

RISKY BUSINESS: FINANCING & DISTRIBUTING YOUR INDEPENDENT FILM

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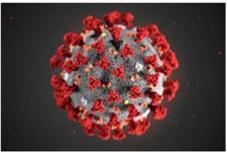
VOLUNTEER LAWYERS
 FOR THE ARTS
 JUNE 2020




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Covid-19 Production Guidelines

IFTA has a listing of worldwide Covid-19 production guidelines updated regularly
<https://americanfilmmarket.com/worldwide-covid-19-film-production-guidelines/>



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Transformation of the Industry

- From Moguls to Managers
- Moguls were entrepreneurs and risk takers
- Today's executives want to minimize risk



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Louis B. Mayer



Co-founder of Metro-Goldwyn-Mayer studios (MGM) in 1924

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The Studio Factory



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Studios lose power when roster System Ends

Roster system fell apart:

- 1) Rise of TV and fall of movie attendance
- 2) Legal decisions limited control over talent (actress Olivia de Havilland filed a lawsuit in 1943 against Warner Bros. resulted in a decision that limited personal services contracts to 7 years.
- 3) Anti-trust decisions causing divestiture of theaters owned by studios



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Breakup of Studio System

United States v. Paramount Pictures, Inc.,
334 US 131 (1948) (aka the **Paramount Decree**)
was a landmark United States Supreme
Court antitrust case that decided the fate of
movie studios owning their own theatres and
deciding which theatres would show their films.



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Stars and Directors are now king

- The power has shifted to top talent
- Executives court talent don't boss them around
- Less casting couches for Stars



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Difficulty of Managing a Creative Enterprise

- Movies cannot be made on an assembly line
- Every movie is unique
- No brand Name loyalty



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No Brand Name Loyalty



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No Monopolies & Low Barriers to Enter

- No studio can monopolize great stories
- Barriers to entry are very low because of digital equipment and editing
- The next great movie can come from anyone with a great story idea.
- Movies without any pedigree can be very successful (e.g. Paranormal Activity, The Blair Witch Project).



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Low Barriers to Enter Industry

- No studio can monopolize great ideas/stories
- Barriers to entry are very low
- The next great movie can come from anyone with a great story idea.
- Movies without any pedigree can be very successful (e.g. Paranormal Activity, The Blair Witch Project).



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Derivative Indie Films Often Fail

Fresh Original Content- every film unique



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Risk Avoidance

Executive Fear of Losing their jobs motivates decision making

Motion pictures entail more risk than



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Tentpole Pictures

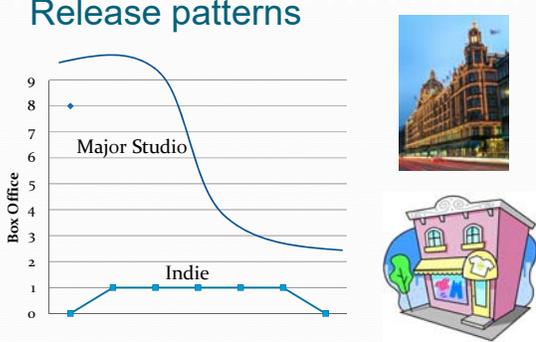
- Men in Black 3, estimated cost \$250 million
- Dark Knight (Batman) \$225 million
- 28 blockbusters in 2017
- Production costs do not include Prints and Advertising



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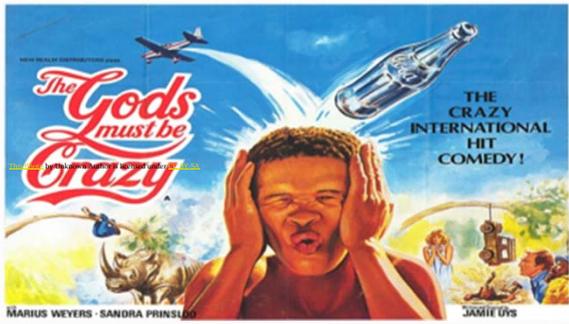
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Release patterns



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There are several movie industries operating side by side

- Major Studio Tentpole Releases Like Star Wars, Spiderman
- Art House and foreign language pictures which are a serious, independent film aimed at a niche market rather than a mass market audience
- Genre pictures *Night of the Living Dead* to *El Mariachi*

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Indies rely on word of mouth

- My Big Fat Greek Wedding (356 million worldwide).
- The Passion of the Christ (604 million worldwide)
- The Gods Must Be Crazy (51.2 million USA)



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Indie Features Cost Less

Estimated average budget for indie dramatic features: \$1.7 million.
 Estimated average budget for documentary features: \$400,000.



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Budgets

Feature Films Entering Production²³



	2015	2016	2017	2018	2019 ²⁴
Films produced (est. \$15M+ budget)	139	135	162	171	178
Films produced (est. \$1M-\$15M budget)	356	376	387	405	423
Films produced (est. <\$1M budget)	237	277	263	232	213
Total films (all budgets)	732	788	812	808	814
MPA member sub-total	110	99	108	107	173
Non-MPA member sub-total	622	689	704	701	641

Source: <http://www.nationalcinematheque.org/wp-content/uploads/2019/03/NCF-111018-1019.pdf>

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Major Studios often missed the boat on new technologies

- Broadcast TV
- Cable TV
- Home Video
- Streaming Music & Movies



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Top Box Office Indies

Rank	Film Title	Distributor	Genre	Daily Box Office	% change	B.O. Cume	Days
1	Darkest Hour, The	Summit Entertainment	Science Fiction	\$1,465,479	41%	\$3,137,963	10
2	Twilight Saga: Breaking Dawn, The	Summit Entertainment	Drama	\$688,784	36%	\$275,530,738	45
3	Tinker, Tailor, Soldier, Spy	Focus Features	Foreign	\$389,128	12%	\$3,955,734	24
4	Pariah	Focus Features	Drama	\$18,764	62%	\$84,986	3
5	Margin Call	Roadside Attractions	Drama	\$8,247	-6%	\$5,246,397	73

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Movies With Lowest Budgets to Earn \$1 Million at US Box Office

Release Date	Movie	Production Budget	Domestic Gross	Worldwide Gross
1 2/26/1993	Ei Mariachi	\$7,000	\$2,040,920	\$2,041,928
2 9/25/2009	Paranormal Activity	\$15,000	\$107,918,810	\$194,183,034
3 8/1/1991	Slacker	\$23,000	\$1,227,508	\$1,227,508
4 8/1/1997	In the Company of Men	\$25,000	\$2,856,622	\$2,856,622
5 6/30/1972	Deep Throat	\$25,000	\$45,000,000	\$45,000,000
6 10/19/1994	Clerks	\$27,000	\$2,852,326	\$3,673,138
7 3/27/2015	The Salt of the Earth	\$44,936	\$1,343,349	\$4,167,608
8 3/16/2001	Gabriela	\$50,000	\$2,335,352	\$2,335,352
9 8/9/1995	The Brothers McMullen	\$50,000	\$10,202,068	\$10,202,068
10 7/14/1999	The Blair Witch Project	\$60,000	\$140,539,099	\$248,300,000
11 5/7/2004	Super Size Me	\$65,000	\$11,529,368	\$22,233,808

Source: <http://www.the-numbers.com/movie/budgets/>

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Films Released Domestically

- 835 films released in theaters in 2019
- MPAA members released 124 films
- Independents released 711 films



Source: MPAA Theme Report 2019

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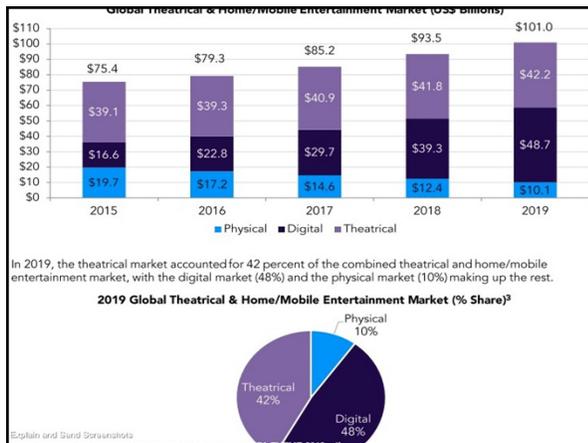
Top Films Dominate

- However, top 133 films made up 95% of box office in 2019.
- So major studios release fewer films, but they garner most of the box office.

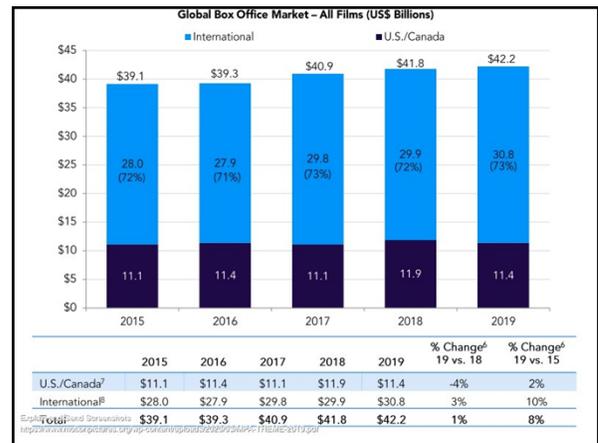


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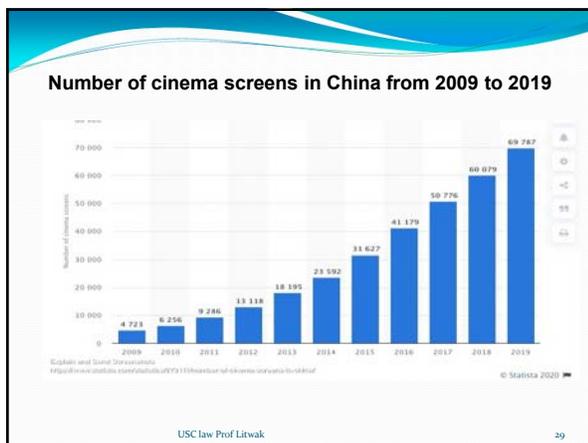
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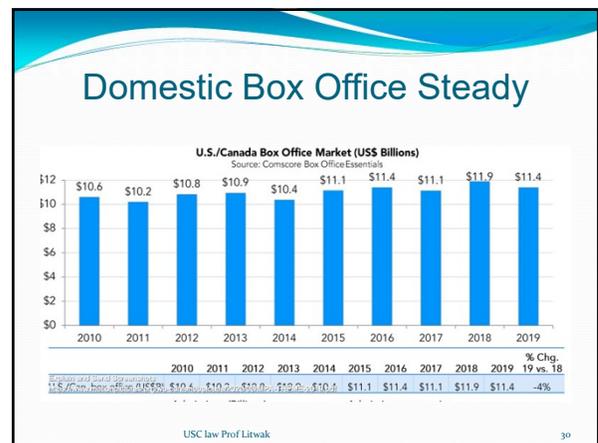
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American Films Dominate

- In most countries US films much more popular than local fare even when exhibition of foreign films is restricted.
- China has allowed only 20 foreign pictures to be exhibited. The quota was recently raised to 34 pictures.
- Foreign movies in China only receive 25% of box office.



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Some Films Earn Most Of Their Money Abroad

- Ice Age: Continental Drift
- Fox Films fourth installment was highest grossing animated film of all time internationally
- Earned more than 80% of its \$875 million worldwide overseas



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Screens

- There are 60,000 screens in China.
- Compare to USA with 40,613 indoor screens and 559 drive in screens
- 38 foreign movies were released in China in 2018, up from 35 in 2017. In 2014, 29 films were released under the revenue-sharing deal.
- By 2020, China's box office is expected to reach RMB200 billion and will exceed North America as the world's largest market in box office revenue and audience numbers.

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Some Movies Do Much Better Abroad

The Fate of the Furious	81.7%
Wolf Warrior 2	99.7%
Pirates: Dead Men	78.3%
Transformers	78.5%



On the other hand, "Crazy Rich Asians" was a hit in the U.S. but flopped badly in China.

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Bollywood Makes The Most Films

Indian cinema is the world's largest film industry in terms of film production, with an annual output of 1,986 feature films as of 2017.



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2019 TOP Domestic B.O. GROSSES

Title	Gross	Theaters	Distributor
Avengers: Endgame	\$858 Million	4662	Disney
The Lion King	\$543 Million	4802	Disney
Toy Story 4	\$434 Million	4575	Disney
Frozen II	\$430 Million	4440	Disney
Captain Marvel	\$426 Million	4310	Disney



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Newcomers

- NETFLIX
- Hulu
- Amazon Prime
- Apple TV+
- HBO Max
- Disney +
- Peacock
- Youtube
- Only over the top services




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Netflix v. Amazon

- Amazon Studios produces and acquires original movies for theatrical release and early window distribution exclusively for Amazon Prime members.
- Netflix rarely opens films in theaters although this may change. Netflix increasingly produces its own films and series rather than acquiring independent films.
- Both services focus on gaining subscribers. Amazon makes money from theatrical as well as purchases.
- Amazon has more than 14,000 films and 2,300 series. Netflix has about 3,800 films and 2000 series.

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MVPD and OTT



- Multi-Channel Video Programming Distributor (MVPD) is a service that delivers multiple channels on Cable or Satellite TV.
- Examples: Comcast, Dish TV, Direct TV, Time Warner Cable
- OTT means Over-The-Top (i.e. cordcutting)
- This is streaming online content without having to subscribe to cable TV such as Netflix, Amazon, Hulu and YouTube. It is over the internet.

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Connected TV Devices



Over the top media



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Virtual MVPD's

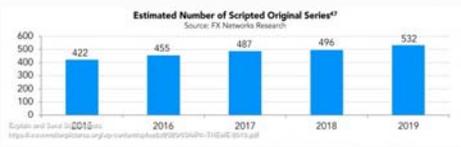
A *virtual* MVPD (VMVPD) is a service that provides multiple television channels through the internet without supplying its own data transport infrastructure (i.e. coaxial cable, fiber, or satellite technology). These services are also sometimes called "skinny bundles" as they often contain fewer channels than a traditional cable or satellite subscription. Examples: Sling TV, DirecTV Now, PlayStation Vue, Fubo, Philo, YouTube TV and Hulu Live.



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Scripted Original Series Increase



Year	Estimated Number of Scripted Original Series*
2015	422
2016	455
2017	487
2018	496
2019	532

*Equivalent Series Order (ESO)
Source: FX Networks Research
<https://www.fxnetworks.com/news/2019/08/2019-scripted-original-series-increase/>

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Self-Defense Checklist

6. OBTAIN INSURANCE COVERAGE

- Typically the producer purchases insurance, including Errors and Omissions (E&O) insurance.

7. CHECK REFERENCES

- Carefully investigate any party with whom you contemplate doing business. Confer with filmmakers who have had dealings with a distributor over the course of several years. Usually, people who have lousy reputations have earned them.



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Self-Defense Checklist

8. TERMINATION CLAUSE

- If the other party defaults, it is best if you have the right to terminate the contract and regain all rights to your film in addition to monetary damages. Writers should insist on a reversion clause.
- Milestones



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Self-Defense Checklist

9. INVESTOR MONEY

- Never make any “offers” to investors or accept any investor money without fully complying with all applicable state and federal securities laws.



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Self-Defense Checklist

10. SAVE COPIES:

- Retain copies of all correspondence, contracts, and drafts of your screenplay. When you make a story suggestion or enter into an oral agreement, follow up with a letter.

11. MINIMUM ADVERTISING SPECIFIED

- Distribution contracts should specify in writing the minimum amount the distributor will spend to advertise and promote a film. Cap expenses.

12. INDEMNITY

- The filmmaker should be indemnified (reimbursed) for losses incurred as a result of the distributor’s breach and for any liability arising from material added to the film.



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Self-Defense Checklist

13. RIGHT TO INSPECT BOOKS AND RECORDS

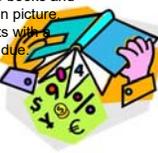
- The distributor should be required to maintain complete books and records with regard to all sales and rentals of the motion picture. The filmmaker should receive quarterly producer reports with a detailed accounting statement along with any payment due.

14. LATE PAYMENTS/LIEN

- All monies due and payable to the filmmaker should be held in trust. In addition, the filmmaker should have a lien on the filmmaker’s share of the gross receipts derived from the film. Interest on any late payments.

15. REMEDIES

- A filmmaker should have at least three years from receipt of a financial statement, or from discovery of an accounting error, to object.



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Self-Defense Checklist

16. ASSIGNMENT

- No assignment should relieve distributor of its contractual obligations to the filmmaker unless the filmmaker consents to the assignment.



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Self-Defense Checklist

17. FILMMAKER DEFAULT

- A distributor should give the filmmaker at least ten days written notice of any alleged filmmaker default.



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Organizing your company

- Sole Proprietorship
- DBA
- General Partnership
- Limited Partnership
- Corporation
- Limited Liability Company (LLC)



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COMPARISON OF ENTITIES

	SOLE PROPRIETORSHIP	S CORPORATION	C CORPORATION	LIMITED PARTNERSHIP	GENERAL PARTNERSHIP	LIMITED LIABILITY COMPANY
Limited liability for owner(s)	No	Yes	Yes	Yes	No	Yes
Composition of Ownership	One person.	Limited to 75 shareholders and one class of stock. Shareholders cannot be foreign individuals, corporations or trusts (except certain qualified trusts)	Generally no restrictions.	Need 1 limited partner and 1 general partner.	Need 2 partners.	Some states require 2 or more. In CA, as of 11/2000 only one member is required.
Continuity of Life	No	Perpetual	Perpetual	Partnership agreement determines term	Partnership agreement determines term	Articles of organization determine term.
Administrative Complexity	Simple	Complex	Complex	Varies	Varies	Complex
Double Taxation of income	No	No	Yes	No	No	No. (LLC can be treated as partnership for tax purposes)

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Sole Proprietorship

- A sole proprietor is nothing more than an individual engaged in a business. The business can operate under the individual's name or a fictitious business name. For example, Bob Jones could conduct his business under the name Serendipity Productions. In this case, Bob Jones is doing business as ("DBA") Serendipity Productions. While Bob may operate under the banner "Serendipity Productions," in the eyes of the law, Bob and Serendipity are one and the same.
- If you choose to operate under an assumed name, you are required to file a Fictitious Business Name Statement with the local or state government.



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Limited Liability

- If a movie is produced by a company that is a separate legal entity from the filmmaker, then the filmmaker may not be liable for the debts and obligations of the company. However, for the filmmaker to avoid personal liability, he must sign all contracts in the name of the company and not give any personal guarantees.



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No Insulation for Negligence

Conducting business through a company does not insulate an individual against all liability. If you are negligent and harm another, both you and your company may be liable. In other words, while establishing a company may protect you from liability for your company's breach of its contracts, it does not preclude other people from suing you for your own negligence. So, for example, if you carelessly run over someone with your car, you are liable even though no contract exists between you and the victim. It is irrelevant whether you even know the victim. Similarly, if you are negligent on a movie set and cause injuries to others, you may be liable even if you are operating under the auspices of a company.



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Piercing the Corporate Veil

To ensure that shareholders, directors and officers of the corporation are protected, the corporation should be adequately capitalized with a reasonable amount of money to function in view of its intended business. Moreover, the corporation's assets should not be commingled with those of its principals and financial records, minutes of meetings and other documentation should be maintained.



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Corporations are subject to state and federal income taxes. Thus, the corporation has to pay a tax on its income, and amounts it pays out to shareholders as dividends are taxable to the shareholders. This potential double-taxation is the major drawback of the corporate form of business.



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Sub-Chapter S Corporations

- Be a domestic corporation
- Have no more than 100 shareholders
- Have one class of stock
- No shareholders who are not individuals
- No shareholders who are nonresident aliens,



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Limited Liability Company (LLC)

- The limited liability company (LLC) is a relatively new form of business entity that combines some of the best aspects of partnership and corporate forms of business while avoiding some of the drawbacks of each. Members of an LLC have the same limited liability protection granted limited partners and corporate shareholders. Unlike a corporation, however, an LLC has more flexibility as to how to pay taxes, and can largely avoid the problem of double taxation.



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- An LLC can be managed by one or more managers (a "manager-managed" LLC) or by all the members (a "member-managed" LLC). A manager-managed LLC is like a limited partnership with two classes of members: managers that actively supervise the enterprise and non-managers who do not. Similarly, a member-managed LLC is like a general partnership where all the partners are involved in running the business.
- The interest of a non-managing member is a security, and securities laws apply. If all the members are active in the management of the LLC (*i.e.*, all members are managers), there are no passive investors and the members' interests are not considered securities.



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Manager Managed LLC

- In a manager-managed LLC, a manager need not be a member, but can be an outsider hired to manage the enterprise. Managers are considered agents of the LLC and they can bind the LLC to contracts with third parties. In a manager-managed LLC, the non-managing members are not considered agents of the LLC

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Non-Managing Members

The interest of a non-managing member is a security, and securities laws apply. If all the members are active in the management of the LLC (i.e., all members are managers), there are no passive investors and the members' interests are not considered securities.

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<h3>Corporation</h3> <ul style="list-style-type: none"> • C-Corp or S-Corp • Owners vote for Board of Directors, who choose managers • Articles of Incorporation, Bylaws, and shareholder agreements are controlling Documents • Corporate Formalities need to be followed 	<h3>LLC</h3> <ul style="list-style-type: none"> • Can be taxed as partnership or corporation • Member-managed or manager-managed • Operating Agreement is the controlling Document • Basically it's a formal partnership with limited liability characteristics
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General Characteristics

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Managers v. Members

An LLC has two classes of members: managing members and non-managing members. Like general partners, the managing members run the business. Like limited partners, the non-managing members are investors who do not operate the business. Both managing and non-managing members have limited liability.



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FINANCING RAISING MONEY

- Pre-sale Agreements
- Banks
- Equity Investments
- Finders



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Investor Money

- Producer should not make any "offers" to investors or accept any investment without fully complying with state and federal securities laws



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Reg D

- 504 Offering: up to \$1,000,000 of securities in a 12-month period.
- 505 Offering: can offer and sell up to \$5,000,000 of securities in any 12-month period. It may sell to an unlimited number of "accredited investors" and up to 35 non-accredited investors.
- 506 Offering: No cap on amount of capital that can be raised. Up to 35 non-accredited investors but they all must be sophisticated.



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Two Exemptions Under Rule 506

- Under Rule 506(b) one can sell securities to accredited investors and up to 35 unaccredited, but sophisticated investors.
- Under Rule 506(c), a company can broadly solicit and generally advertise the offering, but still be deemed to be undertaking a private offering if all investors are accredited; and the offeror has taken reasonable steps to verify that its investors are accredited investors, which could include reviewing documentation, such as W-2s, tax returns, bank and brokerage statements, credit reports etc.

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Crowdfunding

- President Obama signed on April 5, 2012 the JOBS (Jumpstart Our Business Startups) Act
- Investors with a net worth under \$100,000 are limited to investing the greater of \$2,000 or 5% of their annual income or net worth, whichever is greater.



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Crowdfunding

- Wealthier investors can invest \$100,000 or 10% of the investor's annual income or net worth, whichever is less.
- Offers must be made through a Broker-Dealer or a "funding portal" registered with the SEC.
- Major change to Reg D 506 c offerings to accredited investors. Restrictions on public solicitations removed.



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Crowdfunded Films

- 17 Films in Sundance 2013.
- 1) Indie Game, the Movie
- <http://www.indiegamethemovie.com/supporters/>
- Solely funded by personal savings and the support of the gaming community through two successful Kickstarter campaigns. \$23,000 raised in 48 hours
- Second campaign raised 200% of goal with \$71,000.



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Kickstarter.com

- Since launching on April 28, 2009, 11 million people have backed a project, \$2.3 Billion has been pledged, and 102,376 projects have been successfully funded. 54,552 film and video projects launched. Nearly 100 Kickstarter-funded films have been official Sundance Film Festival selections.



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TYPES OF COMPENSATION

- **Fixed compensation**, a guaranteed payment.
- **Bonus compensation** is not guaranteed. Payment is contingent on a certain event, such as going into production or box office receipts.
- **Deferred compensation** iffier than bonus compensation. Deferments are usually not payable unless the script gets produced, the movie is released and significant revenue is received.
- **Contingent compensation**, or net profits (points). Paid only if movie is produced, released and it generates enough that after recoupment of all expenses, distribution fees and marketing, there is something left.
- **"Additional" compensation**. For a sequel, remake or television spin-off series.



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Bonus compensation

- Bonus compensation is not guaranteed. Payment is contingent on a certain event, such as the script going into production. So if the script doesn't get produced, the bonus need not be paid. Thus, bonus compensation is more uncertain than fixed compensation.



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Deferred Compensation

- Deferred compensation is more uncertain than bonus compensation. Deferments are often used in low-budget films when the producer can't afford to pay his cast and crew their usual wages. Producer offers to hire crew at \$250 a week and to defer the rest of the salary they would normally earn. Deferments are usually not payable unless the script gets produced, the movie is released and revenue is received. Deferments can be payable before or after investors recoup their investment. The employment agreement can provide that some deferral holders be paid first or everyone share in revenues equally (in pari passu).



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Contingent Compensation

- The most uncertain kind of payment. Here the employee will receive payment only if the script is produced, released and it generates revenue. And the revenue must be enough for recoupment of all costs and expenses, including distribution fees and marketing costs. It is rare that net profit participants receive anything. Writers typically receive between 1% and 5% of 100% of net profits.



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Why do we state the writer's share in terms of a percentage of 100%?

- So, that there won't be any ambiguity as to the size of the writer's portion of net profits. If we simply said the writer gets 5% of net profits, it would be unclear whether she gets 5% of all the net profits or 5% of the producer's share of net profits.
- Typically, the studio and the producer split net profits 50/50. The producer, however, often must give a writer, director and star a piece of his net profits. These profit participants take from the producer's half of net profits. Nevertheless, the custom in the industry is to express net profits in terms of the whole (all profits) so that there is no ambiguity. Instead of saying a writer gets 5% of 100% of net profits, one could say he/she gets 10% of 50%. It would be the same size slice of the pie.

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Additional Compensation

- Producers make these payments if they make a sequel, remake or television spin-off series based on the original work. Writers often receive 50% of what they were paid for the original movie for a sequel and 33% for a remake.
- For a television spin-off series the writer usually gets a royalty for every episode. An example of a successful spin-off series would be M*A*S*H..
- The series royalty is a passive one. That means the writer is not obliged to do any work on the series. The payment is due him because of his work on the original.



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Passive Royalties

- The series royalty is a passive one. That means the writer is not obliged to do any work on the series. The payment is due him because of his work on the original. The writer is entitled to the royalty even if he/she is not involved in the series. Of course, if the writer works on the series, he/she would be entitled to additional payment.



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TACTICS AND STRATEGY

1. No Sneak Previews
2. Screen It Before A Crowd
3. Make The Buyers Compete Against Each Other



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Tactics and Strategy

4. Do not give away your festival premiere lightly
5. Approach buyers when they are hungry for product
6. Do not disclose your budget
7. Prepare good collateral materials, stills, trailer



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Negative Pick Up v. Studio Film

- Acquisitions of independent films
- Projects developed in house
- Domestic v. Foreign



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TACTICS AND STRATEGY IN ARRANGING DISTRIBUTION

- Sources of Revenue. Is theatrical worth the expense?
- Increasing Your Leverage
- Film Festivals
- Working the Festival Circuit
- Markets and Festivals
- Different types of distributors (sub-label deals).



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Selecting a Distributor

1. **Territories & Media:** What territories and media does the distributor serve? What does this company actually do itself, and to what extent does it use sub-distributors?
2. **Rights Sought:** What rights does the distributor want to acquire? 1) a foreign sales company that attends international film and television markets and licenses pictures to buyers in foreign territories; and 2) a domestic company (or companies) that distributes the film in the United States and English-speaking Canada.
3. **Reputation:** Does the distributor leave a trail of unhappy filmmakers in its wake? Is the distributor known for distributing in this genre?



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Selecting a Distributor

4. **Advance:** What is the size of advance, and when is payment made? Minimum Guarantee?
5. **Division of Proceeds:** How are revenues shared? How large is the distributor's fee or commission? Is the distributor permitted to recoup any of its overhead expenses?



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Selecting a Distributor

- **6. Marketing:** Is there a guaranteed marketing commitment? How many screens in how many cities?



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Selecting a Distributor

- Caps on its marketing and distribution expenses?
- Expenses can be divided into
 - a) market expenses
 - b) promotional expenses and
 - c) delivery expenses



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Selecting a Distributor

- **7. Consultation Rights/Final Cut:** Does the producer have any input or approval over artwork? Can the title be changed or the film re-cut without the filmmaker's approval?
- **8. Financial Health:** Is the company in any danger of going bankrupt?
- **9. Cross-collateralization:** Are expenses from one media or territory cross-collateralized with another media or territory?
- **10. Accounting:** How often are producer reports issued? How detailed are the reports? Does the distributor provide documentation to back up its claimed expenses and revenues? Is there a provision for interest on late payments? What are your audit rights?



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Selecting a Distributor

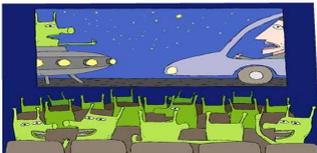
- **11. Ability to Collect:** Leverage with exhibitors/licensees?
- **12. Conflicts of Interest:** Any competing films handled by the distributor? Does the distributor produce some of its own films that may receive more favorable treatment?
- **13. Term:** For how many years will the distributor have the right to distribute the film? For how long ; term can the distributor license the film to its licensees? Performance milestones?
- **14. Personal Chemistry:** Does the filmmaker hav a good rapport with the distribution executives?



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SELF DISTRIBUTION

- **Advantages:** higher margin, more control, no cross collateralization, no creative accounting
- **Disadvantages:** a lot of work, more financial risk
- See www.sellingyourfilm.com for additional info.



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Self Distribution Checklist

- 1) Set up websites early and collect email addresses. Use Facebook, blog, twitter, stumble it, etc.
- 2) Regularly report to your followers
- 3) Determine your niche and identify your core audience and potential partners
- 4) Determine how to reach your core audience without traditional advertising



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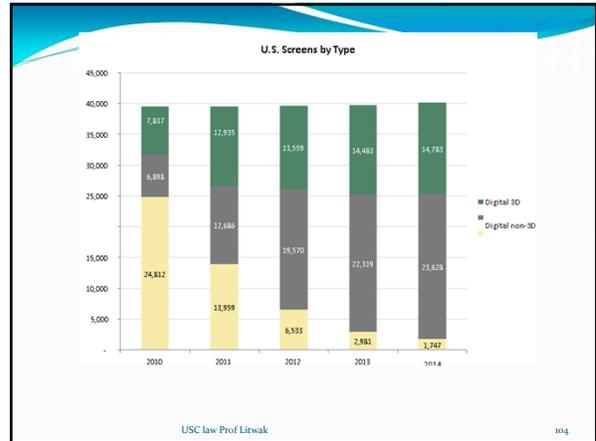
DIGITAL REVOLUTION

- 93% of screens in the USA now have systems that can exhibit a digital copy, which costs about \$150.
- If 35 mm prints are no longer available, and they cannot afford a digital system, which can cost \$150,000, they will go out of business



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HOW MUCH IS MY FILM WORTH?

- Shorts
- Documentaries
- Black/White Films
- Foreign Language Pictures
- Digital Movies
- Cerebral Comedies
- Family Films, Thrillers, Action Pics
- No Name Movies



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Exhibitors v. Distributor

- \$10,000 per screen
- - \$2,000 House Nut

- \$8,000 shared

- 90/10 split
- 80/20
- 60/40



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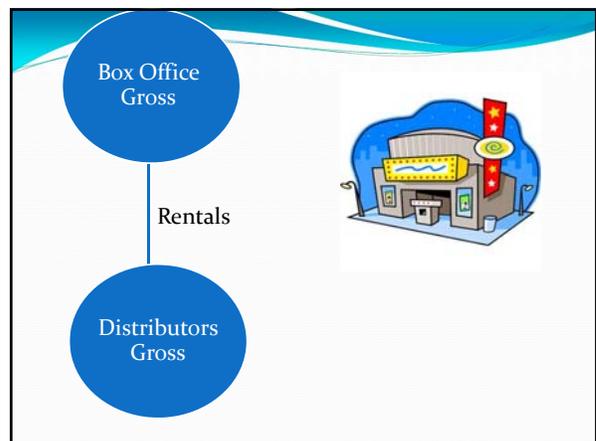
Exhibitors v. Distributor New Formulas

- Distributor receives 48% to 63% of box office receipts, with more receipts earning the distributor a larger percentage. On average, a major studio receives 53% of the box office gross. For art house fare, distributors average around 45%.

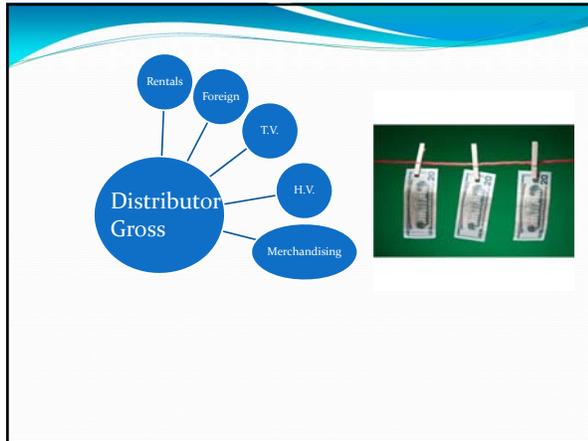


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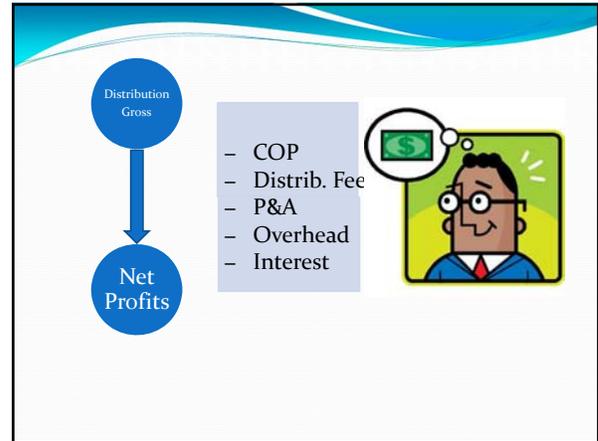
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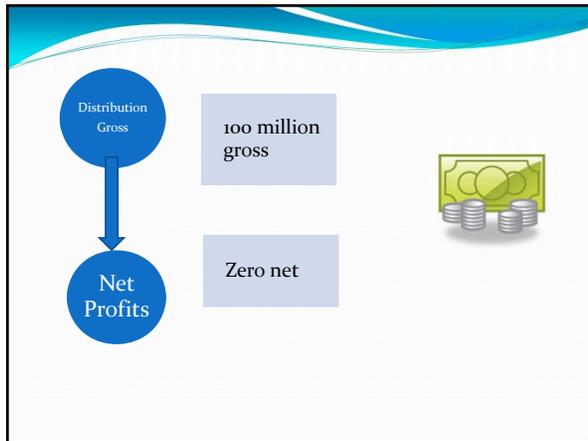
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REVENUE STREAM

- From Gross Receipts,
- Distributor deducts Distribution fee (35% theatrical, 25% TV)
- P & A and other expenses
- Cost of Production recouped by investors or studio
- Production Debts paid
- Reserve

- Net Amount are profits (Net Proceeds)



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Creative Accounting

- Here's how a \$50 million film can return zero profits.

• Gross receipts:	\$50,000,000
• Cost of film:	\$15,000,000
• Studio overhead charge:	\$3,750,000
• Gross points for 2 stars:	\$10,000,000
• Deferrals:	\$2,500,000
• Distribution fee:	\$17,500,000
• Distribution expenses	
• Advertising:	\$5,000,000
• Prints:	\$1,000,000
• Freight & Insurance:	\$100,000
• Dues:	\$100,000
• Taxes:	\$100,000
• Total:	\$55,050,000
• Net Loss:	\$5,050,000



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RIGHT TO INSPECT BOOKS AND RECORDS

- The distributor should be required to maintain complete books and records, generate quarterly reports with a detailed accounting and any monies due.



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- **The Life Cycle of a Television Series 25 Years Ago**
 1. Broadcast Network
 2. Syndication
- **The Life Cycle of a Television Series Today**
 1. Broadcast, Pay Cable or Basic Cable Network
 2. Electronic Sell-Through, Video on Demand
 3. Home Video
 4. Syndication
 5. New Media
 - a. Internet
 - b. Mobile



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The Life Cycle of a Theatrical Motion Picture Today

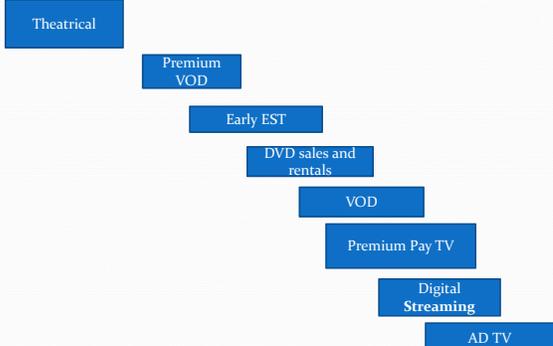
1. Theatrical, HD Video on Demand (VOD)
2. Hotel Pay-Per-View, Airlines
3. Home Video, Electronic Sell-Through
4. Home Pay-Per-View, Video on Demand
5. Pay Cable Network
6. Basic Cable Network
7. Broadcast Network
8. Syndication
9. New Media



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Windows



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Platforms

ELECTRONIC SELL THROUGH (EST)

When a consumer pays a one time fee to download a media file for storage on a hard drive. Aka *Download to Own*. Apple I-Tunes is % of all revenues in U.S.

VOD, can be cable VOD or Internet VOD. If TV then you need set top box. For internet VOD you use a computer.

SVOD example could be Netflix.



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- YouTube shares revenues with content owners with owners receiving 55% of Ad money
- iTunes offers the content owners a 70/30 split in the profits from the sales. iTunes does not allowing anyone to submit, you must submit via an aggregator.
- Hulu offers the content owners a 50/50 split from the ad revenue that occur over the video.
- Amazon offers a 50/50 split via their sister company Create Space

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Time-Shifted Television

- **Free Video-On-Demand ("FVOD")** a viewer can access from a library of programs on-demand at no charge. FVOD is often supported by advertising. This model is common on websites like Hulu and YouTube.
- **Catch-Up**, when a program is available on demand for only a limited period (often 7 days) after it airs on a linear video feed.
- **Transaction Video-On-Demand ("TVOD")** a viewer must pay a discrete fee for each program viewed. A popular example is pay-per-view offered on cable television systems.
- **Subscription Video-On-Demand ("SVOD")** a viewer must pay a subscription fee (usually a monthly recurring fee) for a programming package. Netflix's is an example.



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Home Video Deals

- **Standard Deal:** Distribution fee and expenses off the top, balance to filmmaker
- **50/50 Net Deal:** Expenses off the top, then 50/50 split.
- **Royalty Deal:** 20-25% of wholesale price



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HOME VIDEO



1) What if One Million Gross Sales (wholesale revenue less returns)

- Under a standard distribution deal with a 25% distribution fee, and recoupment of \$100,000 in expenses, filmmaker would receive **\$650,000**
- Under a 50/50 Net deal, with the same revenue and expenses, the filmmaker would receive **\$450,000**
- Under a royalty deal at 20% royalty, filmmaker receives **\$200,000**

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Standard Deal

- Under a standard distribution deal with a 25% distribution fee, and recoupment of \$100,000 in expenses, filmmaker would receive \$650,000

\$1 million

Minus \$250,000 distribution fee
 Minus \$100,000 expenses
 Net is **\$650,000**

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50/50 Net deal

- Under a 50/50 Net deal, with the same revenue and expenses, the filmmaker would receive \$450,000

- \$1 Million
- Less \$100,000
- = \$900,000
- 50% of 900,000 = **\$450,000**



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Royalty Deal



- 20% royalty on \$1 million = \$200,000
- Distributor expenses are irrelevant in calculating producer's revenue.

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2) What if \$175,000 Gross Sales?

- Under a standard distribution deal with a 25% distribution fee, and recoupment of \$100,000 in expenses, would generate **\$31,250** for the filmmaker
- Under a 50/50 Net deal, with the same revenue and expenses, the filmmaker would receive **\$37,500**
- Under a royalty deal at 20% royalty, filmmaker gets **\$35,000**



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3) What if \$100,000 Gross Sales?

- Standard deal, filmmaker gets **0**
- 50/50 Net deal, filmmaker gets **0**
- Royalty deal, filmmaker gets **\$20,000**



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THE U.S. TOP FESTIVALS

- SUNDANCE
- SLAMDANCE
- TELLURIDE
- TRIBECA
- METHODFEST
- MILL VALLEY
- SEATTLE
- LOS ANGELES
- NEW YORK
- SXSU
- HAMPTONS
- PALM SPRINGS
- SANTA BARBARA
- AFI
- CINEQUEST
- MIAMI
- NEW DIRECTORS/NEW FILMS



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Sundance



- Sundance received 4057 feature submissions
- 118 selected

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TOP FESTIVALS (CON'T)

TOP CANADIAN FESTIVALS

- TORONTO
- MONTREAL
- VANCOUVER
- ATLANTIC

BEST FOREIGN

- CANNES
- BERLIN
- VENICE
- KARLOVY VARY
- SAN SEBASTIAN
- ROTTERDAM
- BUSAN

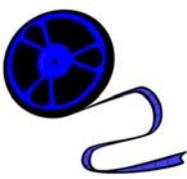


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BEST FESTIVALS FOR DOCUMENTARIES

- HOT DOCS, TORONTO
- SUNNY SIDE OF THE DOC, FRANCE
- AMSTERDAM IDFA
- FULL FRAME
- SUNDANCE
- SILVERDOCS
- NYON DOCUMENTARY FESTIVAL
- CANNES
- THESSALONIKI DOCUMENTARY FESTIVAL
- TRUE/FALSE FILM FESTIVAL
- VISIONS DU REEL



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Film Markets:
AFM, Berlin, Cannes

TV Markets:
NATPE, Mip,
MipCom

IFP Filmmaker
Conference



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Marketing Films



- **1) NAME ACTORS:** "Who is in it?" is the first question that most foreign buyers ask. Sometimes a name director, such as Quentin Tarantino, will suffice instead.
- **2) FESTIVALS:** Movies that have won acclaim at major festivals can be marketed on that basis. Placing a banner across your poster proclaiming: "Winner, Sundance Film Festival," can attract an audience.
- **3) REVIEWS:** Reviews by the trade papers and major media, such as the *L.A. Times*, *N.Y. Times*, or *Roger Ebert*, can be useful in marketing a film. Quotes from such critics are often included in advertising.

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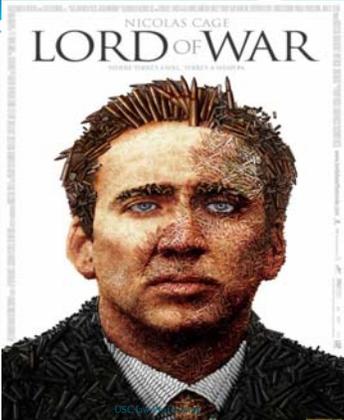
One sheets



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Key Art



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TERMS OF THE DISTRIBUTION AGREEMENT

- Territory
- Media
- Term
- Distribution Fee
- Distribution and Marketing Caps
- Advances vs. Guarantees
- Consultation Rights
- Warranties and Representations
- Accounting
- Arbitration
- Insurance



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TERMS OF THE DISTRIBUTION AGREEMENT

- Termination
- Security Interest
- Governing Law
- Schedule of Minimums



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Schedule of Minimums

Territory	Asking Price	Minimum Acceptable
ENGLISH SPEAKING		
Australia/New Zealand	\$700,000	\$560,000
E/W Africa	\$150,000	\$125,000
South Africa	\$175,000	\$140,000
United Kingdom	\$1,500,000	\$1,000,000
EUROPE		
Benelux	\$625,000	\$350,000
France	\$1,550,000	\$980,000
Germany	\$2,500,000	\$2,000,000
Greece	\$180,000	\$140,000
Iceland		
Italy	\$1,650,000	\$980,000
Portugal	\$140,000	\$100,000
Scandinavia	\$600,000	\$490,000
Spain	\$900,000	\$700,000

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Package Deals

- Avatar \$761 Million US Box Office Gross
- Bad Teacher \$100 million
- Ishtar \$14.4 million

Total: \$875.4 million

- Average is: \$291.8 million

- License fee of 15% = 131.31 or \$43 million per film
- 15% of Avatar is \$114.15 million



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TERMS OF THE DISTRIBUTION AGREEMENT

- Retain Your Masters
- Return of Materials
- Delivery Deadline
- Lab Access Letter
- IFTA Rider



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INDEMNITY

The filmmaker should be indemnified (reimbursed) for losses incurred as a result of the distributor's breach and for any liability arising from material added to the film.



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RIGHT TO INSPECT BOOKS AND RECORDS

- The distributor should be required to maintain complete books and records, generate quarterly reports with a detailed accounting and any monies due.



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LATE PAYMENTS/LIEN

- All monies due and payable to the filmmaker should be held in trust. In addition, the filmmaker should have a lien on the filmmaker's share of the gross receipts derived from the film. Interest on any late payments.



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ASSIGNMENT

- 16) No assignment should relieve distributor of its contractual obligations to the filmmaker unless the filmmaker consents to the assignment.



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WHEN A DISTRIBUTOR DEFAULTS

- Creative Accounting
- Conducting an Audit
- How Revenue is divided
- Creative Accounting Pitfalls



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Arbitration

- Arbitration of credit disputes
- Selecting an Arbitrator
- The Arbitration Hearing
- After the Award
- IFTA Arbitration
- IFTA Pre-arbitration Settlement Procedure
- Arbitrator Fees
- Arbitration v. Litigation
- Arbitration v. Mediation
- Jurisdiction



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Arbitration Clauses

- Needed to ensure contractual disputes are subject to binding arbitration where the prevailing party is entitled to reimbursement of legal fees and costs. Arbitration is often less costly than litigation, and going to court is not much of a remedy if you can't afford it.



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AAA Sample Clause

- This agreement shall be interpreted and construed according to the laws of the State of New York, applicable to contracts made and entirely performed therein. The parties select the American Arbitration Association expedited arbitration using one arbitrator, to be a disinterested attorney specializing in entertainment law, as the sole forum for the resolution of any dispute between them. The venue for arbitration shall be either New York City or Los Angeles, California, to be determined by the party who first files a demand for arbitration. The determination of the arbitrator in such proceeding shall be final, binding and non-appealable.

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Sample Clause

- Any and all controversies, claims or disputes arising out of or related to the Agreement or the interpretation, performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ("Dispute"), except as set forth in subparagraphs (b) and (c) below shall be resolved according to the procedures set forth in subparagraph (a) below, which shall constitute the sole dispute resolution mechanism hereunder **to the extent such mechanism is not governed by an applicable collective bargaining agreement (such as the WGA):**
- and costs.

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IFTA Sample Clause

- (a) Arbitration: In the event Producer and Company/Writer are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. Any dispute under this Agreement will be resolved by final and binding arbitration under the Independent Film & Television Alliance Rules for International Arbitration in effect as of the effective date of this Agreement ("IFTA Rules"). Each Party waives any right to adjudicate any dispute in any other court or forum, except that a Party may seek interim relief before the start of arbitration as allowed by the IFTA Rules. The arbitration will be held in the Forum designated in the Agreement, or, if none is designated, as determined by the IFTA Rules. The Parties will abide by any decision in the arbitration and any court having jurisdiction may enforce it. The Parties submit to the jurisdiction of the courts in the Forum to compel arbitration or to confirm an arbitration award. The Parties agree to accept service of process in accordance with the IFTA Rules. The prevailing party shall be entitled to reimbursement of attorney fees

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Sample Clause

- (b) Injunctive Relief: Notwithstanding the foregoing, either party shall be entitled to seek injunctive relief (unless otherwise precluded by any other provision of this Agreement) in the state and federal courts of Los Angeles County.

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Arbitration

- Contractual v. Judicial Arbitration (limited to 50)
- Limited Discovery
- Exchange of Exhibits
- Witness Lists
- Rules of Evidence don't apply
- Parties can submit briefs
- No Ex parte communications
- Can subpoena documents and witnesses



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Judicial Arbitration Generally Is Nonbinding

- Although a party may stipulate away his or her right to a trial de novo. *Blanton v. Womancare, Inc. (1985)* (attorney had no authority to so stipulate), judicial arbitration is not binding to the extent that any party dissatisfied with an award may elect trial de novo [CCP § 1141.20].
- Judicial Arbitration Expenses Generally Are Paid by Court; Contractual Arbitration Expenses by the Parties.



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Forums

- ADR can be conducted by the American Arbitration Association (AAA), California Lawyers for the Arts, JAMS, IFTA or any other impartial organization or person.
- The AAA is a national non-profit organization with 37 regional offices. AAA handles well over 100,000 cases a year and has settled rules of procedure.
- IFTA arbitration specific to film industry. Market Barring Rule can be invoked to bar a company from participating in the American Film Market. However, this rule will not be invoked against executives of such a company unless they sign either a guarantee or the IFTA Rider agreement.



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Guild Remedies

- SAG-AFTRA, DGA, WGA all require that certain disputes involving their members be arbitrated. In general, disputes involving alleged violations of guild rules go to a grievance hearing and/or arbitration.
- The guilds' arbitration rules and procedures are set forth in the collective bargaining agreement for each guild. Guild rules provide for a hearing before single or multiple arbitrators. In the case of the DGA, WGA and SAG-AFTRA, the arbitrators are chosen from a panel designated during the collective bargaining process.
- Each guild has its own rules as to which types of disputes can be litigated and which must be arbitrated. The WGA and SAG-AFTRA exclude from arbitration those disputes where an injunction or a large amount of money damages is sought. DGA arbitrators have broader power, including the right to order a member company to correct advertising and film titles. In some instances the guilds require the parties to engage in a grievance procedure prior to filing a demand for arbitration.
- Arbitration decisions are final and binding. However, guild rules do not prohibit petitioning a court to confirm, set aside or modify an arbitration award.

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Informal Procedures

- Parties are not required to be represented by an attorney although parties often feel it is helpful to have an attorney. The attorney can draft the Demand for Arbitration, submit a written brief, help select the arbitrator and prepare witnesses and exhibits.



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Enforcement of Award

Arbitration awards can be enforced by the courts, and the local sheriff's office can help the prevailing party collect an outstanding judgment.



If the losing party does not voluntarily comply with the arbitration award, the prevailing party can confirm the award in court. Once confirmed, the award is no different than a court judgment, and the judgment creditor can have the sheriff seize the judgment debtor's assets to satisfy the award.

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Limited Appeal

- Binding arbitration awards are difficult to overturn. Manifest Disregard of Law is No Longer Grounds to Vacate Arbitration Award
- The United States Court of Appeals for the Fifth Circuit recently held that the United States Supreme Court's decision in *Hall Street Associates v. Mattel* "restricts the grounds for vacatur" of an arbitration award and, thus, "manifest disregard for the law is no longer an independent ground for vacating arbitration awards under the FAA." Consequently, the only bases for setting aside an arbitration award are (1) fraud or corruption in obtaining the award; (2) evident partiality by the arbitrator; (3) misconduct or misbehavior by the arbitrator; and (4) where the arbitrator exceeded its power.



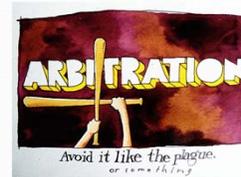
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Arbitrator Need Not follow the Law

- Unless the agreement provides otherwise, arbitrators are not bound to decide cases in accordance with the law, but may base an award on principles of justice and equity. *Moncharsh v. Heily & Blase* (1992) 3 C4th 1, 10-11, 10 CR2d 183, 832 P2d



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Judicial Review

- Parties to an arbitration agreement may expand the scope of judicial review of an arbitration award...by expressly providing that legal errors are an excess of arbitral authority subject to judicial review. *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 C4th 1334, 1361, 82 CR3d 229, 190 P3d 586
- Under the Federal Arbitration Act, parties **cannot expand** the scope of review by contract, and any provision for review of an award for legal error is void and unenforceable. *Hall St. Assocs. v. Mattel, Inc.*



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Ethics and Conflicts of Interest in the Movie Industry

- It is a relatively small industry and many lawyers know each other and clients.
- Representing multiple clients
- Negotiating with parties with a previous relationship
- Making pay or play offers when a producer does not have the funds to cover the star's salaries
- Hiring people as independent contractors when they are employees.
- Hiring unpaid interns.



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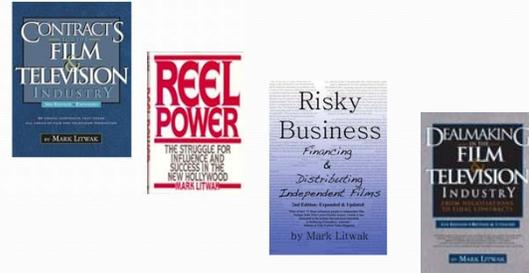
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Seminar: Self Defense for Writers and Filmmakers Next Year

- Writers and filmmakers need to understand their legal rights and how to defend themselves from those who may seek to exploit them. Production companies and distributors often know all the tricks of the trade, while writers and filmmakers know little about how to protect themselves. This seminar explains how writers and filmmakers can prevent problems from arising by properly securing underlying rights, and by encouraging the other party to live up to agreements by adding performance incentives, default penalties, and alternative dispute resolution clauses. In the event of a dispute, participants learn what remedies are available to enforce their rights. Related topics include creative approvals, typical compensation and terms of studio contracts, merchandising deals, and negotiating tactics and strategies.

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Books and form contracts on CD available at www.marklitwak.com



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ADDITIONAL INFO

- Numerous articles, checklists, video clips, etc. available at:

ENTERTAINMENT INDUSTRY
RESOURCES: www.marklitwak.com

IFP Blog: www.ifp.blog

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