

The Role of Production Counsel in Independent Film Production

DESPITE ITS RISKS, the film business remains viable, with numerous quality independent films continuing to be made. Production attorneys may not take the artistic risks that an actor or director takes, but their work can improve the odds of a film's success. In addition to drafting and negotiating contracts for performers and production personnel and handling copyright and other legal matters, the production attorney plays a significant role in keeping the production on schedule and under budget. If the legal issues involved with the production of a film are properly addressed early, the film's chances for completion and distribution are enhanced.

When the production attorney joins the project, the producer may already have optioned the underlying property or engaged a writer who has delivered a screenplay. Before production commences, even prior to preproduction, the production attorney should make an analysis of the property's originality and chain of title. An outside search firm may be retained to conduct the search of the chain of title, but the production attorney at least must ensure that clearance is completed with appropriate findings. A later challenge to the producer could halt production or distribution or lead to a lawsuit.

The production attorney is wise to warn the producer against placing too much of a financial stress on the movie before it is made by promising generous compensation to the actors or production staff who sign the first agreements. It will not take long for the production budget to shrink, leaving little for the financial demands that come later. Production counsel may also encourage the producer to hire a financial adviser or accountant familiar with independent productions. Many producers are confused by the details of deferred payments or profit participations, including what triggers deferred payments, how to calculate them, when they are paid (before or after investor payouts), and how to balance back-end participations against up-front fees. These negotiations can delay the start of shooting.

Locations and Contracts

The multifaceted role of the production attorney does not stop with negotiating intellectual property and contract issues before production. Early scouting of locations and obtaining commitments from property owners is essential to avoiding interruptions that can seriously damage the shooting schedule. Producers should be helped and encouraged to secure backup locations in the event that a location is canceled. A location can become unavailable as the result of force majeure or other problems. The disruption of the shooting schedule and the efforts required to notify cast and crew could result in paying people to stay home. In a similar vein, the production attorney must remind the producer to check for trade names, store signs, and product names. If these appear on film before permission has been obtained, exorbitant fees may be demanded, and the names or signs may have to be digitally altered in postproduction, which adds to the cost of the film.

Unless the production will utilize only nonunion talent, the producer must become a signatory to the Screen Actors Guild. The production attorney may need to prod the producer through the signatory process, which can take a few weeks. Before the process ends, the attorney may make sure that the producer has a realistic budget prepared. The budget determines which SAG agreement applies: low budget, modified low budget, or ultra-low budget.

Prior to preparation of the application, the production attorney should review the SAG agreements with the producer. Not all permit non-SAG performers to be hired, for example. There are important

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differences in the compensation obligations, overtime pay, and other requirements. A production attorney will quickly hear from the manager or agent representing the talent if the producer is not granting the rights afforded under the picture's SAG contract.

While producers generally love to find music that contributes to the mood and reinforces the story, they often leave the legal clearances for production or even postproduction. Music presents significant legal issues that may cause budget overages or lead to removing music from the soundtrack. Not all production attorneys perform this function, but legal guidance and oversight are necessary. The rights holders must be found and copyright status determined before licenses can be negotiated with music publishers and record labels. Negotiations may go back and forth until a fee is agreed upon that is in balance with the picture's budget and the licensor's terms. As an alternative, the producer may hire a composer to create an original score. This choice creates less urgency, because a work-for-hire contract will likely be used. A work-for-hire soundtrack, however, may not be what a producer prefers.

A production attorney for a movie faces challenges similar to those that others in the movie industry face, including considerable legwork under deadline pressure and in the context of budgets that are stretched thin. One central challenge is counseling a producer whose passion project does not always adhere to sound business approaches. Despite these risks, attorneys can find tremendous satisfaction in this unique industry. A producer will long cherish and respect the production attorney whose counsel helped protect the film's schedule and budget and contributed to a completed picture. ■

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