theatrical, television, and home video distributors located in each country.

It's the producer's rep's job to help determine the best distributor(s) for your picture and acquire the best deal terms from them. It's *your* job to hire the best producer's rep. Producer's reps are useful, but not always essen-

tial. Some have great negotiating skills, others have little more than an industry phonebook which you could purchase yourself. Different reps excel with different genres. Be as cautious in selecting your producer's rep as you would be in selecting your distributor. Producer's rep contracts can have a lot of devil in their details. Understand how long the exclusive term of representation will last, and if you have any means of escape if the rep does not perform as anticipated. You should also determine whether the agreement covers legal review and analysis of distributor deal terms and long form agreements. Negotiating broad deals on a cocktail napkin and reviewing a 30-page contract are two very different skills. Often, an entertainment attorney will be needed to supplement the producer's rep, to ensure the long form contract doesn't take away with legalese what the rep negotiated on a napkin at that crowded bar in Park City.

**2. Don't Show the Film Until You're Ready to Foster Competitive Bidding:** You only get one chance to make a first impression. In acquisitions, films are like fresh fish, not fine wine—they don't get better with age. Don't announce that your film has a date until you are truly finished with it and ready to make that grand debut. Executives don't sit through a film twice, so keep it new. If you truly believe your film will be worthy of a bidding war then make sure you *allow* a war to occur. Your best bargaining position exists when you have two or more distributors competing for your film. At the same time, don't over-extend your hand. If you keep a distributor waiting too long for an answer and no others come to the table, your first offer may come back with less once they recognize that there aren't any other bidders out there.

If your film is lucky enough to gain acceptance into a prestigious film festival, your first selective screening date should be that festival. It is generally recommended that you do not give sneak previews to distributors in a piecemeal fashion, though they



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L-R: SLAM DANCE CO. FOUNDER DAN MIRVISH, SAC-AFTRA'S ASSOCIATE DIRECTOR OF NEW MEDIA, BOB JENSEN, AND THE AUTHOR

Courtesy of David Albert Pierce, Esq.

press hard for a sneak peak. Every attempt should be made to have as many acquisitions people as possible watch the film in a theater with a pristine print at the same time. If the film is well-received in that first screening, a mad rush to close a deal can incite a bidding frenzy.

DVD screeners are the least desirable way to market a film that was intended for a theatrical environment. However, if you are not fortunate enough to have a film at a festival, can't afford a screening room, have a film that's best served for television distribution or one that simply lacks big names and buzz, DVDs may be the best alternative.

**3. Know Your Buyer:** Research everything you can about your potential suitors (same advice goes for dating). Some distributors are better than others with a particular genre. Likewise, some may have a track record for being filmmaker-friendly. You are entering a distribution deal for a long time, so make sure you know this company's track record, reputation, financial health, leverage, and their ability to collect from exhibitors and retailers. Do you get along with the decision-makers at the company? Do they have any conflicting or complementary films?

There is no better reference source than a moviemaker that has had past dealings with the distributor. They may be sworn to secrecy about their deal terms, but they can tell you whether they were ultimately happy with their choice. If a distributor is not willing to disclose information about whom it has done business with in the past, you might want to avoid them. In addition to the names of producers a distributor provides, search out other names not given freely. Most distributors and sales agents have websites listing the titles

they're hawking. Track their producers down and ask for their impressions of the company you are considering.

**4. Don't Act in Haste:** Always get commitments in writing and don't make any commitments yourself, except in writing. Important questions: How much is the distributor paying upfront? How much later? When? What is the definition of recoupable costs and deductions, distribution fees, overhead, cross-collateralization, payment schedules? Are they allowed to use sub-distributors with double distribution fee? Is there a right to audit their books? Are there guaranteed marketing commitments, special promotions, advertising? What will the release patterns be? Do you retain any creative say? What if they hold your film and never distribute it?

A common acquisition trick is for the distributor to pressure the producer into releasing the elements of a film without taking the time to fully negotiate a contract. You will be told that you must provide the distributor with access to materials immediately or else the distributor cannot meet some upcoming deadline, such as a market like Cannes or the American Film Market. Don't be fooled. Different markets occur about every three months, so a distributor can always justify the need to rush to make the next one, and once they have the film your negotiating power is severely hindered. Remember, another market is always just around the corner. Take the time to fully negotiate the deal with the help of an experienced entertainment attorney who will spot the traps in a distribution contract. Any additional money and

time you spend in carefully negotiating a deal will pay off immensely.

**5. Protect Copyright and Ancillary Rights:** Among the many clauses that exist in a distribution agreement, perhaps the most important are those that dictate who owns the copyright of the picture and all the numerous rights that extend from it (rental and sales of DVDs, VOD, pay-per-view, satellite, pay cable, free television, airlines, multi-media, Internet distribution, etc). If the distributor you deal with does not normally exploit a certain market or has stated they have no plans to, try to carve out those rights from the deal. In addition, distributors may attempt to claim ancillary rights such as soundtrack album rights, prequel/sequel/remake rights, television spin-offs, and merchandising rights. It is your job to try to pare them down and preserve as many as you can for yourself. The last thing a moviemaker wants is to begin a sequel or sell off rights for a remake, only to discover that they inadvertently gave those ancillary rights away.

Be diligent and involved in each stage of this process, and maintain communication with your producer's rep and potential buyers. Remember, no matter how eager you are to sign a deal, once it's signed there are no do-overs. When the long form contract comes, reading all the redundant legalese might put you to sleep. That's exactly what it's intended to do! Stay awake, stay alert, and make sure to have people who understand the clauses by your side. Then hopefully you can sit back and wait for that advance check to clear. **MM**



A FINANCING CONFERENCE AT THE 2013 AMERICAN FILM MARKET