1 page paper: Single-spaced (preferred), normal margins, thoughtful/non-obvious

INTRODUCTION

- **Most films lose money** - certainly at the theatrical release point, but over time, films can make money
    - In general the only movies that have large returns are those that are made for a lot or very little money – David O'Selznick (producer of Gone With the Wind)
    - 600-750 films for theatrical release, but somewhere between 200-250 get released
        - What happens to the rest? $1 bin at Target, low cost PPV
    - There is a vast oversupply of production (supply is greater than demand)
    - There are many more producers than distributors; distributors have the power
    - Why can't all films get distributed? – limited methods of distribution
        - Are there more producers or more distributors? – Producers
    - Traditional rate of return is 5% (capitalization rate = rate of return on invested capital)
    - Why continue to invest in film?
        - Individual people (investors) – there's a sex appeal to it, it's *cool*
        - Distributors make money on distribution proceeds
            - **In production, the talent, behind the scenes people, etc make money, but money on the film is not made until distribution**
        - The "potential energy" of a movie that gets unlocks when new media comes out or when new people want to buy the company – the catalogue also gets sold
        - In other words if you have a hit that comes out (think Star Wars) – that movie made money in theater, VHS, laser disc, DVD, Blu-ray, etc etc
        - They want to hold on to the rights and sell the library – In the past 10 years Universal's library has been bought and sold 4 times, each time for more money

- **What is entertainment law?**
    - Document 2, page 7 – for the list of who entertainment lawyers are
        - For the types of things these people do – look at the production checklists
    - Entertainment law is essentially any type of law involving clients in the entertainment industry
- You always want to be thinking about what underlies the **negotiation stance** of the parties
- **What's changing now** in entertainment?
    - Methods of delivery/distrubution
    - **"OTT"** – over the top – **delivery** methods that bring you recorded entertainment but not by standard cable or analog or digital broadcast; provides data to your TV that doesn't come from a cable
        - Roku, Neo TV, Google TV, Netflix
        - Ginsburg thinks this represents a big change and the moving away from cable to OTT
        - "OTT" – also means "off the top" – 5% distribution charge
    - **Change** he highlighted from last year – **Weinstein Company** used to only show their movies on Showtime; After 2016 when their deal expires, they will move to Netflix
    - **Day and date release** – movies released essentially simultaneously to theatrical markets and to pay-per-view
        - In the beginning people thought this would be a death knell for movies, but it turns out that movies are making money using this method

- **TV** – mode of distribution has changed, and the seasons have changed
  - "Second bites" – showing the same show over, making new shows that follow the same formula (real housewives of X)

- **Schuyler Moore's Philosophy – 3 Questions**
  - 1. ***Who has control?***
    - The actual, factual control over decision-making/result
  - 2. ***Who has power?***
    - ***Power is a subset*** of control
    - **Power is relative** – relative measure of power = **leverage** – the ability to use something the other side wants and lever it
  - 3. ***Where is the money?***
- **Moore's Philosophy Rephrased:**
  - **Money In** – money flowing into a transaction or one of the parties
    - Who contributes or pays?
    - What triggers the contribution?
    - When do they pay?
    - How much is paid?
    - How are unforeseen losses or overage expenses handled?
    - What is the legal mechanism for enforcing the contribution?
  - **Money Out** – visited in the corporate or ownership context – involves the order and priority of distribution (is interest paid, how are contingent fees paid, etc)
    - What is the order and priority for distributions of money?
    - How are contingent revenues accounted for and divided?
    - Are revenue sources and definitions the same for all payees?
    - i.e., big stars get paid more b/c they have more leverage
  - **Control**
    - Who has it?
    - Is it joint?
    - Is it allocated btwn, say, creative and financial?
    - Who has active control / veto power vs. who is merely there for the ride?
    - Can control rights be transferred or assigned?
- **Robin Hood Article – Entertainment Law Issues**
  - Issues in the article
    - Conflicts between director and star
    - How much money was spent to acquire and develop an awful script - $6.7 million in script-writing costs
    - **Main:** What's going on with the budgeting for the writing?
  - Original spec script – bought rights with the option of going forward – $1mil to acquire the rights, and another $500K if movie got made (contingent bonus) ▭ $1.5mil total
    - **Buyer has title; title transferred immediately**
  - You could look at the money another way:
    - $1mil as the option payment (they have the option to use script for some period of time, and time is of the essence)
    - $500K as the exercise payment – to exercise, have to give written notice
    - **Seller still has title until exercise payment is made**

- Each of these payments involves 1.5mil, but the difference is when the money changes hands; when does title pass
- **BUT** the budget says $750K ("story & other rights") – why?
    - **Draft** – changes script structure
    - **Polish** – changes only dialogue
    - Ginsburg thinks they split it $750K and $250K (i.e., 750K for the original draft that they already wrote and 250K for a rewrite and 2 polishes)
        - Splitting it this way keeps the writers on the project
        - By shifting 250K, they have established their price in Hollywood for doing rewrites – their **"quote"** (these were unknown writers)
            - Thus, even though the sellers get paid later, they probably prefer this method rather than just getting $1mil flat

Basics & Terminology:

- **Distributor** – a true distributor is the financing party who is capable of taking films and putting them in the chain of distribution – Take films and make them available to theaters, home video, pay television, streaming, etc
    - Copyright salami – the bundle of rights in any copyright issue; called a salami because it can be infinitely sliced
    - Not every distributor gets all of the rights of the salami (all of the bundle of rights)
    - Distributors hold the power in the distributor/producer relationship, because they make the money
    - Distributors/studios make money on distribution, not production
- **Studio** - People use the word "**studio**" loosely to mean distributor – but studios also act as producers; so be careful with this distinction; when studios produce films, they also distribute and that's where the difference is. Studios produce and distribute
    - Studios: produced, distributed, exhibited (historically; studios don't really exhibit today)
    - Studios are difficult to create now
    - Professor will use studio and distributor interchangeably b/c they are essentially the same now (Unless there's a distinction)
    - Every studio has "bet the farm" on a movie (e.g. 20th Century Fox & Cleopatra, Avatar, Titanic, LOTR)
    - Studios have the capital to take these kinds of risks
    - Studios make money on distribution—production is money out, as is development
- **2 ways to look at a film**
    - Playability – whether an audience likes a movie when they watch it
    - Marketability - if and how you can sell a film
        - The trick for a studio is to figure out how to market a film
        - A film can be playable but not marketable
- **Terminal gross** – End line of the movie's economic life
    - **Low/poor, base, and high model**
    - **Low** estimate– worst case
    - **High** estimate – best case
    - **Base** – what they think the movie will make more likely than not
    - Producers don't want to predict too high or too low because of credibility
    - Trigger is pulled to make the movie if the base is high enough

Order of Operations for a Movie:

- Acquisition of **Rights** – What sort of rights?:
    - **Underlying rights** – primary literary rights that film will be based on
    - **Spec script** – speculative script; idea holder writes it speculatively; something a writer composes without being first hired to write it
    - **Article**
    - **Book**
    - **Event** (i.e. from percipient witness)
    - **Biography**
    - **Song**
    - **Work for hire**
- Enter into a writer's agreement, get a quote: create an original agreement
    - Exercise within the option period with payment
- Where do you get the **money** to go through with your original idea/spec script?
    - The perfect result for most producers – **PFD (voluntary, bilateral contract)**
        - P – Producer
        - F – Financing
        - D – Distribution
        - A PFD is when the studio says, we will completely fund the movie
        - Go to the studio, pitch a script, etc and they agree to handle all the work
        - Essentially makes the **producer** into an **employee** of the studio
        - Studio is putting up all the money and owns all the rights
    - Loan financing
    - Private investor
    - Tax incentives – provide a sort of hidden subsidy that lowers the net cost of the project
    - Promotional financing – Adidas pays you some money
    - Foreign buyers/distributors (if the topic travels across cultures)
    - Internal forbearance – producer can forgo her producer fee and spend the fee on the movie
    - One of the sources for financing is **pre-sales** – selling rights usually in foreign territories – selling NOT just theatrical rights (b/c this is not enough for foreign territory to recoup its losses; foreign territories can also be sold in clusters)
        - US – **35-40%** percentage of budget submitted to pre-buying venue
        - Japan – 10% percentage of budget
        - UK – 10% percentage of budget
        - Germany – 10% percentage of budget
        - Total = ~65%
    - You can play a financial trick by artificially increasing the budget – so gap gets filled b/c 65% of an increased budget is a little more than 65% of a non-increased budget
        - i.e., you think the budget is only going to be $10mil but you submit a budget of $12mil ▭ doing this inc. the putative cost to third parties ▭ 65% of 12mil is a bigger number than 65% of 10mil
        - By artificially puffing the budget with junk, you fill in the gap
        - BUT insurance rate is often based on budget—increases other costs
    - **Pre-Sales** – **selling rights in a film, usually in a foreign territory**
        - A sort of species of negative pick-up

        - **Pre-sales** – **occurs BEFORE film has been made**
            - You don't just sell theatrical rights – you also sell other collateral rights, i.e., digital, home video, free tv, pay tv (this is b/c most movies don't make money in theatres)
            - Pre-sales are not paid at the deal, they are paid upon **delivery** (i.e. finished movie); upon agreement the party just signs an agreement saying they will pay, may pay some percentage down
            - Make sure to note the time value of money issues – discount to present value
        - **Negative pickup** – **occurs when project is FINISHED and can be viewed**
- **Gap** – the difference between what you have in cash before production starts (what you presold) and what you need
    - The gap is where other sources of funding come in – borrowing money, getting an investor (borrowing money involves a debt you pay back and investor gets payments later), etc
    - Sometimes there are costs to close the gap – sometimes these costs aren't worth it
    - Usually you have to front the money for the gap: loans, investors, "soft-money" (tax-rebates, deductions, credits, etc), internal forbearance (withhold your own producer's fee upfront)
    - If you sell all the rights to the movie, the gap is the upside for your own profit
    - Can try to "sell" (license, give rights) the gap later after initial success (with mark-up), but risky
        - Countries may make an arm's length assessment based on territorial market valuation
        - Foreign territories can be sold as clusters and typically purchase all rights for the territory (mini-PFDs)
            - Easier access to local distributors
            - Other rights can cross-collateralize for poor box-office performance, or if the movie does not have a theatrical release
- The other way to make the movie is independent from the studio system and see if you can get a distributor to pick it up
- TV Production is quite different from this independent film production model
    - Until about 1985, most of TV was financed on the license offered by the American broadcaster – ABC, CBS, or NBC – and the rest of the world was the upside
        - So, producer would sell show to network; network license fee would cover the budget, and the rest of the world would be the upside
        - This worked really well – it was super lucrative!!!
        - This is how Aaron Spelling bought his ridiculously large mansion
    - Now, the model is different – due to tax policy
        - Used to be the case that networks were prohibited from wholly owning the programming – feared monopolies – these rules ended in 1997/1998!!
        - Now networks make wholly or partly co-owned shows <u>with</u> the producer
        - We went from a 3 channel universe to a 300 channel universe
    - Now, the financing of TV looks more like a PFD than an independent finance model
        - Networks pay for it
        - Sometimes jointly get world wide incentive benefits
        - Producers get fee and a share of back-end

- The more powerful the producer, the more likely he can put up a **deficit** (the difference btwn what the network is putting up and what the project costs) and give himself a larger upside or get larger front-ends and back-ends

CONTRACTS

- Verbal contract – a contract expressed in words (as opposed to an implied contracts
  - Oral – the parties say what their deal is
  - Written – the parties write down what their deal is
- Ginsburg's first deal was written on a napkin, somewhat specific terms, and the napkin was signed by both parties; is this a contract? – The court has to decide (legal question)
  - Is there enough in the written agreement that objectively sets forth what their rights, regulations, and remedies are
- Know what the default rules are
  - Suppose you know what the default rule is, and it favors you. Is it better advice not to mention it (assume it's operative and you'll end up with the rule anyway), or to set it forth in writing?
    - You want it in writing because one person's perception of custom practice could be different from what a reasonable jury would accept; the preferred version is to set forth everything with clarity
- What are some factors that affect the enforceability of the employment agreement?
  - Whether the parties have had an agreement in the past; custom and practice; labor laws/unions; civil code; common law
- Ginsburg's custom practices – be honest, honor what you say, don't renegotiate old points, don't bypass the chain of command (i.e. if you're senior to the person you're negotiating against, don't treat them poorly and go over their head to a senior person), zealously represent your client (modern collaborative approach) point out if someone missed a material term or made a dumb move (terms of services, perks, credit)*
  - *Ginsburg said if he would have conceded the term the other person forgot to ask for, he will give it to them later because it creates good long term relationships
- Material terms in employment contracts (in general)
  - Parties, services, compensation, term of services (time), perks, **credit**
- *THE MOST IMPORTANT WORD IN A PERSONAL SERVICE CONTRACT: **exclusive –** allows you get a negative injunction in case the artist tries to go work for a 3rd party
- **Hierarchy/Categories of Written Contracts**
  - **Letter of Intent (LOI) – an agreement to agree – this is <u>NOT</u> a binding contract – all that is here is intent**
    - Sometimes these are useful though as a starting point or sometimes they will set conditions
    - Not w/o use, but not binding
    - *What if you have a LOI that's **<u>signed</u>** by both parties. Is it a contract?*
    - No – intent is just intent – it is not a present agmt executed by the parties
    - Yes – it states the material terms and it's signed
    - <u>Answer</u>: it depends on how advanced parties were in what they intended to do
    - **Generally, though, a LOI, in and of itself, is not a contract**
    - Hypo – LOI, later an oral assent, but contract sent and not signed – this is where promissory estoppel may come into play (send a detrimental **reliance letter**); however, this might not work

- **Reliance Letter**
  - **Sent out when parties have been exchanging drafts and it's getting close, but one side just won't sign**
  - Purport to establish detrimental reliance
  - RLs create a memorialization that the party sending the letter relied on the assertions of the other side
    - **Promissory estoppel** – **detrimental reliance**
      - Big issue is consideration – I am giving up something for something, and if I proceed in reliance on this, then a court may find a contract here
  - Wouldn't work in a copyright grant situation or a negative injunction situation
    - Only works in situations where there is no Statute of Frauds requirement
- **Deal Memo**
  - Set forth the basic terms but not in narrative text
  - **A short** (can be quite short) **list of essentials of the contract they have agreed to; a little shorter than a true short form contract**
  - **This is a memorialization of what they agreed to**
  - This is what the business affairs dept comes up with ▭ send it to the legal dept
  - Agencies – want to have in their files that they made such a deal – then they can calculate what their 10% cut is
  - *What if this is signed (assume all the crucial terms are set forth)?*
    - Agencies try not to put the word "**exclusive**" in, but it usually gets put in by the studio; assume it is here for this hypo
    - It Depends on the Wording:
      - There might be protective language that the parties do not intend this to be binding until a more formal agmt is signed in the future
      - Sometimes it says this contract IS binding now until a more formal long term contract is formed, if it is ever formed
      - However, in most cases, absent language to the contrary, and if it's signed by both parties, it IS binding
- **A Short Form Agmt**
  - Differs from a deal memo in that this agmt has more **narrative** language
    - Has same weight as deal memo until signed
  - Includes i.e., force majeure, language about whether or not it is binding, etc.
  - Provides very powerful remedies if the word **exclusive** included
  - Another Kind of Short Form Contract
    - For purposes of recording in the copyright office, often, attached to the full contract granting rights, is attached a **short form agmt** – serves as confirmation of the more formal grant of copyright – this is a signed writing for purposes of copyright grant – references an external document (the long form), but says that copyright rights have been granted subject to the long, attached document ▭ the point of this is so that **if this case goes to court, only the short form will become public record** (i.e., if a writer doesn't want public to know how much she got paid for granting the rights to her book)
- **Certificate of Authorship** (only for writers)

- Report the existence of a deal if not all its terms
- If you can't get the long form agmt done, you get the writer to sign this certificate, saying that as btwn employer and writer, all results and proceeds of the writings, shall be a work-for-hire for the benefit of the employer, and shall be the exclusive property of the employer
- Certificate is not actually the agreement, it's just a signed recognition of an agreement Unless there is a "condition" – i.e., that "the writer shall be fully and duly paid"
- *What if the writer didn't get paid and now wants an injunction on the film?*
  - Put into the certificate that the SOLE remedy will be damages (unpaid sums + interest) ⎵ this solves the problem of the writer potentially asking for an injunction against the movie

- **Long Form Agmt/Formal Agmt**
  - Except for certain studios, you just don't see these anymore, b/c they just don't get signed; most places like to make Ks shorter but binding
  - These are still used for **net profit definitions** and **contingent profit definitions**
    - 20-30 pages of legal-sized paper
    - Stuff gets built in from every long form contract ever – they account for everything
    - i.e., the **force majeure clause** – something not within the control of the parties that makes the performing of the contract impossible

- **Force Majeure** – an act of god/nature – some force beyond the control of the parties
- 3 EXAMPLES of Force Majeure: (Reader p71)
  - Commonly include references to "acts of God"
  - *Do we need all these specifics?*
    - We could just summarize these
    - Better to have something short, concise, and binding – SEE EX 1) of the force majeure clauses
  - **"Including, without limitation" clause** – clause included to combat the claim that because something was not listed in the clause then it doesn't apply
  - Long-form contracts end up with the risk of excluding something by including too much
  - Big Risk – diff. parts of the contract are drafted at separate times and are not harmonized – thus, **there is always the risk of contradiction btwn diff. clauses** (this was Ginsburg's answer)
    - To avoid this risk, studios try to put in clauses saying which part governs if there is a conflict
    - Nonetheless, conflicts occur
  - **Better to have a short, concise, binding, and signed agreement**! – being short is better
- 2 contracts that must be signed are personal service agreements and copyright grants
  - Must contain the word **exclusive**
  - Why do we want these agreements signed?
  - 1. **There has to be a signed written agmt to grant exclusive copyright to someone**
  - 2. **There also has to be a signed written agmt to get a personal service contract enforced against a person**
    - *What does a **negative injunction** give you?*

- If you can't force someone to work, you can force someone not to work for someone else
- Each piece of real estate is unique – George Clooney is unique – there is no adequate remedy for replacing him – but he can't be forced to work
- So say a young actor gets a role, but then the next day Steven Spielberg offers him a role, and the artist breaches. *What really happens?*
  - They get told they can't do the Spielberg film
  - Smart parties try to rearrange the timing, so the actor can do both
  - <u>This is an ex. of rights/remedies/practical solutions:</u>
    - **Remedy** is a Negative Injunction
    - **Rights** – first party has a binding contract
    - **Practical Solution** – try to rearrange schedules to accommodate both productions

- *What one word has to be in a 1) personal service contract or 2) a grant of copyright?*
  - "**<u>Exclusive</u>**" : default in silence is construed as non-exclusive
    - **If services are non-exclusive, then party can work for multiple ppl at one time**
      - **If NOT exclusive, then you CANNOT get the negative injunction**
    - If copyright is not exclusive, then multiple can be granted the copyright to the same thing
  - Personal service contracts
    - Subset of the world of employment agreements
    - What are the essentials?

<u>Talent Contracts</u>

- *Who drafts? Does it matter?*
  - Yes, it matters
  - It is better to draft first – set the framework of the contract and establish **control**
  - <u>Counter:</u>
    - Language tends to be construed against the drafting party, so it's better to comment rather than to draft
    - <u>Ginsburg:</u> **Generally, it's better to strike first – set the playing field then someone else has to spot what's there and what isn't there**
  - It's always harder to spot what isn't there
  - By initiating control of the documents, the power is established on your side
  - So if other side doesn't ask for a change, what you write stays
- Constraints on free-bargaining
- Immigration limitations: transporting talent in or out of location
- Union agreements: cannot go below minimum scale compensation
- Jurisdiction clause: Global Rule 1: SAG-AFTRA's JX is the entire globe
- **<u>Pay-Or-Play Clauses</u>**
- These provide that **employer can pay and use the services of the talent OR pay and not use the services of the talent – either way, employer has to pay**

        - I.e. there is an obligation to pay BUT NOT to use the employee's services
        - Actor's perspective:
    - Actor thinks he was getting a credit
    - Actor also thinks he was getting the opportunity to work with a specific actor or director
        - **No obligation to mitigate (to try to get another job** – because no 2 jobs are exactly alike (like real estate) – if another opportunity comes up for the artist, doesn't matter, artist has no obligation to look for work or take work. Also allows talent to seek out alternative employment without affecting their damages
    - Now, this has spread to executives of companies
    - 2 meanings
        - Adj – the artist is/was pay or play (describes the artist)
        - Verb – pay or play the artist
        - Artists get paid whether or not the movie gets made – it doesn't matter if the movie gets made, doesn't matter if they're in it, etc
            - Incentivizes the producer and the artist
            - What about contingent compensation? – The artist doesn't get % of profits, sales, credits, perks (except payment for entourage), etc that they would have normally gotten
        - Important to designate **who holds obligation to pay**—ensure party is financially reliable and can later be held liable; otherwise SAG will ask for advanced payment
- Not including this in a contract may be considered malpractice
- "Final approved bonded budget" clause – makes the contract illusory because if a movie isn't made, the artist doesn't get paid (so can't make a pay-or-play contingent on final approved budget)
- In certain other cases, there is another kind of agmt: **Pay-And-Play** – **the employer must pay AND must use the services of the talent**
    - Comes up in a couple of environments:
        - i.e., Some writers might require that they are not only paid to do writing, but that they also actually do the writing
        - i.e., Powerful directors have these kind of contracts – this director has the absolute right to direct this movie
            - If director wrote the screenplay, a lot of times he will say, "I will only let you option this if I can direct"
    - *How can you counter a pay-and-play deal for a director, say for an 8-week shoot?*
        - Director is allowed to shoot the first 1-2 weeks of principle photography, but if employer concludes this film is not being executed well, then employer can change the director after 1-2 weeks
- Artists often get paid through **loan-out corporations** (a type of corporation, usually owned and controlled by the artist, which provides his/her services) as opposed to a standard work-for-hire/direct employment relationship
    - **How does it work?**
        - Loan out corporations can deduct all professional expenses (key is they have to be for business use – so if you use a car, allocate the portion of the car used for business)
        - Money gets paid to the corporation, all expenses/goodies get deducted off the top

- Ex: 1 mil flows in, 150k paid out as goodies (car, tickets to festivals, plane tickets, etc) nominal gross is only 850k rather than 1 mil
    - Some of this 850k goes to the 'medical plan', 'pension plan', etc and gets deductible
- Whatever is rest is paid out as human salary to 0 out the corporation so that the corporation doesn't have to pay tax
- This saved the human about 75k in taxes (if you assume the marginal tax rate is about 50%) – since they paid out 150k as expenses

- **Laughton v. Commissioner –** Payments to actor's loan-out corp. are NOT taxable to the actor (if all the formalities of a corporation are observed)
    - Established rule that corporations otherwise conducting themselves as a corporation are a legitimate way to hire a human owner
- There are at least 2 kinds of corporations:
    - **C-Corporations**
    - **S-Corporations**
        - Limited liability as a corp – income not taxed to corp
    - Foreign Services HYPO
        - Lets say ur client is working in Hungary
        - If they are there for more than 180 days, Hungary may take 15-20% as a withholding tax just off the top of all income earned there
        - That money can then be claimed b/c it passes right through to the tax payer as a foreign tax credit on a domestic return ▭ in other words, they get a 20K tax credit on their taxes in the US, on a human level
    - *What would be the problem if it were a C-Corp?*
        - Suppose the C-Corp were paid 100K and Hungary extracted a 20K withholding tax
        - *What's the problem based the structure of a C-Corp?*
            - At the end of the year, there is zero money in the C-Corp
            - So, at end of the year, the C-Corp has a 20K foreign tax credit for ZERO tax
            - So, it's a useless foreign tax credit
    - This is why you might want to use an S-Corp for overseas services (individual shareholders are taxed as opposed to the corporation as an entity paying federal income tax)
        - These are described in the **IRS Internal Revenue Code**
        - Employer (contracting party) pays money to C-Corporation (i.e.., Tom Cruise, Inc.)
        - When money comes to rest in C-Corp., this C-Corp. has to report income, deductions, and any net income
            - Corp. can own, buy, and deduct things on a basis diff. than a human
                - Not limited to the caps humans are limited to
            - The C-Corp. spends a lot of the money that flows into it – buys legitimate business expenses ▭ things that the artist needs to do his work, i.e., lessons, audio-visual equipment
            - Corps. routinely buy cars, pay for travel, pay for insurance – these things are a lot harder to deduct at the personal level (subject to an intervening

minimum level of expenses, which if you don't reach, you don't get to deduct)

- So, if adjusted gross income was 30K, until you hit 30K in expenses, you can't deduct these things at all, BUT if ur a corporation, you can deduct these things
- Using this device saves you money
- If you can't deduct, then you have to pay taxes on it
- If you deduct, then you don't pay taxes, so you save money

- **Deduction** – goes against income
  - If you have a $1 deduction, it reduces your income by $1, but it may not have much effect on your taxes
- **Credit** – goes against tax – this is juicier
  - If you have a $1 credit, it reduces your tax by $1

- After you can't make any more deductions, what's left is what you pay the artist
  - HYPO
    - Gross = 200K
    - Deductions = 75K
    - On Dec. 30, C-Corp. decides how much of the 125K should be put into a retirement or investment account (this amount also gets deducted)
    - Then, the final left-over money is the salary to the artist ▭ gets paid out
- This is what's embedded in the ***Laughton*** case
- C-Corps. flourish – encountered all the time
- If ur using a C-Corp. and you breach, *who gets sued? Do you have to exhaust your remedies against the corporation before you can sue the individual?*
  - C-Corp. pays out anything left to the human
  - Studio would sue the corp. they hire
  - The money in the human's hands is untouchable
  - **Goal is to zero-out the C-Corp. by the end of the year – if there is no more money in it, then you don't pay taxes (otherwise, you would be paying corporate and personal taxes)**
  - C-Corps. are essentially economic shells, and they are meant to be, so suing them is pointless
    - So, you want the actor to execute an **inducement letter** – basically, it lets the studio sue the actor directly (employer does not need to first exhaust remedies against the c-corp.)
- In some jurisdictions, some very sophisticated tax-planners have artist's services set up where artist also has an S-Corp.
  - In **S-Corps**, the money flows right through

        - You get the benefits of a corporation <u>and</u> the tax benefits of having a corporation
        - One major benefit of using an S Corp is that if you have foreign tax credit for shooting a movie in a foreign country – pay taxes for shooting in a foreign country, write off a deduction when you come back to the US for your US taxes if you use an S Corp
- One problem with this loan out corp system is that if the human/artist that is getting paid by the corporation could breach the contract between the corp and the producer; if there is a corporate shield, won't the human/artist be able to breach at will without consequence?
    - The solution to this is to insist that the human/artist (whose services are being lent) signs something that is called an **inducement letter** – this letter says, producer is allowed to sue artist (as if they were in privity) rather than have to sue the corporation
    - The letter confesses jurisdiction and allows the producer to sue the artist
    - These corporations are called C corporations
- There are also S corporations, which are corporations for limited liability purposes, but for taxation purposes the money passes straight through the company to the employee
- Another thing he pointed out – when you get paid for a job, there are deductions from your salary for taxes; employer typically pays half and employee pays half
    - In the case of a loan out corp, technically the loan out corp is supposed to pay
    - To avoid this situation, artists will typically ask the producer to pay the deductions as if they were directly employing the artist (and thus would have had to pay anyway)
        - The counter argument from the producer's end is that the artist didn't have to create a loan-out corp

<u>Work period</u>

- **Pre-production** – covers the period before principal photography
    - Rehearsals, makeup tests, wardrobe fittings, etc etc
    - Usually all of this stuff is included in the compensation
    - But if you are paying the artist the absolute minimum daily scale, you have to compensate additionally for this
- **Production** – the start of principal photography – the main narrative action of the movie (nowadays includes things like on-set 'making of' interviews for DVDs)
    - Principal photography – the photography involving the main stars
- **Post-production** – after principal photography
    - Looping – dialogue replacement
    - ADR – automated dialogue replacement
    - Re-shoots, additional scenes, etc
        - But this partly depends on the contract, level of compensation
- **How much** time is being bought?
    - Typically do not state a specific stop date
- Example of payment – artist paid $600k for 4 weeks + 2 "free weeks"
    - The artist gets paid 600k whether they work 4, 5, or 6 weeks
        - Artist is getting paid 150k per week (since weeks 5 and 6 are 'free weeks')
    - The reason they do this "2 free week" structure is because if they go an extra week (7 weeks total) the divisor is 4 weeks instead of six, so the artist would get 150k for the additional week instead of 100k

    - But how do you deal with a problem where you pay the artist for some time but you're not done and the artist has other commitments
        - Artist includes a contract clause for **'subject to artist availability'**
        - If the artist is not available, producers for each project try to work with each other to adjust shooting dates; if it really can't be worked out, then you just have to reassemble the crew later for the extra shots (very expensive)
            - Could also go to where they're shooting and shoot there (but also expensive and could raise other issues)
- Drop and start – can't drop someone and then start again – the new start is a new contract
    - I.e. you can't sign someone, let them go, and then bring them back under the same K; also can't use someone for some time, release them of duties, and bring back without making a new K
- **De Haviland case** – the producers wanted to count her 7 years of employment as 7 years of actual working, but the court said 7 years of employment means 7 years from inception of the contract/commencement of service
    - Obviously fair because you can't sign someone for 7 years and drag that out over 20 years
    - This is still good law in CA for entertainment Ks – the longest K is 7 years
        - Legislature intended to prevent anti-competitive behavior and allow workers to freely change employers. Churn availability of personal services as a matter of public policy.
    - *Expressio unius est exclusion alterius*: expression of the one indicates exclusion of the other. Canon of statutory interpretation.
        - Legislature did not intend "actual service" if it did not include such a stipulation
    - A producer might have an artist sign a contract when they're testing, even before they've appeared on film, so that they can secure the services for 7 years
    - He also talked about contracting for sequels in movies and series in TV

Artist compensation

- Consider the loan-out corp info from above
- Most obvious way to pay artist is through **cash**
- Result of an arms-length contract btwn artist/loan-out co. and employer
- Usually based on one of two established floors:
    - 1) **Union Scale** (+ 10% if represented by agent according to custom)
    - 2) **Quote** (if actor is advanced enough to have established a price)
        - *If artist got 100K before, agent will ask for more the next time*
- Can create clauses for bonuses upon receipt of awards (and potential rerelease)
- If you have a per-picture rate you can negotiate for a single week that preserves their quote
- Artist may choose to work for less than their established price, i.e., if artist works on an indie picture
        - Artists often gyrate btwn studio ("**pay-days**") and independent pictures
- When they work on independent pictures, they have to lower their quote
- In general the starting point for negotiation is not less than the artist's quote (the amount they've been paid by a prior, similarly situated, arms-length payors
- What happens if the artist asks for less than they are 'worth'/their quote (to pursue an independent picture project) and you don't want the other side to use this as the new quote
    - Use a non-disclosure clause, i.e. the parties agree that the quote is limited to this film and the quote can't be discussed with other companies

- **No-quote deal**: preserves actor's normal quote and binds parties from revealing it
- **"Most Favored Nations"** *covenant* used to get a cluster of stars receiving less than they typically would garner and they all receive the same compensation—if someone else receives a different amount it is a breach of covenant; similar to a "no-quote" that future studios will not discount their typical studio deal
    - Reciprocal covenants ⊏ even if breached obligations remain
        - Contract goes forward but there are damages for breach
        - Vs. Conditions which break the totality of the agreement and dispose of all obligations

- **Components of compensation**
    - **Front-end compensation** – what the artist gets in cash during their services
    - **Fixed compensation**: guaranteed amount paid along normal process
    - **Deferred compensation** – money to be paid at a future *time*.
      Includes a delay in time and some risk that the conditional event never occurs (negotiate for a bigger amount for taking on risk). Two Kinds:
        - **Contingent** –payment conditioned on event that may or may not occur (i.e. 100k now and 100k upon some condition [sale to distributor, theatrical release, etc])
            - Anything that must be paid must be in the budget so this is not in budget (since there is a contingency)
            - He also mentioned the phrase *fixed deferred contingent*, which means that the deferred contingent fee is some fixed dollar amount
            - Higher risk because there is a potential that this will not occur
            - Back-end compensation is by definition deferred contingent payment
        - **Guaranteed** (only dependent on passage of time) – he classified this as its own category; basically a deferred form of compensation with no contingencies (guaranteed amount) – a payment that must be paid on a future specific date
            - This type of compensation **must** be included in the budget
    - In lower budget movies where the front-end is lower, artists will take more contingent compensation
    - As a producer who has committed to deferred payments, must ensure that distributor assumes responsibility to fulfill this future obligation and pay the costs—assign payments to financially responsible distributor (therefore also make sure they have made an accounting)
- Terminology:
    - **Pro Rata**: at/by the rate (ratio)
    - **Pari Passu**: at the same time/at an equal pace
        - When splitting up the pool, you pay parties at the same time
    - **Stature**: position in the industry (how much they can command)
    - **Leverage**: ability to use your market power to move the deal in the direction you would like it to go
        - Archimedes: Give me a lever long enough and I will move the world
- **Checklist** – p49: non exhaustive list of what things artists ask for in contracts
    - Hierarchy of artist powers for choosing hair artists, makeup, etc. based on stature & leverage

        - Absolute approval over hair, make-up and wardrobe (can select their artists)—outright ability to accept; also implies the corollary right of veto
            - Want them flown in, put up in nice accommodations
        - Approval of pre-agreed list
        - Approval, conditioned on a rate within a certain budgetary restriction
        - Consultation clause: we will talk about it, provided that producer's (etc) decision is binding on the artist (to ensure reasonable terminus with finality)
            - Violation is probably a breach—damages would be difficult to calculate
    - *Responses to this? What if their ppl are out of the price range of the movie budget?*
        - "Such approval not to be unreasonably withheld"
            - Put in this proviso – this puts a counterbalance on absolute veto
    - With major artists, you have to pay for their perk package – they get to have ALL the goodies they want – there's no choice, particularly for studios (they always cave on this)
    - In independent production, you usually get, "We'll consult with you" and "We'll hire ur ppl if…"
        - 1) They will work for what *we* have in *this* budget, AND
        - 2) If work is occurring abroad, they can get a visa in time (this is often an issue)
    - Artist Side – I want my person and I don't care what it costs
    - Producer Side – Wants to be able to get the work done w/in the budget
    - Note for directors, they often want choice of production designer, etc
- **Concept from Credits that applies to pay** – problem that arises when you hire a cluster of artists or hire actors in a non-linear way
    - Lots of recognizable actors in an independent film
    - "(**Most) Favored Nations**" – client will get the same (or at least, not worse) credit as all the other stars – if there is a pay cut, they will all get the same reduction (so that they end up at the same number) (regardless of how much money they normally command) ▭ for pay, actors can also contract under favored nations - **they all end up at the *same number***, i.e., every actor gets 100K
        - Employing party guarantees this – this is a contract covenant (promise)
    - *Lurking Issue?*
        - *What about credit? What if all of them got 1st position credit before? How do you sort out credit when there is a cluster of stars?*
            - SAG doesn't provide much guidance on what credits have to be given artists
            - Fair way to solve this, and popular way, is to list stars by alphabetical order
                - When done this way, there is no implication that first actor listed is "**primus inter pares**" (**first among equals**)
            - Alphabetical order undercuts implication that one actor is more important in the picture
    - If someone ends up not getting paid the same in a favored nations agreement, that is a breach that would lead to damages
- **Commercial Endorsements:** issues that may distort the story-line that actors/directors are growing increasingly frustrated with:
    - Producer is reserving the commercial tie-ins and promotional rights
    - Appearance of brands on regulated TV for compensation has(?) to be disclosed

- Gradations of commercial promotion: extent to which actors are asked to be a promoting agent and are thus tied to a product (can be constrained by endorsement deals with competing brands i.e. Russell Wilson wears Beats by Dre when NFL sponsored by Bose)—unions care about the level of endorsement required
    - **Product placement** – the product appears in the movie as it would in real life (Kellogs box gets pushed across the breakfast table)
        - This isn't usually argued too much by artists because it's passive
    - **Product integration** – reference/mention or plot point centered around; woven into the script; almost becomes part of the movie (corvette in Transformers, FedEx in 'Castaway')
    - **Program-length commercials** –otherwise dramatic show has a real product interwoven into the whole feature; the whole show/movie about tennis shoes or some product
- Want to approve outtakes, stunt doubles, dubbing and nudity
    - Dubbing: who will be speaking your voice in another language (typically used over a long period of time—consistency)
    - Nudity: explaining the scene and purpose, negotiate particular compensation for it
- Tax indemnity: if being transported into a foreign jurisdiction ensure employer will pay compensation to extent that tax is higher than in US
- Insurance Policy: named under errors and omissions
    - If someone sues they typically name everyone involved so artists want to be insured against potential damages
    - Union now requires these policies to be included automatically

CREDITS

- He focused on writers for the credits examples because they tend to have the most complex issues
- **Default: collective bargaining subject to minimum union terms**
- **Consideration**: expectation of reciprocal advantage
- **Purpose of Credits**
    - Source attribution: rightfully recognize creator of work
        - Also want to accurately identify the source
    - Career advancement: more credits is better
        - Career move: TV to film
    - Money
- Pay or play implications: may get paid but you don't get credit
    - Let's say there is a writer who writes a script, but another writer comes on and changes the script
    - Guild rules determine
    - **Ferguson case**
        - **Holding**: Judicial review of arbitration is limited to 1) whether the parties agreed to submit the issue to arbitration and 2) whether the arbitrator exceeded the power granted by the agreement (i.e. the employee is a union member so the court won't step in unless union power is exceeded)

        - The mechanism the ent industry has evolved – before credits are accorded to a writer, the producer must file a tentative notice of writing credits (which is the producer's good faith assertion of credits that the producer feels should be assigned)
        - So what happens if the first script is dumped?
            - Union requires that producer list:
            - The type of credits to be given
                - Script credit A, story to B, etc
                - Infecting the chain of writing – if you give a story credit to B, chances are he will get the script credit too (because it shares elements)
            - Then producer sends his comments to a committee and the committee decides who gets what credit
            - & - means the writers worked together as a team; "and" means they didn't work together
                - Has real meaning when a contract grants a bonus for having a "sole screen credit"—&-team is treated as a unit (jointly and severally the sole writer)
        - Agents always want their client to get the credit, but on the other hand you can't in good faith (and fair dealing) say in advance that the final script is going to be the product of that writer (because the script may be substantially changed during shooting or during pre-production); the good news for producers is that credits are out of your hands once you submit your recommendations
    - An actor, director, etc on pay or play won't get credit if they don't appear or work on the movie
- **What governs the system of credits?** Free bargaining subject to outside constraints
    - Private contract between parties
        - Credits are generally governed by free contract—union agreements generally represent the minimum contract obligation, but people try to negotiate for more
    - Union agreements (collective bargaining agreements) provide at least a certain kind of credit, in a certain form and certain position
        - Only cares/will step in for issues of lesser credit that do not meet its minimum standards (ex. director who owned the film and did not accord himself minimum union credit and got in trouble)
    - Constrained by the type of service performed
        - IATSE do not exercise power over credits like above the line professionals (actors, writers, producers, etc)
    - State law (7 year rule, etc)
    - Federal law
- What **kinds of credits** are there?
    - **Logo**: graphic or animation
        - Ex. MGM Lion, WB shield, 20th Century lighthouse
        - Distributor or maybe production first
    - **Presentation credit** - "Presented by" credit – usually <u>distributor</u> gets this
        1) ex. X Presents… or A X Presentation (typically a studio)
            - This is a distributor
        2) If there is more than one, you see "In association with"

- US is not a signatory on any co-production treaty (which were designed for purpose of financing)
- Involved in financing or creative elements of the field
- Even if there is negative pick-up (financed after production) it will still be credited as X presents…

3) Does not imply PFD

- Even if there is negative pick-up (financed after production) it will still be credited as X presents…

- **Production credit** – 'a Citadel entertainment corp' – the company that produced the film (usually these days it's more than one)—<u>producer</u>
  - In Europe there are a lot of these
- **Possessory credit** ("A film by...")—<u>director</u>
  - Before the 70s or so, you didn't see these credits in films
  - In the early days, writers had a problem with this – why should a director get a possessory credit?
  - It used to be that writers+directors could only get the credit, but now directors can get it
- After the pre-movie credits (above) the traditional order of the other credits were (in this order):
  - Written
  - Produced
  - Directed
  - Film start
- This changed about 6 years ago and the order is now:
  - Produced
  - Written
  - Directed
  - Film Start
- The underlying principal is that it is *deemed* to be **preferable** to be **closer to the director** (considered the most important role so they have the credit with closest proximity to the beginning of the movie)
  - Opposite for actors: want to be first in time (first position)—can be negotiated as "above the title"
  - Writers now follow producers, which is a demotion to producers (because the writers are closer to the director—P␣W␣D or D␣W␣P)
- Sometimes the director can take his credit after the last frame of the film, and you see the above order in reverse – it is still preferable to be listed close to the director
  - Directors have so much power they even get their name in a box
- Position:
  - First position: logo, presentation, possessory and production and principal cast
  - Middle credits: cinematographer yada yada
  - Credits at the end:
    - Alphabetical order
    - Order of appearance
    - Producer has discretion about how many credits to allocate

1. **<u>Above The Line Credits</u>** – **the principal creative credits – actors, directors, writers, producers**

- i.e., Written by, Produced by, Directed by
- Form for *all* of these is specified by the unions
  refer to themselves as "guilds" i.e. artisanal
  - Producers Guild of America (PGA) has gained momentum recently but it is NOT a union, merely a trade association
  - Screen Actors' Guild, Writers' Guild, etc.
- In Britain, they just say "Producer" or "Director"
- DGA is zealous about having conforming director credits

2. **Below The Line Credits** – all the other credits
   - Directors get other credits in addition to the default "Directed By": The 3 Ps – these are the subject of negotiation

1. **Presentation credits** – "_____ presents for a _____ presentation"
   - Historically, given often to chief creative exec of a studio who green lit the production
     - i.e., Sam Goldwyn presents…
   - Now, this tends to go to the distributor
     - i.e., Columbia Pictures Presents…
   - NOTE: no union covers this credit it is the subject of contract negotiation

2. **Production credits** – "A _____ production"
   - Often this comes up multiple times in a film, particularly when there are multiple financiers, each of which claims they are responsible for the production
   - Can be accorded to the production company that made the film
     - Occurs often when an independent prod. co. sold movie to a big studio at some point (i.e., at Cannes)
       - i.e., "Columbia Pictures presents a Killer Films Production"
   - **Separate Card** – when a credit is alone on screen for a fixed period of time
     - i.e., "Produced by Steven Spielberg" – this is onscreen, alone, for a couple of seconds
     - Scrolling is done at a speed so that there is some point when it is alone on the screen for 3-5 seconds
   - Group of people is a **shared card**
     - *What happens in a **crawl**?*
       - As credits crawl up, the separate card has to be on screen, alone, as it's crawling up, for a certain number of seconds

Sometimes, you will see something like "In Association With"
- This is extremely common in multi-country co-productions
- This can go either with a presentation or a production credit (sometimes on one card and sometimes split)
  - i.e., "Columbia Pictures Presents in Association with Silver Screen Partners" or "A Killer Films Production in Association with Silver Screen Partners"
- Again, this is a contractual credit (bargained for)

3. **Possessory credits** – if accorded, goes to director, on the theory that the author of the film is the director
   - Most important of the 3 credits from the director's POV
   - Came to the fore in the late 1950s idea is that the director is the author of the film – originally, this was a French theory

        - i.e., “A Steven Spielberg Film” or “A Film by Steven Spielberg”
            - Implies that it’s HIS film
    - Again, this is negotiated for – not called for by any of the unions
    - If the ad is on a billboard the director’s credit must be in a box
- These regularly get confused, BUT they are all different!
- **Credits appear in 2 forms**
    - **On screen**
        - Before/after the principal action
        - Single-card credit – credit alone on screen for a finite but measurable period of time (either on a standalone card, or on a scroll but it appears by itself for 3-4 seconds)
        - Shared card – share a card with another person
        - Main title (cluster beginning or end of the film): subset of on-screen
            - Whatever is clustered with the director has right to be last credit before principal action or last frame of movie then first of main credits after the film is over
    - **Paid advertising** – print, TV, full page ads, etc (as opposed to a non-paid advertisement, like an interview)
        - Key art – main artwork used in the advertising campaign
        - He pointed out in key art there is the big title as part of the artwork (**artwork title**) and there’s also the title in small print among the credits (called ‘**standard title’/**‘real title’/’regular title’)
- **In terms of credit listing, who wants to be first?**
    - For the cast it is a little different than the scheme discussed above (where people want to be close to the director) but for the cast, the main stars want to be listed first
        - The exception is when an actor is set off by “and...” or “and introducing” etc
    - Can negotiate position i.e. “not less favorable than 3rd”
    - When you do something like “in order of appearance” or “in alphabetical order”, you’re just making it clear that you’re not listing by order of importance, you’re just trying to be fair
- **How do you enforce these credits?**
    - You accord credit by releasing to the distributor the types of credits to be given
        - The producer delivers the negative, the credits in the form of an optical strip (or digital) – principal action of film and the credits are separate elements
    - Typically go first to the union
    - If this is above the union (you’ve complied with union rules) you go to court
    - May also go to arbitration
    - What about the failure to accord a credit? What sorts of **remedies** are provided? What types of clauses might an employer (more likely to be sued over credit dispute) seek in order to protect himself in credit negotiation in the **original contract**?
        - **Almost every entertainment contract has 3 or 4 standard provisions that give the party who undertook to accord the credit some leeway (among others)**
        - First, it's almost always provided that **failure to accord a credit (aka a breach) will NOT give rise to an injunction** (unfair to prevent movie release if just one credit is missing) [**anti-injunction clause**]
        - Second, damages themselves are waived – “There shall be **NO damages” – for a “casual or inadvertent failure” to accord credit** if someone makes a mistake, no damages

        - If it's not casual or inadvertent you have to prove that it was reckless or intentional
    - Third, clause that says cure need be prospective only
        - Anything that's already out there is done – thus even if a film comes out and gives an incorrect credit, you can't make retrospective changes
    - Fourth, bind third parties to credit terms and you are not liable if the downstream assignees don't perform – 'provided no breach by a 3rd party shall be deemed breach by employer hereunder'
        - If someone breaches down the distribution line, you can't come after the employer
        - The way to get the talent to agree is that you say you will accord all third parties to assign the credit – A will accord a credit and A will require all 3rd parties to accord a credit, then you have created a cause of action for the artist against 3rd parties; you're creating privity/a cause of action for the client
    - The reason for this cluster of clauses is because distributors don't want any liability for things outside their control (leverage – distributors have the power)
    - To get around these clauses that remove distributor liability, lawyers tried a new theory under ***Marino v. WGA***
        - Lawyers said, you're selling a product that is unfairly labeled to the detriment of the public because the artist's name is not on it, so the distributor is thus liable
            - Court: A failure to accord credit does not constitute reverse passing off (credit not there); the only thing that's cognizable is whether the manufacturer (distributor) is incorrectly listed. origin of goods correspond to manufacturer/provider not the services contained in the goods)
            - I.e. if it says it's an MGM movie, but it's really a Paramount movie, that might be a cognizable claim
        - This is the **Marino rule**, which tried to invoke the Lanham act, which was a law against selling mislabeled goods
- How would you measure damages for the failure to accord credit?
    - Theories for what the credit was worth (using expert testimony)
    - What fee would you have taken to waive your credit?
        - Some incentive plans (to qualify for tax incentive) can have limit on
        - Usually has some relation to their pay (like 50% or pay)
        - Show that others have accepted absence of credit within this range
    - What the party can demonstrate that they actually did on the project
    - Whether those functions actually contributed to the film's success
    - Actual projects that the party is previously or subsequently associated with
    - Value of credit taken as severed part of the contract is completely speculative
    - Liquidated damages are not industry practice
- Screenplay By: writer afforded this credit was assigned underlying material (often accompanied with, the note "based on the novel …" or "based on an idea")
    - Writer has the right to choose "screenplay by" "or written for the screen by"
- Teleplay: this is the television version (also working with underlying material)
- Story By: underlying material later used to create a screenplay

- Written By: either this person wrote both the underlying work and the screenplay, or it was all original to this author—everything appearing on the screen is the work of this person—this is a strong credit (fusion of story by and screenplay by)
- **Paid Advertising**
  - DOCUMENT
    - Compare Citizen Kane [1941] credits (not many) to Sleep Walking [2008] Credits (many)
    - 88 Minutes – terrible movie
      - All three "P" credits (presentation / production / possessory) in the right order
      - **Music By**, **Costume Designer**, **Director of Photography**, and **Production Designer** – these important, creative credits tend to be clustered together, as they approach the director credit
      - There are TONS of "executive producer" credits
      - Same person, here, has "produced by" and "directed by" credit
      - HISTORY: Important directors seek the "produced by" credit ⇨ do this b/c they want an Oscar (producers get the Best Picture Award)
        - If there are many producers, only the top 3 producers (determined by PGA) can get the Best Picture Oscar
      - **Line Producer** – the journeyperson who made the film from a technical standpoint but didn't create the film (i.e., put all the parts of it together) – these ppl used to end up getting the Oscar when they didn't deserve it ⇨ so directors started seeking the "produced by" credit; British-ism
      - "88 Minutes" is in the 3rd line – this is called the **standard credit** – this is the credit against which you measure the size of the other credits
        - Default – you want your credit to be of the same size and type of the title of the movie
        - Now, typically, all credits are 100% of the title
        - If you want diff. colors or something else goofy, you have to get a waiver (usually granted as long as type is of the same size)
    - Hannah Montana The Movie
      - **Standard Credit/Billing Block** – this is what is sent out by a credit administrator to everyone who might be placing ads, domestic and foreign, in the movie
      - "Hannah Montana The Movie" is circled – this is called an **artwork title** b/c it is usually rendered in a fanciful way
        - Very common today, but not every movie has them
        - Miley Cyrus is both above the artwork title and below it but before the standard credit/billing block
      - *What was the first card on-screen?*
        - 1. Walt Disney Pictures Presents
        - 2. Miley Cyrus
        - 3. Hannah Montana The Movie
      - Notice, the director is the last credit, as per custom

TRANSFER CONTROLS

- Page 111 – continuum of transfer controls embedded in an agreement between an initial transferee and transferor with respect to an array of rights that may arise and that which the original grantee wants to have their lunch hooks in – they want to have control over those rights
    - In other words – Contractual limitations on the ability of a granting party to exercise, in a fettered or unfettered way, future grants – basically there is some initial grant between grantor (e.g. author) and grantee (e.g. producer/buyer) and the parties contemplate future transactions – the producer wants priority to future works because of his investment in the original work
    - Usually, these **transfer controls are attached to a prior grant of some kind**, i.e., a grant of a first novel and there are future novels yet to come (and the grantee wants to exercise certain control over what happens to those)
    - Free negotiation --- | Right of first negotiation --- Right of first refusal --- Right of last refusal--- Option --- | Approval
        - Left – weak end
        - Right – strong end
        - Strength/weakness measured by the party that can exercise the control (not the party under the limitation, a.k.a. the party to whom the control has been granted)
        - **Example: Parties are engaged in an initial relationship and envision a future relationship**, i.e., 1) **works yet to be written** (i.e., unwritten James Bond novels), 2) **works that already exist but which are not the subject of *this* grant** (set of books already written but you're only starting out with one), 3) **sequel** rights, and 4) **when one set of rights in a book is granted but others are withheld** (i.e., motion picture and TV rights are granted, but live stage rights are not granted)
            - **Sequel v. remake** – sequel is a follow up to the first story, and a remake is a retelling of the same story
            - By custom, a sequel was a story involving some or all of the characters at a different period in time (prequel is actually a misnomer)
            - Traditionally a sequel is considered more valuable (because it presumes the first one was a big success); remakes require a passage of time
            - **Reboot** – a remake that somehow reconsiders, reimagines the original story ▭ more than just a slavish remake
            - Technically, reboots and remakes are, if not twins, very close siblings
        - In all of these cases, the author or co. that acquired the work from the author will perhaps agree to one or more of the transfer controls
    - **1) Free negotiation** – you have the right to ask for rights to future works; ex: I hear you're writing a new book, I'd like to buy it
        - If one or both parties want to talk to each other about those future rights, they can do so
        - NO obligation here for either side ▭ not much of a constraint at all
        - "**Mutual Option**" – this is zero/nada – each side has some set of rights or some opportunity to exercise nothing!
            - But this comes up – quasi/pseudo-lawyer way to explain open negotiation ▭ that each party has the right to ask the other party for something
        - But we all have that right in almost every aspect of our personal and economic lives ▭ you can always ask
    - **2) Right of first negotiation** - (ROFN) – involves an actual constraint on the grantor ▭ **if the grantor wants to do something with those rights, he has to come to the grantee first**

- **Grantor has right to sell controls, but before he/she can do so, he/she must go to original grantee first**
- Typically includes specific provisions requiring a time-frame, conducted in good faith
  - Grantor must present terms of proposed negotiation to grantee
- Usually granted in tandem with right of first refusal
- *What happens if grantor has this ROFN obligation, but instead of honoring it, sells it to another studio w/o any notice?*
  - This happens ALL the time
  - *Is this actionable?* YES
  - *What's the remedy? Damages?* ▭ Hard to prove actual damages
    - Grantor could say we were never going to make a deal with you anyway
      - Speculative as to whether or not they would have closed the deal
    - So, damages is a remedy w/o much teeth
  - *Counter?*
    - Say we paid for the 1st book, and would have paid for the 2nd book, but we didn't even get a chance
  - *Remedy?*
    - An **injunction**
    - You probably have an exclusive grant on the 1st book, and the effective remedy is not to just let someone take away your franchise
  - Ginsburg thinks this is a serious breach!
  - *Cure?*
    - There needs to be some notice in writing
    - Say something like "If we don't make the deal in 30 days, then this right goes away"
    - If no set day limit (i.e., 30 days), courts defer to a "**reasonable amount of time**"
      - There's a difference in "reasonable time" btwn rights to a regular novel and a "hot" novel
    - *If first novel was $1mil, is the sequel worth more or less?*
      - Sequel to first Harry Potter is worth more ▭ it's a franchise, has audience awareness ▭ it's a franchise ▭ it's got followers
      - So, put in "Price shall be NOT LESS THAN a sum equal to i.e., 150% of sums paid in all categories for the first novel"
      - This is a radical change from previous studio clause (a model which existed for 50-60 yrs in the motion picture industry)
- ROFN is a **real obligation** ▭ you must do what you say you're going to do
- Suppose you put in "The failure to accord ROFN, by the foregoing terms, shall give rise to the right of negative injunction"
  - You are agreeing you have the "right to *seek*" the injunction – will actually argue about whether or not you can get the injunction in court
- The Watchmen – transfer right belonged to Fox but movie got made by Warner Bros

        - Same issue w/ Dukes of Hazard
        - In both cases, Warner Bros settled quite quickly
        - Some have argued that Fox, in the settlement, made more by not getting the chance to make the movie than they would have if they made the movie
        - *What might you seek if you are the second studio getting the grant?*
            - Indemnity for breach
- Ask your grantor to attest that you "represent and warrant" "subject to an indemnification" that no 3rd party rights inhere in the rights being granted ⇨ that you have clear and unfettered right yourself, presently to grant what you're granting us
- **3) Right of first refusal** - **contractual right that gives its holder power to enter into business transaction w/ owner of something before the owner is entitled to enter into the transaction w/ another party**
    - *How is this diff. from ROFN?*
        - ROFN – **I have to come to you first when I am interested in selling**
        - ROFR – **focus on refusal – grantor is actually allowed to talk w/ a 3rd party and to set some price**
            - Lets say Book 1 went for $1mil to Paramount; grantor negotiates now w/ Sony and sets new price, i.e., $3 million ⇨ BUT CAN'T CLOSE b/c burdened by ROFR
                - **Before you can close w/ a 3rd party who is ready and willing to buy, you HAVE TO DISCLOSE to 3rd party the ROFR** (a short, fixed period of time when you have to go back to first owner)
                    - **If you don't disclose, it's a breach of contract w/ first studio**
                    - Also, you could be in trouble w/ the 2nd studio (they might think you are just using them as a lever just to get the price up)
            - So there is a fixed period of time where you must go back to holder of ROFR (Paramount in this hypo) and say "I am ready to sell for $3mil. You can match this or refuse it."
            - If Paramount refuses, then I can close with Sony
    - ROFR is usually short, i.e., 2 days, 72 hours, 1 week, etc.
        - When the grantor goes back to the original grantee, there are two things the original grantee can do: **match** or **overbid** (determined contractually)

            Matching right: pay the same price as the third party

            Over-bid Right: pay the same price as the third party, plus some additional increment (such as 5 or 10%)—rewards the additional leg-work that the grantor had to do by negotiating with another party

- HYPO
    - Overbid Right
        - I am ready to close for $3mil (offer by Studio 2)
        - I don't think it's fair that you pay same price they offered
        - I will only take offer from the Studio 1 if they pay MORE than 2nd studio offered

        - So, sometimes there is a **matching right**; other times there is an **overbid right** (you have to put these into the contract and specify which is the requirement)
        - *Concern?*
            - A "fake" bidding war (setting up a phony 3rd party) [this is called "**shill bidding**"]
            - Thus, you are required to disclose the name of the other party in the bidding war ␣ so you can call them and check the price (and know that they exist and are real)
    - **At the instant you turn down a ROFR, obligation just goes away (expunges)**
        - *What happens if the party that offered more breaches or goes bankrupt or rescinds? Does holder of ROFR, after the refusal, have any more hold on the property at this point?*
            - NO!
    - Directors can have these to ensure i.e., that they get to direct the sequel
- **4) Right of last refusal - if you have last refusal, you almost automatically have first refusal; it's a continuing right of first refusal (the difference is first refusal is a one time event but a last refusal is a continuing event)**
    - He gave the example in the reader where a right of first refusal was treated as a right of last refusal – looks very similar to a right of first refusal
    - HYPO
        - I got a $3mil offer from another studio; I went to the studio holding the ROFR (Lets say Paramount); they turned it down ␣ deal w/ 2nd studio, for some reason (i.e., breach, bankruptcy, dispute, claim, lawsuit, etc.), does NOT close
        - Paramount also has the ROLR
        - I now go to Lionsgate, which offers $5mil
        - Before being able to close, you have to go back to holder of ROLR (Paramount)
        - A ROLR is a **continuing obligation to come back**, in this hypo, to Paramount (the holder of the ROLR), every time the deal w/ the 2nd studio falls through
            - **You have to keep coming back if, for any reason, the intervening deals don't close**
        - This creates an interesting problem – the party trying to bid (not the original grantee) has to bid what they think the project is worth, but they can't underbid for fear of the original grantee matching
- *What about non-monetary terms?*
    - You can say that the only material terms are purchase price and maybe contingent compensation
    - OR you can say there are other material terms, i.e., the offer has to be from a similarly situated studio/distributor capable of a comparable domestic/foreign release
- Some $3mil offers are NOT equal – i.e., a big studio versus a tiny independent studio making the film for the same amount of money – a big studio can actually place the film into world wide commerce, whereas the independent studio could go bankrupt tomorrow

- **5) Option** - **an option is the absolute right to buy it on fixed, known terms usually upon written notice/exercise before expiration of option, and often, though not always, accompanied by tendering payment**
    - For a fixed term, for a fixed price, party who holds the option has the right to exercise purchase of something ▭ "**time is of the essence**"
    - You have the absolute ability to prevent everyone else from getting it
    - Until expiration of option, you have absolute power to buy it
    - *How to extend an option?*
        - Offer more money!
    - In these types of deals, it is very common to allow for the reality of the business – the time it takes to ready a property
        - i.e., when you option a novel you want to allow enough time to cause a script to be written and to attach a director – this usually takes 2-3 yrs ▭ so structure of these deals takes into account this lag time
    - HYPO
        - By tradition, option price is creditable against purchase price
            - 3mil = purchase price
            - 1mil = option price
            - 3mil – 1mil = 2mil (due on an exercise)
            - Often you can negotiate an extension term (extension money) ▭ often, it's not applicable against the purchase price, so you still have to pay the $2mil
        - *What's the diff. btwn an option and a purchase w/ a bonus?*
            - The difference is who owns it – diff. is where title is
            - If option, title stays w/ grantor until the exercise of the option
            - If purchase w/ bonus, title passes
- **6) Approval –** one party has the final right to approve some action by the other party; this is a diff. sort of beast, hence the squiggly line
    - Usually the right of one party or the other to not necessarily acquire rights but exercise some constraint over *how* they're exercised
    - i.e., when talent gets to approve hair, makeup, etc.
    - Strong right – if you don't get the approval, it amounts to a veto
    - It's usually not about the fundamental right itself ▭ usually party w/ right of approval wants to exercise some creative control, i.e., who the director is, i.e., an artist approving who does their hair/makeup
    - Contract Proviso: "…***such approval not to be unreasonably withheld***"
        - **Approval is a reasonable right to say yes or no, BUT it has to be exercised *reasonably***
        - Sometimes, there will be a paragraph **pre-approving** a couple of entities/parties
            - i.e., an author might want to approve the **distributor** of the movie (based on the book) ▭ if it's not one of these, you have to come back to me and get my approval ▭ basically, the major studios get pre-approved and others approved by writer later
            - Author might also want final approval of **budget**, **cast**

- If left un-negotiated or worded badly, an approval right could be left so absolute that inaction or disapproval can leave the other party frozen; could prevent the transfer of rights

DISTRIBUTION FINANCING SOURCES AND CYCLES

- **Gold Standard for distribution finance – PFD** (production, finance, distribution)
  - If you get this, you're not going to be looking very far for other financing
  - Not very easy to get this
- Other sources of funding:
  - **1) PRE-SALES**
    - **A)** Territorial presales; **B)** Loans against presales
    - **95% of films do NOT get PFDs** (a *single* multi-territory deal on a pre-sale basis)
    - **What kind of distribution rights might you pre-sell?**
    - **Foreign rights, domestic rights, medium (TV, internet, etc)**
      - Sometimes, the US territory is actually the US & Canada (meaning they are 1 territory for financing purposes)
      - Canada is 10-11% of the North American market (as high as 20% if specialty film)
    - You might be able to pre-sell the picture for the total amount of the picture on a cash basis
    - Most of the time, if you sell a picture for 100K, nobody pays you 100K right away, *unless* the picture has already been shot and delivered
    - Lets say a territory sells for 100K
      - E.g. You get an **advance** of 10k, then 90K gets paid on **delivery**
        - *To Who?*
          - To whoever is specified in the presale agmt
          - You deliver according to a schedule and *often* you deliver to the "laboratory" (i.e., CFI Hollywood, Technicolor, etc.) rather than the distribution co.
          - Each agmt specifies the technical aspects of "delivery," i.e., what exactly constitutes delivery
          - Finishing a film does NOT mean you deliver a DVD of the film – delivery of the film means you have to deliver either certain elements, i.e., an internegative, an interpositive, 2 prints, a **textless master** (the film w/o any titles), sound elements, OR you deliver an **access letter** which says all those materials have been deposited at a specific lab
          - Then lab certifies that all the elements specifies in the **delivery schedule** have been received
    - You can sell a film for more than it costs (so, you know the budget is 100mil, but you pre-sell the world for more than that)
      - **There is no problem w/ overselling the budget ⊐ the excess is simply profit to the company selling it**
        - In fact, you expect to get back more than the film cost you
        - You WANT to make a profit

        - **What you can't sell is more than 100% of either the (equity) ownership in the film or more than 100% of the contingent proceeds**
    - You could intentionally sell *less* than the budget (this is somewhat risky but could be rewarding if film does well and you figure out another way to finance the film)
        - **The GAP = the space btwn what the film cost you in cash to produce and the money you have at an appropriate time during production**
    - HYPO
        - Film costs 10mil
        - Chances are that in this budget is ~1mil (this # varies) – this number does not have to be extended during production to third parties
            - i.e., the **Producer's Fee** (producer might elect not to take this fee ▭ thus, this money does NOT have to be raised during production if the producer is willing to take a risk)
        - Normally when you make a film, you are paying money to third parties (actors, writers, crew, location services, travel services, hair, makeup, etc.)
        - HYPO
            - Lets say 65% of budget is raised
            - Gap is 35%
                - Producer's fee is in this gap
                - If producer doesn't need the producer's fee, then that money does not need to be raised
                - So, the producer fee is in the budget, but not 100% of the budget needs to be spent / raised

- **2) LIBRARY AS COLLATERAL**
    - HYPO
        - Producer or Prod. Co. involved has a Library of films in distribution with available rights or with a bundle of rights that are producing income (i.e., from home video)
            - Library has some films which have not yet been sold to certain territories or certain media (i.e., Pay-TV) but which could be sold
                - Ex) A movie has gone through one cycle (usually 5-7 yrs) in foreign TV and the Prod. Co. is assessing what the next foreign cycle is worth (TV goes up and down in value depending on the show and depending on the foreign market)
        - *Where might you go after you have decided to sell to no more territories, to get the rest of the balance when you're done selling to territories?*
            - Goal is to "cashify" the library ▭ draw value out of it ▭ get money out of it w/o selling it
            - Use the bundle of rights as **collateral** (you are not selling the library when you do this)
                - Borrow 10-20% more (you think this is NOT risky b/c the two parties are thinking that either 1) the collateral (money coming from the Library) will back up the potential of non-receipt OR 2) when picture is done, I will sell off those rights for a much higher value)

        - When a picture is completed, this has a higher income potential (than when picture is not yet completed)
        - In other words ▭ So the company getting the loan is thinking they will be able to pay it off either 1) w/ further revenue from the Library OR 2) from revenue from the film
            - There is a set of banks/lenders that specialize in film financing ▭ one of the tools they use in the collateralization of their loans is a library
    - Ginsburg's Co. almost always decided to raise just enough money to make the project and then take the **upside** afterwards internationally
        - However, when their library was big enough (10-20 titles), he sold it for a **multiple** ▭ buyer bought the library and bought the company with all of the development projects ▭ contracted Ginsburg's co. to continue working for two 4-yr cycles (first 4 yrs were contracted for; second 4 yrs were based on an option that the buyer could choose to use or not)
        - This is an example of taking the chance that, on average, I will do better by holding off and selling the gap later
- **3) BANK LOANS**
    - *How does collateral work?*
        - It's just like a mortgage
        - If they don't pay, you file a UCC 1 form in the Copyright Office and in 1 or more jurisdictions where you want to be able to enforce the security interest
            - In the US, you would typically file in CA, NY, and the resident states of the borrower and the lender, maybe a couple of others, and sometimes in key foreign territories (if there is a central registration system for that kind of right under copyright in that territory – not every territory has that kind of registration system for encumbered copyrights)
        - So, you file evidence that you have mortgaged these properties (meaning the copyright is encumbered) and if you don't pay, they can foreclose on them ▭ they get the property back
            - Essentially, they have a deed of trust – they are now owners for purposes of liquidation
            - LOOK AT DOCUMENT– Notification of Disposition of Collateral
    - Once a film is mortgaged, if they don't pay it back, the library films get sold to the highest bidder at fair market value
        - ▭Lender thinks if worst comes to worst, I will sell the mortgaged property
    - **Interest** – what you pay when you have money today and you pay it back later
    - **Discount** – you are being lent money today against money you will have later – the ***present value of a future sum*** (so if you will have $100 in a year, and interest is 10%, you will be leant $90 now)
- SO FAR, we have talked about pre-sales and loans
- *What else can you sell?*
- **4) EQUITY**

- Equity interests/**investments** in the film – you take on business "**partners**" (NOTE: this is NOT the legal definition of partners)
- *What does a business "partner" mean?*
  - A legal, technical "partner" has unlimited liability, jointly and severally, with the other partners
  - Limited partners don't ▭ they have liability up to the limits of their investment generally (but there's always a general partner with whom they're partnered who has unlimited liability)
- Here, a "**partner**" is someone who you take on who joins with you to acquire equity in the film ▭ you are probably going to be the majority controlling interest
- In theory, 100% of the equity ownership of the film is available (the fact that already i.e., 65% of the film has been sold off in pre-sales does NOT matter b/c the buyers were NOT equity investors)
- **Equity = You're buying a share of either title in the movie, OR** a share of the revenue that flows from the project

- The **equity is in the ownership vehicle – owning a share of that which owns the movie**
- **Typically, these are 1-picture vehicles** (b/c the owners of other properties do NOT want to be cross-collateralized – they don't want the wins/losses from this picture to offset the wins/losses from other pictures)
  - Keystone Financing
    - This is **the last stone that gets put in to provide the support for the film** (name is based on the last stone, shaped like a wedge, that was put into an arch to make it stable in Roman times)
    - **The last investor in gets a higher share (premium value)**
    - **LIFO**
      - Last In, First Out
    - i.e., Keystone financer puts in $2mil of the $10mil and wants 50% of equity – this is normal

- *What do lenders get?*
  - They get the principal (the money they leant you) PLUS interest, that's it! [versus equity owners who get the benefits of the film]
  - It doesn't matter how well the film does (they don't get more money back if film makes a lot)
- **5) SUBSIDIES & INCENTIVES**
  - There is another whole source of funding ▭ **subsidies** and **incentives** ▭ this area has gone wild in past 10 years
  - **Avg. studio film costs $65-75 million to make**
  - Offered by states and foreign jurisdictions to incentivize you to come there and film because you'll spend money locally, pay taxes, hire local people – the idea is the net of this vs. the incentives you get, the states will earn money (if the system works)
  - They differ from place to place
  - Some of them require you, in effect, to partner w/ a local producer
- *Why?* ▭ b/c the subsidy is conditioned on providing a tax benefit to a local taxpayer

- So, if you're coming from LA, chances are you're not a taxpayer in Louisiana (where you're filming) ▭ generally, you have to be somewhere for 180 days in order for taxes from that state/country to attach
- So, to *actually* get the benefit, the producer sells the benefit (which he can't use cuz he's not a local taxpayer) to a local tax-payer and makes the money this way
    - Legislature makes the benefit saleable/transferrable (b/c producer has a benefit he can't use since he is not a taxpayer of the foreign location)
  - Talked about tax shelters, which don't exist anymore, but transitioned into talking about tax incentives that still do apply
  - **Subsidy** (tax benefit) is usually based on the total amount of money you have spent in the state
    - **Deduction** – reduces gross income
    - **Credit** – reduces tax as calculated
  - Several diff. schemes of subsidy/incentivization:
    - 1. Provide a deduction/credit – usually, it has to be transferable ▭ there are various scheme of transferability – the easiest is that you can sell it
        - Lets say you sell a $1mil credit – *how much do you get from the local taxpayer you sold it to who wants the tax credit?*
            - There are intermediary brokers that trade in these ▭ sold like shares ▭ so, there's a **discount** rate ▭ so buyer (local taxpayer) gets a bigger credit than he paid (i.e., gets $1mil when he only paid $850K)
            - You need this discount; otherwise there would be no point for the local taxpayer to buy the credit
  - **Subsidies**: grant (much more typical in, though not limited to, foreign tax incentives)
    - **Direct Subsidies** – **grant**; you simply get the money; when you go to a jurisdiction, and if you spend i.e., $1mil, we will give you in cash i.e., 5% or 8%; another word for a grant
        - This money usually takes a year to get to you (so make sure to build in interest)
        - Subsidy goes from incentivizing gov't to incentivized party
            - Can be a deduction, credit, or check – something of direct economic value
        - Contrast with a rebate which you get back after you spend money – deferred incentive
    - Another type of direct subsidy:
        - In some schemes, you have to have a local "partner"
        - For decades, the way you got the benefit in Canada was by nominally letting a Canadian Co. produce it (on paper, you had to sign everything over to the Canadian Co.) ▭ b/c the Canadian Co. then got the benefit, it gave you back 85% of it
        - Historically, if you produced a movie in Canada, you got federal and provincial benefits, but to get the benefits, you had to be a legitimate, certified Canadian producer, which Americans weren't
        - So, Americans would run their program through a Canadian Production Co.

        - There are law firms in Canada w/ clients who specialize in becoming this kind of "partner"
        - So if the "partner" gets a $1mil benefit from the Canadian gov't, he will give $850K to the US Co.
        - The "partner" is basically charging a 15% fee for letting the foreign producer access the Canadian incentivization plan
        - Remember, the American Production Co. does all the work in terms of making the movie/tv show, so it makes sense that they get most of the money
- So, basically, **you either sell the direct subsidy or you partner w/ a foreign co. to get the direct subsidy**
- **Indirect Subsidies** – Some territories have a domestic policy whereby they require that they have to have a certain amount of programming (i.e., 10% or 15%) as certified as being domestic, i.e., Canadian (shows about Canada – use Canadian actors, writers, directors, composers, locations, etc.)
    - By creating a quota for programming, the government indirectly raises the license fee
        - If an American show sold to CTV it may be about 250k, at the same time a 'legally/certified' Canadian show of similar budget could rise as high as $1mil for licensing fee
        - Thus the Canadian government isn't directly paying these Canadian shows, but they are creating a system whereby Canadian distributors must pay more to acquire Canadian programming
        - This works because there is tons of American programming but there is not that much Canadian programming – the few people that have Canadian programming thus have their product price driven up and the Canadian networks have to compete with each other for this programming
        - Scarcity drives the price up – this system artificially raises the value of the programming
    - Some territories worry about their own domestic, cultural needs want a certain amount of domestic programming (usually on TV) to ensure that their broadcast schedules are not just identical to America's (for decades, this used to be the case – private Canadian actors just bought a bunch of American shows)
    - So, certified Canadian productions become a comparatively rare good this is worth more money to the Canadian broadcaster (they will pay more for this)
        - Canadian broadcaster has to have a certain amount of Canadian programming to keep its license
    - So, American producers learned how to make an American show look Canadian
        - So, American producers were able to sell their shows for more than they otherwise would have been able to sell them

- **Indirect Subsidy** = diff. in price btwn what the American show would have sold for and what the "Canadian" show actually did sell for
- This is the quota system – when you have to have a set percentage of certified local programming

- When you or your clients are offered, usually a *foreign* financing scheme, to the extent you are promised greater than 10% benefit of your budget, you should expect that to the extent the fine print exceeds 10%, then the excess is probably an equity component
  - This is where you first see the blend of investment and subsidy
  - So, there are subsidy/equity combinations
  - There are also loan/equity combinations
- *Are there mixed flows of money?*

- Foreign Tax Incentives
  - Sometimes in deals offered, particularly, but not exclusively, in the foreign market, sometimes foreign investors, through a foreign tax incentive, can generate **10% (in general) of the production costs expended in the foreign jurisdiction**
    - You have to spend the money in the jurisdiction to get the incentive
  - *What is the foreign locale getting out of it? Why are they giving you this tax incentive?*
    - You spend money there in a variety of ways:
      - 1. You may be and probably are hiring local talent (the more local talent you hire, the higher your foreign tax incentive)
        - The foreign tax incentive plans work better when the producer has to bring fewer ppl from the US to make the film
          - The number of ppl that the incentivizing country/jurisdiction can provide is called the **production depth**
          - Strong jurisdiction can accommodate 5-6 crews from local staff
          - Weak jurisdiction can only accommodate 1-2 crews
        - When you have to fly in crews/actors, you have to pay them **per diem** (their daily living allotment)
        - So, the less ppl you have to fly in, the better for you in terms of money
        - There is less and less reason to go to the foreign jurisdiction to film if they can't field a fairly deep number of crews at one time
      - 2. Local taxation paid to foreign gov't
      - 3. Local catering
    - Foreign country thinks if they give 10% of budget, they get 20% back in money spent in their country ▭ they're making money (otherwise, they wouldn't do this)
  - Foreign countries do provide direct subsidies, where all you have to do is bring the film there, and they'll give you money; and they also provide indirect subsidies (where you create a locally-produced good that is rare and thus fetches a higher price upon sale)
  - **Problem with tax credits:** if you're getting tax incentives in a foreign jurisdiction, how do you reap the benefits of this (you file taxes in CA, but you're trying to get a credit in Louisiana)

- Tax credit market created – you spend money in Louisiana, you take your tax credit to a broker in state, the broker

- Another Foreign Tax Incentive Mechanism (used to be used frequently in Canada) – frequent mechanism by which indirect subsidy can be simultaneously of value w/ a direct subsidy; while the foreign tax incentive creates a transferable asset, this mechanism involves allying yourself with a foreign country just to get a tax break
  - Sometimes, foreign producer gets subsidized for bringing film there (somewhere around 10%)
  - Sometimes, very elegant productions can be created which qualify under a parallel scheme called **International Co-Production** ▭ schemes by which countries, via **treaty**, agree to cooperate to create TV/movies, and if certain conditions are satisfied, they will simultaneously be certified as *local product* for BOTH countries (as if the film were 100% made in both countries)
    - This is "cinematic alchemy" since this isn't physically possible
  - **Co-Production** – **a certifiable, signed, international treaty that provides for certain tax and other benefits agreed to by the other parties**
    - These were designed in the last 50s/early 60s as a means by which David (smaller foreign countries) could fight Goliath (US)
    - Goal was to make it so other countries could make films of similar quality to the US (films that could, at least theoretically, compete w/ Goliath)
    - **NOW, there are no more co-production treaties to which the US is a party**
    - But lots of other countries have made co-productions, i.e., "Anglo-French Co-Production"
    - There is a looser meaning of "co-production" where films list like 20 co-producers (this is NOT the true "treaty co-production")
  - They get right to distribute film in their home country, and under certain circumstances, maybe some treaty benefits
  - Treaty benefits btwn countries that are already EU members have sort of declined in recent yrs by virtue of the philosophy of the EU, where they see themselves as sister or sibling states w/in a political, economic union ▭ so, they already provide for cross-border labor w/o tariffs and other restrictions
    - So, **greatest vitality of co-production treaties is btwn any country in the EU and former Commonwealth countries** (i.e., Australia, Canada)
      - There is little incentive for EU countries to have co-productions w/ each other b/c of they way the EU is set up
    - Example – Canada
      - 10 points: story, writer, director, composer, actor (1st or 2nd lead), editor, etc.
        - These are points
        - If you get at least 3 points you can be minor partner; if at least 6 points, you can be major partner
          - Sometimes, you can get waivers
      - In almost all co-productions there is a majority partner and a minority partner (rarely 50/50)
        - Still treated as fully local in both countries
      - HYPO
        - Ginsburg made film about plot to assassinate Gorbachev

- They wanted to get it into theatres b4 one of two things happened: a) Gorbachev was out of office OR b) Gorbachev was actually assassinated
    - They got it in b4 a)
- Director – New Zealand; Composer – UK; First Lead – US; Second lead – UK; Editor – UK
- Shot completely on location in Hungary ▭ looked liked Soviet Union
    - Shot there b/c they wanted Hungary's treaty connection w/ Canada
- There was an existing treaty btwn Hungary and Canada and Germany and the UK
- So, this film was a Hungarian-Canadian-German-UK Co-Production ▭ but, after blowing away all the smoke, it ended up a 30/70 Canadian-UK production
    - Great deal!
    - You can stack elements as long as all requirements are fulfilled
    - Hungarian TV rights inc. ▭ indirect subsidy
    - Also, an indirect subsidy in Germany (indirect subsidies in 2 countries at the same time)
- If it's a minor country, they just want a bit of input
- If it was truly just a Canadian-UK Co-Production, then it would have had to have been shot in one of those countries

- As long as treaty is satisfied, you can bring on other partners (countries)
    - You end up w/ local benefits based on probably no more than 10% of the local participation
    - If filmmakers in the 2 countries actually take split ownership positions, then they **might get local benefits AND an equity share on top of it**
        - **This leads to greater than 10% benefit**
- In exchange for the creative compromising and blending you have to do in a co-production, i.e., selling foreign talent to an American buyer / network (e.g., there was a time when it was hard to imagine Helen Mirren starring in an American production), the production gets levered into a lot of money
- Main benefit of a treaty co-production, aside from any local subsidies which you would have gotten anyway, w/ or w/o the supervening treaty relationship btwn the 2 parties, the 2 partners in co-production, both get benefit of being fully domestic productions in their home territory (even the 30% partner is deemed fully Canadian)
- It's often not easy to get parties to agree to do a co-production because it's hard to convince everyone that the resulting co-production will be beneficial – **factors** to consider when dedciding whether to take on a co-production:
    - Absolute value you get out of the production (in direct or indirect subsidy)
    - Creative or other benefit you get from the mix
    - Make sure to adhere to local law/custom to get all the benefits of a treaty co-production (cost for local counsel)
    - Is it worth it to transfer an entire crew to another country to get the benefit of the treaty?

- Delay – even if you apply for the benefits, you don't get them before production or even right after production – you only get the benefit after submitting audited records of everything (thus you have to be able to front the benefit)

- **6) CROWDFUNDING:**
  - Posted a chart that compares crowdfunding to traditional investment
  - Boosted by the Internet
  - There are securities regulation issues associated
  - Then Lending Club, Circle Up, etc, other companies have treated crowdfunding as though it really is a sale of a security and working with the regulations
    - He then gave some crowdfunding regulations that can allow capital formation to proceed (for any type of business, including films) without having to deal with securities
    - This still raises some issues – what is defined as a project? Is a TV show a project? One episode? One season? If people are contributing money to different episodes, how do you determine who gets what share of profits when you sell a box set of the season?
  - Kansas and Georgia have created exceptions to allow crowdfunding and the SEC seems to be willing to let it slide

- **FINANCING CYCLES** – boom and bust

- Phenomenon ▭ **there is a repeating cycle of financial schemes/fads that come into and fall out of vogue w/ uncanny predictability**; rise of method, abuse, fall
  - Ppl (i.e., jurisdictions, hedge fund managers, entrepreneurs, etc.) attract some of the most gullible/thirsty users of money ▭ producers
  - Rises and falls of investment schemes in movies:
    - **First** (before Ginsburg's time): US Tax Shelters
    - 1) **Canadian Content** - Canadian Tax Benefits – 1977 – started in 1975 – in the first generation of benefits, they had a local incentivization scheme, whereby they provided for unbelievable goodies in its first generation ▭ the goodie in the first generation was—of monies invested in Canadian films up until about 1979, the goodie was…
    - Lets say you spent $10 mil on movie ▭ you got to deduct 10% in first iteration of Canadian tax shelters ▭ benefits Canadian tax shelters
      - Goal is to benefit local Canadians
      - *Who also benefitted?*
        - Americans ▭ huge amounts of money were generated into American pictures by this device
          - Canadian partner just wanted to be a partner in the film
    - Gov't caught on ▭ So, they changed the rules
      - '76-'86 ▭ instituted **At Risk Rules**, meaning yog you reall had to be on hook for the money
      - If they invested 10mil, they would put up 1mil in cash and borrow 9mil ▭ however, they would deduct 50% of the 10mil
      - ▭ so, for 1 mil, they could deduct 5mil
      - ▭ led to potential for abuse
    - 2) **Canada 2**
      - An echo of the first one

- There is always a Cycle of: Inception, Peak Investment, Abuse, Change in the Rules, Decline, Add Something New
- 3) Next came **British-Content films**
  - Tons of films got made (there was a Canadian-British treaty)
  - Had a great couple of years
  - Then the rules changed
  - Went into decline (period of indecision ▭ 1) rules changed, and 2) all of the Canadian networks, which were the customers for these things, all of their licenses were abolished, so everybody had to reapply and get a new license ▭ so, the ownership of British commercial TV changed – the players changed)
- 4) Next, big period of **foreign bank lending** ▭ giving away money ▭ shoveling monies into films
- Byproduct of these Schemes ▭ films got made that should never have been made
- 5) **Japanese Bubble** – everything you bought in Japan went up in value due to a colossal economic boom
  - Crash ▭ it has been ten yrs and Japan has still not fully recovered from that crash
- 6) **German Bubble** – German Stock Market & American Stock Market – 1999-2001 – Americans had a large bubble; Germany was investing tons of money ▭ Americans smelled foreigners w/ money (like sharks in water)
  - German stock market collapsed ▭ billions were lost
- 7) **Insurance-Backed Lending** – around 1997, a bunch of A. insurance co.'s (that had sort of gotten experience in completion bonds) decided to issue insurance policies that if the money that the banks lend is not paid back by distribution, we will pay off the insurance policy ▭ we will ensure the market performance of films
  - Ins. Co.'s were not good at predicting which movies would catch fire
  - When films flopped, Ins. Co. said it was not covered (did not honor what they said they would do) ▭ these Ins. Co.'s did NOT pay!
- 8) **Hedge Funds** – why not form a hedge fund for movies
  - Billions were lost in movie hedge funds
  - But the brokers made money; investors thought they would make money ▭ some investors just didn't care in the end
- **These cycles of boom and bust go on and on and on**
- *Where did money that you got from these schemes go?*
  - This is all outside studios ▭ this is all independent financing
  - Money tended to go to the gap
  - If money went to primary financing of film, the eventual loss was even bigger

- Ginsburg suspects that crowdfunding will be the next rise and fall
  - Moore thinks it's in ad financing ▭ Ginsburg disagrees
  - Ad financers do 3 things:
    - 1. **Product Placement** – product appears on screen
    - 2. **Product Integration** – it's an element/character in the movie, i.e., James Bonds' Aston Martin (it almost becomes a character in the movie rather than set

dressing) ▭ usually requires character to utter dialogue re: the product ▭ product gets used and mentioned materially
    - SAG is against this – doesn't like its artists being forced to say the names of products
- 3. **Program-Length Content** – i.e., movie about winning a soccer match (and Adidas is seen everywhere throughout the movie)

BUDGET

- Pattern budget topsheet on page 117 – every studio has slight variations on this pattern budget
    - **Topsheet** – this sheet goes on top of budget ▭ a model/template ▭ provides a chart of accounts ▭ often, 1 page
- Budget (prospective) is not what a movie costs, it's what the **anticipated costs** of the movie are
- What a movie actually costs (in retrospect) is given in the:
    - **Final cost statement** (which reflects the negative cost) – retrospective
        - **Negative cost** – cost of producing the film's negative (but not distribution) – slang term
- What's in a budget?
    - All costs incurred to get the film produced
    - He went through all the common elements
    - Above the line – everything attendant to story, producer, director, and cast (+travel/living and "fringe benefits")
    - Below the line – categories of expenditures during the time the film is being photographed
    - Contingency – the amount allotted for 'wiggle room' in case things cost slightly more
    - Overhead – 15-20% of the film's budget – huge source of studio recoupment for losses
    - Completion bond – 3rd party species of insurance policy
        - It is usually a fixed percentage of the budget – usually 1.5-3% of the budget
- Who cares about the budget?
    - 1) **Distributors** – pay a % in a presale environment (paying in advance of a movie's production)
    - 2) Insurance package based on % of budget
        - Producer's package policy
        - 3rd party liability
        - Set destruction
        - Medical illness
        - Errors and omissions
        - Rule of thumb insurance is 5-7% o budget (does not include completion bond)
        - Overhead: 15-20% of budget to account for costs of operation
        - Contingency is 10% of all other costs—allows for overages
            - Unallocated and undifferentiated additional cost
    - 3) Puffing the budget – **Lenders** care about this, people who have agreed to pay a % of the budget in a **presale**, **completion guarantors**, etc (done in order to close the gap)
        - Because if someone has agreed to pay a % of the budget, it makes a difference to them whether the budget is 10mil or 12mil if the extra 2mil was just puffed up (just saying it's going to cost more and then you come up short – it's a 10mil film

budgeted as 12mil to get more money up front and then the film ends up costing around 10mil)

- Typically, you look for the categories that are production value categories (usually 4-6), i.e., special effects, location, special music score, extras, etc. (categories that buyer wants to see on the screen as value ▭ this is what the buyer is paying for) ▭ these are auditable categories ▭ a team of auditors **audits** *these* categories
- So, when you know a certain set of categories is going to be audited, you DON'T puff those categories ▭ make these are as accurate as possible ▭ also, check on these often
- Parties may demand a **right to audit** at will, upon notice
  - Costs that are NOT Audited
    - It is generally assumed that non-auditable expenses are **cross-collateralizable** (you can use areas where you are under to compensate for areas where you are over in the budget) – there are at least 3 places where this term comes up in entertainment industry:
      - 1. Lending/Loans – i.e., houses, if 1 or 2 drop in value, you can sell the other ones to make up the difference ▭ so out of the pool of properties, the lender sells enough of the properties to get back the amount that was leant
      - 2. Distribution – small movies don't recover their costs ▭ producers of i.e., Avatar worry that high revenues of Avatar will be bled to offset the losses of the small movies ▭ there is usually covered by a contract clause that says you can't cross-collateralize; rather, you have to account for each movie individually
      - 3. In non-auditable categories – lets say there are underages available in things that are not audited (i.e., cast line, travel line, film stock line, etc.), but there are overages in other categories, i.e., construction, transportation, paint, etc. ▭ underages in one category can be shifted to serve overages in other categories ▭ so that, as a whole, you don't go over ▭ this is not regarded as cheating b/c these are just estimates
        - Prospective Cost Statement for the week: Amount to Complete (your estimate of what it's going to cost to make the film) will be the same; BUT the amount available will be diff. (i.e., if you borrowed from transport and added to construction, the amount available for transport will be less and the amount available for construction will be more)
- May also force the producer to **certify** the cost statement

- Question – Can you say, "I'm under in all these categories and I misestimated the producer's fee?
  - In other words, can an underage ever go to a producer?
    - Generally no, but sometimes yes, i.e., if the producer does a good job, then he should share in the underage ▭ this incentivizes careful producing
    - At some level, you want to incentivize careful producing and at some levels you don't

- **Under-budget concerns** – parties will come to some agreement: the producer is entitled to some % of the underbudget profit but no more than that % cap
- 1) Any limits to underage?
- 2) Any reason to disincentivize?

- **In budgets, some costs are variable (can go up or down) and others are not**
  - If you pay 350K for the motion picture rights, and the movie goes over budget, do you get more money?
    - NO – this is a non-variable cost
    - Rights to buy the motion picture – this is a non-variable cost: usually either 2, 2.5, or 5% of the budget
      - Script costs are also usually non-variable, but they have limits
    - Some well-represented writer's contracts provide in a clause that they will get 350K for their script for a film not to exceed i.e., 50mil, 100mil, etc. in production costs (clause allows purchase price to float up w/ an unanticipated rise in budget)
      - They understand their script is being for a big-budget film (prevents writers from being taken advantage of when their work is used in a big-budget picture)
      - This sort of clause is even more common when the producer pleads poverty and says it's going to be a low-budget film (well, if it's not, i.e., the producer was lying or managed to get more money, then writer gets paid more)
  - Big talent – not variable
  - Variable things – things that can sot more than anticipated ▭ weekly employees (i.e., a cinematographer), construction
  - **Completion bond** ONLY focuses on variable costs – this is called the **bondable base** or the **bondable budget**
    - It does NOT bond changes in items that are not going to go up or down
    - Does not cover:
      - Risks of market performance
      - Against breach
      - Massive copyright suit in the middle of production or risks related to chain of title (covered by errors and omissions insurance)
      - Under budgeting of music
      - If you fail to get a certain rating and it requires re-shooting
      - Force majeure
      - Death or disability
      - Funding up to the approved budget
      - Artistic quality
    - Either pay off strike price to initial investors (pre-sale distributors) or take-over to completion
      - "soft" takeover → threatening takeover but not doing it
      - "hard" takeover → actually taking over the production – completion guarantor uses any cash left in the production and tries to finish without spending any more money → accomplishing for the least cost means that it risks the final product being garbage
    - Fear of losing creative control incentivizes keeping costs under budget
    - Completion guarantee agreement is the actual bond that defines obligations between and among guarantor and the bond

- Producer completion agreement: creates privity between the producer (first line of defense in making the film) and bonder
  - Producer is liable for a claim of breach
- Tandem agreements: interlocking agreements that create a system that bolsters the probability of successful performance and completion

- Differences btwn TV Budgets and Movie Budgets
  - Fundamental and persistent
  - Differences have evolved as a matter of custom – the big one is that there are **no contingencies**
  - **Contingency** – a flat amount included in the budget, as a general pool to lessen your exposure to mis-budgeting ▭ usually at least 10% of the budget, or at least 10% of the variable costs ▭ you can draw from this contingency for all categories that go over ▭ allows you to be imperfect in your estimates
    - By custom, contingencies are virtually *universal* in *film* budgets
    - By custom, contingencies are virtually *absent* in *TV* budgets
    - ▭Though of course there are **exceptions**
    - So does this mean TV budget estimates have to be perfect (i.e., have no contingency)?
      - NO – there IS a contingency ▭ it is just in a diff. location ▭ it's called "**salting the budget**" ▭ puff individual categories, i.e., overtime, extras (categories where you think the discrepancy won't be noticed)
        - No one is going to question the amount you allow for overtime ▭ you can do this in multiple ways
          - If total overtime account is 250K, you can just make this a higher number
          - OR you can put in a certain number of hours per day (i.e., add half an hour or an hour of overtime to each day, whether or not you use it)
            - So if you go a few days w/ no overtime, you are saving an hour's worth of money (and so if you do go overtime one day, it's not a problem, b/c you have extra money to spend)
          - **Note**: you don't want to puff the auditable categories – the goal with auditable categories is to be as accurate as possible, because you can't spend any underage elsewhere
        - **You can rise up to your red-line as long as you keep track of it**
      - Once you get into the groove of a routine TV show, the budgets don't tend to vary much from episode to episode
      - *What's the difference btwn film puffing and TV show puffing?*
        - If you're truly just puffing in a feature film, you're usually just puffing it to get a higher percentage out of the presale price; maybe you're puffing it as a contingency – but you're allowed an actual contingency in a film (that's the difference)
          - In a feature film, you're allowed an actual 10% contingency to accommodate overages ▭ if you puff over this, frankly, you're edging into fraud

        - In TV, b/c you can't build in a contingency officially, you have to build it in somewhere, so this is how it's done
    - TV Networks know this ▭ they're fine w/ it ▭ They don't look too hard ▭ they know that no one goes into a business venture w/o protection ▭ *so why don't the just put in the contingency?* A: b/c of custom
    - **Residuals** (the amount to be p

aid for reruns in domestic, foreign, and other markets, i.e., video) are NOT included in feature budgets, BUT they ARE included in TV shows (somewhere in the $250K range)
        - In features, residuals arise only if and when the film is distributed
            - If film is never distributed, then there are no residuals
            - In the first medium of exploitation, that is the medium in which the artist is engaged, there are no residuals
                - So if you're hired to do a film, you get no residuals from theater profits ▭ when the film goes on TV, then you get residuals
        - Residuals are treated as a distribution expense ▭ an obligation of the distributor to pay those residuals ▭ they are NOT a cost of making the film, which is why they don't show up in the budget
- **Deferments** vs. **Participations**
    - **Deferment** – if it is guaranteed to be paid on a non-contingent event except for the passage of time, and so therefore it must be paid, it **MUST be included in the budget** ▭ this is an actual, incurred production cost that must be paid
        - **Guaranteed** – must be paid at some point in the future after some passage in time
            - Included in the budget
        - **Contingent** – may or may not be paid depending on occurrence on some contingent future sale
            - Don't go into the budget
    - **Participation** – If however, it is truly a contingent event (i.e., paid out of DVD revenues, paid upon first sale of the film in the UK, or paid upon first broadcast of the film in Germany if ever), it is **NOT part of the budget** ▭ it slides over into being a distribution expense (it has to be accounted/provided for in the relevant contract that triggers the payment)
        - Truly contingent money (meaning it might never arise) still has to be paid (assuming it arises) ▭ just not w/in the budget
- **Prints and advertising**
    - Traditional prints and advertising are not in the production budget (cost of distribution)

COMPLETION BONDS

- **Completion bonds** – species of policy that looks like an insurance policy (typically issued by an insurance policy) – guarantees that the film will be completed and delivered to the beneficiary of the policy, or at the discretion of the guarantor, another way to satisfy the guarantee is not by finishing the film, but by paying the beneficiaries back what they spent
    - In reality it is in the completion guarantor's interest to take over the film and finish it (rather than pay the strike price) because of professionalism reasons
    - **Strike price** – the amount the bond company pays if it doesn't complete and deliver
    - Bonds cover the sums of the potential overages in the VARIABLE costs
- Either pay off strike price to initial investors (pre-sale distributors) or take-over to completion
    - "soft" takeover → threatening takeover but not doing it

    - "hard" takeover → actually taking over the production – completion guarantor uses any cash left in the production and tries to finish without spending any more money → accomplishing for the least cost means that it risks the final product being garbage
- Fear of losing creative control incentivizes keeping costs under budget
- Completion guarantee agreement is the actual bond that defines obligations between and among guarantor and the bond
- Producer completion agreement: creates privity between the producer (first line of defense in making the film) and bonder
    - Producer is liable for a claim of breach
- Tandem agreements: interlocking agreements that create a system that bolsters the probability of successful performance and completion

Powers of the Guarantor

- (1) Give the producer further money and let the producer complete the film (unusual)
- (2) Pay-off the beneficiaries (strike price) and not deliver the movie
- (3) Guarantor takes over the production to complete and deliver the film (most drastic, most authority, most rare)
    - Threat of a take-over gives the guarantor leverage for two reasons
        - (1) Taints the reputation of the film
        - (2) Leaves a black mark on the record of the producer

Bond Pricing

- Cost of the bond is typically 1.5-3% of the "bondable budget" (bondable budget = parts of budget that are subject to going over budget)
- Standard rate is around 3% (ex: 300K on a 10M movie)
- You will pay less than 3% if you have a good reputation, have never called in a bond, etc.
    - However, if you get a discount and then go over budget, you will have to pay the difference between the standard 3% fee and the discounted base fee you paid.
    - One thing you can do as a producer is simply pay up that extra money out of your own wallet to cover the over-budget – rather than turning to the bonder. This way you don't get the "bad driver mark" on your record.
- However, if bond gets called in. They call in another percentage of the bond for the fee.
    - So structure is 1.5%/ 3%
    - Essentially penalty if it gets called in, and incentive if it doesn't (no claims rebate)
    - This sort of thing is what the contingency in budget is for
        - Therefore YOU DO NOT BOND THE CONTINGENCY
            - As costs go up you don't raise the contingency, you spend it.

Studios May not get Bonds

- they will rather self insure, and pay more money if necessary
- These are more often use when there are multiple lenders, like banks
    - They will need this bond, from a financially responsible guarantor, before giving the loan
    - Pre-sale investors usually don't require these
- In most independent production, this bond is almost always for 3rd party investors as the beneficiaries

Non-Bond Risks

- There are risks which are not covered by the bond but instead other insurance in the general producers package insurance policy.
- This includes things such as *force majeure*, actor death, etc.

Fee Structure

- 1- 3% of gross bond
- There is market completion though
- But reputation of producer and director may cause the fee to go up
  - Who ultimately have control over how the film is made
  - If they always go over budget, then they're going to go into the bond
    - Woody Allen has a reputation for moving fast. And if he did want to take more time, he paid for it himself.

Additional financing sources before calling in the bond – where the completion guarantor forces the producer to look before forcing completion guarantor to complete the film

- (1) Producer fee
- (2) The **Contingency** (10% of the budget) is the first source of money you turn to before you need to go to the guarantor to get extra money (invade contingency, exhaust contingency)
- (3) Squeeze the talent you think is responsible (usually Producer and Director) – get them to put up their fee/a portion of their fee – **producer/director fee**
    - Cannot get the director below scale- because of the guild- unless someone counters their fee
- (4) **Shifting line item underages**: you may have pockets of individual budget categories where you spent less than you foresaw in the budget. If you can use pockets that are under to fund pockets that are over, this is referred to as *internal cross-collateralization* (but remember clawbacks)
- (5) Presales
- (6) Ask 3rd party beneficiaries to take on more risk
- (7) No-claims rebate

Re-Insurance of Bonds

- Completion bond companies buy reinsurance to insure their ability to pay these risks
- **Insured party will get a "cut-through endorsement" which will allow them to go directly to the reinsurer if the guarantor does not pay**
- Point: the relationship exists b/w the nominal guarantor and the reinsurer, but the customary practice is to look to the ultimate insurer via the cut-through.

What Completion Bond's do **NOT** Cover ▭ Should either be covered by: other insurance, the original budget, or too subjective/creative

- The validity of the **underlying Rights**: if the reason the film cannot be completed is b/c the underlying rights were not properly obtained, the completion guarantor **will not pay** for this
    - Covered instead by "errors and omissions insurance"
- The **under budgeting of certain creative categories**:
    - Ex: Music - cannot use the completion bond to cover creative/subjective overages
        - Just want more music
    - The completion bond will of course cover things like crew cost overruns b/c of delays
- **MPAA Rating costs**: sometimes buyers contractually require that the final cut gets a rating no more restrictive than a certain line (often PG-13). Obligates producer/director to edit the film until they obtain the required rating, the costs associated w/ this additional editing time will not be covered by the bond.

- **Force Majeure**
  - Other specialized insurance covers this
- **Death/disability of talent** re: essential elements: particularly the cast
  - Covered by "cast coverage insurance"
- **Default of the Distributor**
  - Insuring too many people
- **Funding up to** the approved budget: Bond will not cover shortfalls in initial budget funding. You need to reach the initial budget amount, the bond is there for overages, not **shortfalls**.
- **Default/insolvency of funding** parties: if one of the parties which is funding your film (ex: foreign distributor goes bankrupt) before you get the money you need (progressive payments), bond will not cover this. Relating to funding shortfalls.
- **Artistic quality**: If distributor takes position that the film is awful/not what he ordered and refuses payment of final chunk of funding, bond will not cover this
  - Note: script is usually an exhibit to the bond, thereby allowing objective analysis
  - Will not insure if the movie is doo doo. This is too subjective.

Takeovers:

- **Soft Takeover**: the threat by guarantor to come in and finish the film; reduces the need for an actual takeover
  - Guarantor (nicely) threatens to come in cut corners/creatively compromise the film
  - Motivates the producer to find some other way to finance/finish the film (ex: sell another territory)
    -
- **Hard Takeover**: an actual takeover
  - When the guarantor/under the guarantor's direction, the completion of the film is actually taken over. Takes the creative reins.
  - Note: rather than paying the strike-price.

Form E & Form F

- Form E - Completion Guarantee Agreement: ␣ The actual bond,
  - Note: both the script and the budget are standard exhibits
  - Director must opine that he can complete the film in accordance w/ the budget, on schedule and in harmony with the script. Director opines that he can make the film
  - The parties to this agreement are the completion guarantor and the financiers – establishes the obligations of the guarantor to the beneficiary
- Form F - Producer's Completion Agreement:
  - Agreement w/ the producer which gives the completion guarantor over the producer
  - Calls on the producer to be obligated to do all sorts of things to the bonder
  - Note: both the script and the budget are standard exhibits
  - Remedies for Breach
    - Agreement is independent of Completion Guarantee Agreement
    - Its there to get the producer to do their job
- Exhibit is attached that has the director agree can make the movie in the time and money constraints present

Moore Chapter 9

Intro

- "Completion Guarantee" is issued to guarantee that a motion picture will be completed and delivered to the distributor in accordance w/ the script by a stated outside date ▭ *guarantees that the film will be completed or the financier will be repaid*
    - If the picture runs into problems, completion guarantor has right to:
    - (1) loan money to producer to finish film
    - (2) take over film and finish it itself
    - (3) abandon the film and repay the financier the production financing, interests and certain other costs
- Financier will only finance once producer obtains a completion guarantee
- By allowing studios to control costs through an intermediary, they let studios keep a good relationship w/ runaway producers = cosmetic completion guarantee = "swish cheese bonds"
- Page 82 lists document package
- Most imp doc is "Producer's Completion Agreement" which creates the rights of the completion guarantor against the producer and permits the guarantor to ensure that it will be in position to produce and delivery in accordance w/ the guarantee

Roles of the Completion Guarantor

- *Production Manager*: producer's agreement permits the guarantor to function as production manager. Attempts to minimize its financial risk. Reviews budget to make sure everything accounted for. Generally insists on adding a 10% contingency to the budget. Stays involved w/ day to day production via an on-site representative. Will receive regular spending updates.
- *Recoupment Position*: Right to recoup any amounts it advances or loans to the producer to fund costs in excess of budget. Rights are secured by the motion picture and not against assets of the producer
- *Takeover*: takes over the production of the picture to complete it

Exclusions – costs for which guarantor not liable

- *Chain of Title*: producer's failure to acquire the underlying rights to the motion picture
- *MPAA Rating*: not liable for failing to deliver picture w/in certain rating. Problematic for financier b/c distribution agreements usually state acceptable rating. Get distributor to not make the rating a payment condition.
- *Artistic Content*: issues related to artistic content of the film
- *Insolvency/breach by distributor*: creditworthiness of distributor is financier's risk
- *Conditions precedent to guarantor's liability*:
    - Financier must have all financing in place
    - Guarantor must receive its fee
    - Pre-approval of certain production-related documents, the commencement of principal photography and certain key insurance being in place

Delivery

- Completion guarantor's delivery requirements extend to delivery of all the physical elements required for the motion picture and are generally the same requirements contained in the distribution agreement
- Must therefore carefully review distribution agreement, esp. w/ respect to:
    - Timeline – must leave room for production delays
    - No artistic-quality-type restrictions in distribution agreement
    - Delete any other subjective approvals

Takeover

- Pre-Takeover Due Diligence: Review all talent related agreements (esp. producer and director's contracts) re: change of control provisions

- Make sure can become sole signatory to bank account + able to draw down financing
- Guarantor can eliminate any enhancements director/producer want – job is to complete film cheaply
- Reality of takeovers:
    - Very few actually happen
    - "Soft takeovers" more common. Completion guarantor will exercise more administrative controls, including controls over the expenses and the bank accounts, but will leave the cast and crew to deal w/ day to day. Will require the producer/director to implement its *suggestions*.
    - Generally, attempt to comply w/ suggestions/soft takeover to avoid full takeover
    - In full takeover, completion guarantor proceeds as the agent of the producer pursuant to nan irrevocable power of attorney:
        - POA structure gets around assignment clauses in talent agreement (in shoes of…)
        - However, should draft clause in agreements w/ talent that producer can assign
        - Right to fire talent is a bit tricky

Moore Form E
Sample Completion Guarantee Agreement

Difference between agreements

- PCA- Creates producers obligations to keep the film on track
    - Otherwise what would he care? Bond is in place.

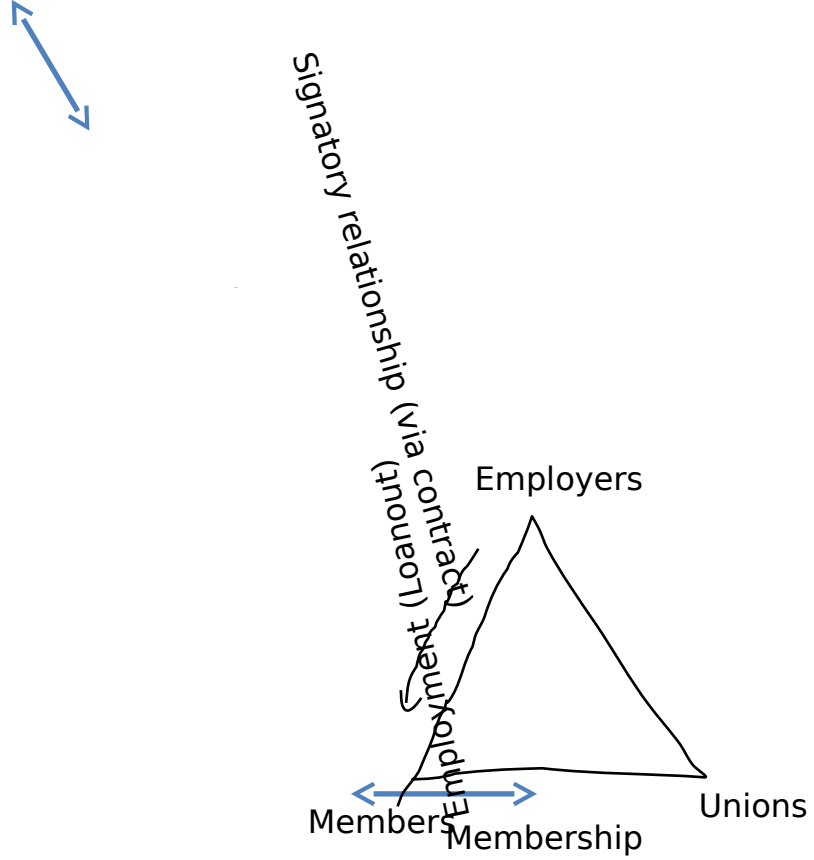
Moore Form F
Sample Producer's Completion Agreement

UNIONS & GUILDS

Things that are not unions/guilds (do not represent employees):

- Management side: The **AMPTP** (association of motion picture and television producers): the collective bargaining unit of producers who's delegated purpose is to negotiate w/ the various unions so that each producer does not have to individually negotiate w/ the unions
    - If a producer wishes to negotiate individually, they do not have to sign onto the AMPTP as their bargaining representative.
    - Kind of like an oligopoly, the studios are all part of this. When the guilds strike, they are dealing with the entire industry that consumes their services.
    - Has delegate representatives for all studios and production companies—speak with one voice when interacting with actors and directors
        - Somewhat diminishes bargaining power of unions but these agreements are negotiated separately with each company
- Above the line Unions:
    - Performer side: **SAG-AFTRA**
    - **DGA**: covering directors and closely allied employment categories having to do with directors
    - **WGA**: writers, split between west and east—do not unite
    - Craft unions: **IATSE** (International Alliance of Theatrical Stage Employees) makeup artists, etc.
    - Teamsters: transport-related work: includes location scouts
- True union arena (collective bargaining units recognized in foreign countries): foreign countries have their own version of American unions
    - Canada: ACTRA (more all encompassing than SAG)

- Distribution side: **IFTA**: sets forth international standards, model distribution agreement, arbitration mechanisms. Does not act for employees therefore not a union
- Exhibitors: **NATO** (national association of theatre owners): acts collectively on behalf of theatre owners, vis-à-vis the distributors.
- **MPAA**: responsible for lobbying, rating and title registration
    - Title registration: if you are a member of the MPAA, you can register film titles (1st to register) to prevent other members of the MPAA using.
    - Usually key when world events occur. People run to the MPAA to register titles that may be used for films (kind of like cyber-squatting – note: not supposed to sell them…instead they "waive them" for consideration)
    - Lobbying in DC/ Sac
- **Motion Picture Academy/Television Academy**: purport to recognize artistic excellence but do not represent employees
- **Academy of Television Arts and Sciences**: split in two, NY and LA
- **Professional associations**: usually the recognition that a person who has been granted the right to append these titles after their name has achieved sufficient professional credits (ex: ASC, ACE)
    - **Fulfill certain requirements**
    - Producers guild seeking to create recognition: currently **PGA** is a mere trade association, not a union—<u>NOT ALL ABOVE THE LINE GUILDS ARE UNIONS</u>
        - Theory is that they are management, not actually *employed* so doesn't make sense to allow them to collectively bargain for employment
            - BUT line-producers are engaged to project in the field and are not responsible for employing others yet treated as producer
        - Small wins, such as receiving p.g.a. after name in credits
    - **ASC** (American Society of Cinematographers) have to have done a designated number of movies, TV and commercials
    - **ACE** (American Cinema Editors): Honorary society of film industry newspapers and journals such as Variety and the Hollywood Reporter
    - **BVK**: German Society of Cinematographers



This relationship is built on interlocking, mutual **exclusivity**

- Employers and unions ▭ Unions ensure that employers can only hire members
- Members and unions ▭ members agree to only work for signatory employers
- Employer and Employee – have some kind of exclusive agreement for employee's services
  - Guilds only apply to employees, not independent contractors, but for loan out corps. Use inducement letter
- Taft-Hartley exception – "station 12" – you get to hire someone who is not a member once – person at Station 12 enters their information into a tracking database – that ensures that you can't do it again

SAG-AFTRA Global Rule One:

- NOT the rule that obtains in other unions
- "No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the guild which is in full force and effect"
  - *as a performer*: SAG can only object if you're working as a performer
  - *make an agreement to work*: scares agents, can't say or negotiate to work
- SAG wants members to always be governed by a union contract, but recognizes that this might be a *foreign* union contract under very limited circumstances
- Exception 1: "SAG members who are foreign nationals, and are not resident in the US, may choose to accept employment under a union contract applicable to their country of residence where the production takes place completely outside the US. If the production is not signed to the union contract of the performer's country of residence then the performer must work under a SAG contract."—can't completely control foreign films with foreign unions
  - Must be a member of SAG and a member of home country's union
  - Must be a foreign national
  - Production takes place entirely outside of the US
  - Production must be signatory with foreign union that actor is a member of
  - Intended to limit actors to joining unions only in home country and SAG

- Exception 2: global rule 1 does not apply to non-English productions that are shot within the JX of another country's performer's union. BUT, non-English productions shot in US under rule one
- Intent was not really to sweep employment into US, but this was the effect
- If a foreign company wants to do a couple of days (of shooting) in the US for a limited portion of the film and the rest is abroad
    1. Carve out: SAG gives one picture side-letter, with respect to SAG members get production to agree to all working conditions and residuals and abide by those—for the term of their work in the US you will pay them as if they are being paid for their term in the US, the rest of the work will be subject to their home territory contract
        i. Narrow signatory status that applies only to SAG members
            1. One picture, for this contract, for these artists
        ii. NOT a general signatory status for the whole contract, or another picture you may be making, nor does it apply to the rest of the cast
        iii. Issue is what happens to all of the other actors
    2. Can sign a side-letter abiding to SAG rules for one picture
    3. Create a new company that subjects their whole cast to the SAG agreement
    4. Make a non-committal blind call asking about what SAG would accept in terms of a narrower provision

Strikes

- Agitation/discord/strike occurs about every 10 yrs
    - 1960, 1970, 1980, 2008
    - Correlates w/ stable income source (theatrical revenues)
        - If income source is stable, then no strike
    - 1960 – advent of TV ▭ so big strike here was about residuals
    - 1980 – big issue was about residuals again
        - Ended up setting up a formula
    - 2008 – also a fight about residuals due to digital downloads/streaming
    - PATTERN: Some new technological reality gives rise to an economic income stream that becomes the basis for argumentation
        - Credits, health care, number of hrs per week, etc. – traditional union stuff – this stuff is largely not fought about anymore ▭ fight over economic stuff brought about by technology
            - They do NOT strike over traditional union stuff!
            - The minimum basic compensation is always settled on day 1 of negotiations ▭ they give some set raise every year due to inflation, and this is never an issue
    - Strikes are about new tech
        - 1980 – home video
        - 2008 – digital
        - **OTT rights** ("over the top" – the ability to watch TV or movies through a device that bypasses ur cable TV co. and is essentially over the top of ur TV via the internet) (a form of streaming, i.e., Roku) – Ginsburg thinks there will be a strike about this
    - There tended to be an order to the organizations striking
        - WGA
        - DGA
        - SAG

- For several cycles, the WGA agmt became due/expired around Oct 31 (dates not literal; spacing and order is important); DGA was around Dec 31; and SAG was around March 31
- The combo of the 3-yr cycles + this order was called **pattern bargaining**
- *What is the benefit to the producers of this spacing?*
    - By spreading them out, they CANNOT all strike on the same day and shut down the industry
    - i.e., if WGA is striking, they can get scripts some other way (scripts are stockpiled; can get foreign scripts); if DGA is striking, you can use foreign directors and film overseas; if SAG is striking, you can use foreign stars and shoot overseas
    - Writers always felt a great amount of responsibility as being the first up
    - But writers had least leverage b/c producers were always stockpiling scripts
    - If writers settled materially below what the other organizations were counting on, then the DGA and SAG would be screwed
        - So the writers are the ones who have to go on strike to make sure this doesn't happen
    - *Why not make the DGA go first?*
        - DGA has never had a strike
        - By the time the producers get to DGA, they are worn down / softened up, so DGA gets what they want
        - In the WGA strike of 2008, the DGA hired Ken Ziffren and Tom Wolzien (top motion picture industry finance analyst)
            - They checked that AMPTP was not lying about finances ▭ did a deep financial analysis about what the AMPTP was saying about future streaming revenues
            - They concluded something startling – that despite the WGA's claims, the AMPTP was telling the truth! (DHA was persuaded b4 they sat down that AMPTP's negotiating posture and financial performance was genuinely what they could pay)
                - So, the DGA agreed to contract terms that were contentious
                - At this point, DGA relished the fact that the AMPTP was softened up, so the DGA didn't have to fight very hard to get the terms they wanted
            - They also put in a **sunset clause**, saying that all the things just agreed upon in the areas of contention would not be the basis for the next negotiation
                - Also, they agreed to do a similar financial reassessment the next time they have to renegotiate the contract
    - Once the DGA settles, WGA settles right away (stops striking) (based on the same conditions/rates the DGA agreed to w/o striking)
        - WGA had very belligerent management at time of 2008 strike – very strike-prone

- Management of WGA that led the catastrophic strike was voted out during the next election
- Instead, they brought in more middle of the road ppl

- SAG – extremely belligerent management during 2008 ▭ however, delegations went to those managers and they were convinced to sign onto the DGA model agmt
  - Specifically, delegations, including Clooney and Hanks, begged management not to strike
  - This management was also voted out during the next election
- B/c THIS strike went so long, WGA got something
  - AMPTP wanted WGA contact to be backdated to Oct 31, BUT WGA wanted their contact to be in synchrony w/ SAG's ▭ WGA won this battle

Unions/Guilds

- Labor: A union or guild recognized as such by its members and the labour act is the same thing. No difference b/w the words union/guild
  - Highfalutin way to looks artisan like= guild
  - So that they don't look like blue collar workers
- Note: if you are shooting overseas, the domestic (US) unions will apply to staff you flew over, and the local unions will apply to people you hire there

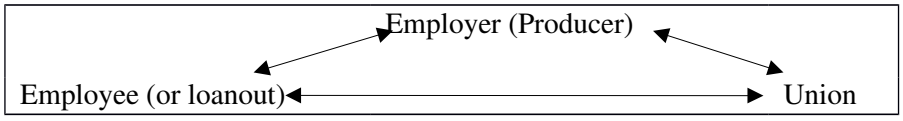
Domestic Unions:

- SAG - Screen actors guild: covers performers, primarily who's performances originated on film
- AFTRA (American federation of television and radio artists): began as an org that grew out of radio into television. Many people are members of both SAG and AFTRA. Signed many shows during the SAG strike. (Has merged w/ SAG)
- WGA - Writers guild of America: writers
  - Note: split into WGAe and WGAw – east and west branches
- DGA - Directors guild of America: directors
- Teamsters: teamsters
- IATSE - International Alliance of Theatrical Stage Employees

Foreign Unions

- ACTRA, etc
- If you're shooting in any foreign jurisdiction and are employing people there, you need to obtain local counsel to be advised of your local union obligations

Structure – what unites all of these:

- 

- **Minimum Basic Agreement (MBA):** You cannot hire (ex) a SAG employee w/out being signatory to the SAG agreement. When the employer signs this, they ***agree to only hire SAG members and adhere to all the terms in the MBA (which was negotiated by the AMPTP)***

    - MBA sets the minimum standards for employment
- "shop rules": refers to the rules that the employees agree to adhere to vis-à-vis their union
- Note: the Three year cycles are referred to as "pattern bargaining". This is important b/c do not want all the union agreements to end on the same date b/c
- Why does this link exist: if you want to hire the people that have reached a minimum level of success or they are just the people you want to hire, you need to get union members. i.e. the talent signed w/ unions so you need to sign with SAG members.
- Loanout's and union agreements: **the loanout company employs the artist and loans their services to the studio employer. The unions thereby require that the loanout company needs to be signatory to the union agreement.**
    - Request to reimburse: this relationship removes the obligation from studios to pay certain benefits to the artists due under the union agreements. Loanout companies try to get the studio to reimburse them b/c they would have had to pay this but for the loanout co. Aggressive response is to say, well if you want to use a loanout, then pay the associated costs
- **Station 12/ TAFT HARTLEY Exception**: this is the exception that allows signatories to hire talent that is not yet in the union. If the talent never worked before and is not member of any union. That first job is the only way to hire non-union talent as a signatory. Simultaneously allows producer to verify the legality of hiring this person while also informing the union of this persons non-membership
    - It is the employer's obligation to determine the artist's membership status
    - Employer therefore calls union and finds out that they haven't been a member and can hire them, result is that union is then informed that the person is not yet a member

Jurisdiction of SAG

- Historically, the jurisdiction of unions was limited to the USA – SAG however expanded its jurisdiction by adding the following rule to its constitution:
- **Global Rule 1**: "no member shall work as a performer, or make an agreement to work as a performer, for any producer who has not executed a basic minimum agreement w/ a guild which is in full force and effect" – this rule has ***worldwide*** effect.
    - This rule has been interpreted to mean that SAG members must always work under SAG contracts everywhere in the world (subject to Station 12 exception)
    - They are asserting worldwide jurisdiction
- SAG members who are **foreign nationals**: (i) If all work takes place *outside of the USA* and (ii) if the SAG member is also a *signed member of their home union* and (iii) they are working under that home agreement (*producer must become signatory to home agreement*). However, if the production is not signed to the union contract of the countries residence, then they must work under SAG
- **Foreign language productions**: "Global rule 1 also does not apply to non-English (language) productions that are shot w/in the jurisdiction of another country's performers union. But non-English (language) productions shot anywhere in the US are subject to SAG's jurisdiction."

Global Rule 1 and Residuals

- Employees want SAG, employers do not
- Artists want the production to be a SAG production b/c of residuals.
- Producers prefer non-SAG b/c lower residuals obligations. Other countries' unions do not have the same stand on residuals. (Ex: Canada)

- In the first two years alone, Global Rule 1 increased the members' earnings by $120M and $6M to the guild's pension fund.

Foreign Nationals

- If a producer hires a **foreign national** who does not have a green card, he needs to get a work visa.
- Employment agreement should contain a representation and warranty that the foreign national can work in the US.
- To get a visa it must be proven that the artist is special and that no US national could replace him and this has to be accepted and **confirmed by SAG**. Must be artist of "some repute"

Guild Signatory Status

- Flows downhill but not uphill. Subsidiaries are bound by parent's status. Inverse does not apply.
- Trick is to sign at the lowest level possible
- Should there be a mistake and a representative of the mother company signed the agreement, two options:
    - (1) Call the business manager at the union and tell them they didn't have authority to sign. I.e. try to negotiate w/ the union.
    - (2) If that fails, create another company that will be the production company. This company will hire all the talent and therefore will need to be a new signatory = limit the taint to one co.
        - *This way you can have multiple companies w/ different union profiles which allows you to be more flexible for all aspects of your production.*
- **SIGN AT THE LOWEST LEVEL POSSIBLE**
- Note: duration of status: default rule is that you are bound for the balance of the three year cycle of the MBA.

Moore Chapter 7
• Members of the guilds may work only for guild signatories and guild signatories may hire only guild members = exclusivity • Jurisdiction extends to independent contractors working under loan-out corporations • All subsidiaries of a guild signatory are deemed signatories to guild agreement • Guilds increase film costs in many ways (primarily the cost of residuals and benefit/pension payments owed to the talent and the guild, respectively

Casebook Document 28: Entertainment Industry Unions and Guilds
Just a list of and description of the different unions

System of Exclusivity

- Each union has a contract with the studio is exclusive

RESIDUALS

Intro:

- "**Residuals**": *contingent amounts owed to talent. Percentage of "defined at source gross receipts" derived from the production's exploitation*

- *Contractual contingent compensation that you get by virtue of being an employed member of a union which has negotiated for those rights.*
- Union MBA set out residual rights, talent does not need to ask for it.
- Purpose of residuals: due to the **feast and famine** nature of this industry, residuals are vital for talent as they provide a steady stream of long-term income.
- Contingent compensation
- Only included in TV budgets (initial license for television), not film budgets, b/c broadcasters want to know that the minimum number of runs has been paid for

Calculation of Residuals

- **Who calculates**: distributor
    - It is the distributors in the respective property that is responsible for calculating/paying the residuals. It is practically impossible for the producer (outside of a PFD) to account/report to the artist b/c he cannot keep track of the actual use. Therefore independent producer's residual obligations must be enforced by the distributors
- **When do they arise**: when used beyond primary use
    - Generally speaking, there are no residuals payable for the primary employment/ **primary initial medium**
        - Ex: if you're hired for a feature film, that film can be displayed on screens in the market w/out requiring the payment of residuals
    - It is only when the product is **reused** (ex: feature film broadcast on TV), when it goes beyond the initial medium, that residuals arise
    - However, w/ TV this is a bit more complicated b/c reruns still occur in the same medium (TV), but to the extent that they occur beyond the initial contract agreement, they will give rise to residuals b/c it is no longer the primary use.
- **Gross Revenue**: **the sums that are taken it at the "at-source"point (see chart below**
    - Guild's position*: in the context of any media for which the producer receives a minimum guarantee (*that is to say, if the producer sells TV rights to a motion picture for $10M, that is the minimum guarantee/flat price for that right*) they are entitled to receive residuals at **the greater of** (i) what the film producer has received (the minimum guarantee) or (ii) what the distributor will be receiving at source*.

Note: vital to know (i) how do the unions get accounted to and (ii) at one point in the revenue stream

Casebook Document 11: Income Streams and At Source Revenue

SEE Chart
• For each medium (theatrical, video, Cable TV, etc) there is a flow of money (income stream) that flows ultimately to the studios
• Example, theatrical
  ○ Studio = = = Sub-distributor (if applicable) = at = source = Theater = = = Public
  ○ The theatrical at source definition is therefore "what the theatres account to the next link"
  ○ Note: $100M box office is $50M accountable at source
 	
• *Theatrical at Source*: where **theatres** pays the next link (**distributor**/sub-distributor)
• *Home Video at Source*: where **retailer** pays the next link (**wholesaler)**

- *Free TV at Source*: where **broadcaster** pays the next link (**distributor**/sub-distributor)
- *Cable TV at Source*: where **cable channel** pays the next link (**studio)**
- *Merchandising/Soundtrack at Source*: where **manufacturer** pays the next link (**studio)**
- *Internet at Source*: where **website** pays the next link (**studio)**

- Note: that for Cable TV there are two revenue streams flowing into the cable channel, from the cable co. for subscribers and secondly from advertisers to the cable channel
- **Streaming vs. Downloading**: if the end result is that you are streaming it, then it falls into the Internet model. If you're downloading it, so that you wind up w/ a copy that you can keep, that is treated like home video.
    - Note however that there is a new trend that Netflix revenue model will now be treated like television revenue b/c Netflix is gradually replacing TV (Dreamworks)

Casebook Document 12: Residual Calculations

SEE CHART

Note: that you only need to know for the exam what is above the line on the document

- At the top is a sample model of a license of a film for a $30M minimum guarantee
    - $10M Theatrical - $0 at-source residual b/c theatrical film therefore first exhibition/primary
    - $10M TV - $10M at-source allocable to television
    - $10M Video - $2M to be paid in residuals ($10M Video x20% video residual default %)
    - Total: $30M grosse, $12M residual grosse
    - Guild fees: Residual grosse x 15% = 1.8M owed to Guilds (15% is rule of thumb aggregate residual for all guilds)

Summary

- **Step 1: Calculate the residual grosse (Grosse + allocations)**
- **Step 2: Calculate the guild fees (Residual Grosse X Guild %)**
    - **Who gets the residuals:** Depending on the union, this money will either be paid directly to the talent/workers (above the line unions – SAG, DGA, WGA) or will be paid into the benefit system (ex pensions) of the guild (below the line unions – IATSI, Teamsters)

Quick Review:

- Video is a royalty
    - Note: Home video grosse is a percentage b/c that's just how it evolved. It came from the record industry model as VHS was originally sold in record stores.
- Tv usually passes through in full
- Digital is treated like Internet if no permanent copy, and like video if it is a download

Securing Residuals

- Residuals are so important that unions seek security
- **How:** File a UCC-1 statement to put a lien on a production
- **Also**, unions seek, but will sometimes waive, a cash escrow account during production (show as union deposits on budget)
- Usually done for productions that are under-financed or with new producers

Chain of Obligations:

- The obligations b/w the producer and unions re: residuals must somehow be connected to the ultimate distributors
- **Therefore you want the distributor to assume the obligations to pay the residuals** in the distribution contract ⎵ *assumption agreement*
- Two kinds of assumptions agreements:
    - "**distributor's assumption agreement**": distributor agrees to take on third party payments
        - However, if they don't pay, the unions take the position that the original employer is still on the hook under secondary liability
    - "**buyer's assumption agreement**": Buyer now stands in your shoes. Is in effect a novation. Usually countersigned and accepted by the union. Buyer has therefore fully assumed the obligation and no secondary liability.

Casebook Document 33: New TV Pilot Language Putting a Squeeze on Residuals
• Networks are trying to get residual payments for first-run reruns to be included in actors salary. Whereas before an actor making $30,000 an episode would expect an extra $2,500-5,000 for the first-run rerun, now studios want that that to be included in their original salary. • Foreign residuals also being targeted. This is kosher under guild rules as the CBA's provide that studios have the right to defer up to 35% of an actor's minimum compensation as prepayment for future foreign residuals if the actor is making more than guild minimums.

DISTRIBUTION

Intro:

- Distribution: Where the product that is manufactured is turned to account and transitions from the manufacturer (studio) to the distributor (~ wholesaler) to the exhibitor (~ retailer)
- Copyright enables distribution:
    - Right of public performance
    - Right of distribution
    - Right to make copies, DW, etc.
- Key questions re: Distribution, your distribution rights will be limited by:
    1. Exclusivity vs. non-exclusivity
    2. Territorial scope of your rights
    3. Time/Term of your rights
    4. Medium/Media
    5. Language rights (ex: English language rights will not grant you German language rights)
    6. Assignability
- Reviewed PFDs, negative pick-ups and presales.
    - These sale models (not PFD) will have varying terms, i.e. can have a negative pick-up with only theatres in a given territory
- Aside from PFDs, which imply cash will be paid during production, payment on a presale/negative pickup is usually made on delivery
- Distribution fee: what distributors charge to distribute a movie, the cut they take at the at-source point from the theatres. Standard fee now is **35%**
    - Ex: theatre takes in $2, reportable grosse is $1 to distributor. The distributor then takes its %, and then the remaining $0.65 is returned to the studio
    - Note also that distributors will not pay you proceeds from the performance of the film until their initial advance (Ex: at the film festival) has been repaid

        - Ex: $1M advance, with a 35% distribution fee, need to collect $1.35M from the theatre before any will begin accruing to the other participants in the income stream and therefore box must have been $2.7M

Modes of getting films into theatres:

- PFD: studio is also distributor
- Presale / Negative Pick-up: Distributor buys distribution rights via an advance to the production entity. Then collects a 35% fee on reportable grosse
- *Rent-a-System*: when no distributor is willing to pay money upfront to secure the distribution rights against an advance (i.e. not willing to give a minimum guarantee), you have to pay the distributor to distribute the film (i.e. you're renting their distribution exchange), rather than the distributor giving you a distribution advance system (fee is usually 12.5-17.5% of the money that gets collected/reported) ⇨ ***Distributor does not give you an advance, fee is lower, and distributor likely not paying distribution expenses***.
- *Multiple picture deals*: distribution structure where distributor has agreement with production entity for a number of years/films (ex: Pixar and Disney had a 5 picture deal)
- In all of the above models, the distributor has a **license** to distribute this document on some exclusive basis – there is a transfer of title
- *Sales agency*: in a sales agency, your relationship w/ the sales agent does not involve a title transfer. It is analogous to a realtor. You are hiring an agent to attempt to procure a distributor (major foreign territories). **Sales agent never has title** to the movie.

Risk/Reward analysis:

- The more that is put-up as a minimum guarantee, the more that that militates in favor of a stronger distribution fee

Term of Distribution Deal:

- **Beginning of term:** You made a deal, now when does the term start?
    - On delivery: usually defined as when the lab certifies that all of the elements, both film/digital and documentary (documents of title, contracts, etc.) have been delivered
    - Date of execution of the documents: preferred by the licensee that the term begin at the date the agreement is entered into b/c gives them a greater right of control (ex: advertising campaign), but do not want to pay any money yet
    - Date payment is made:
    - Point: the date the term starts is something to consider when making the deal b/c lots of things can go wrong before both parties have fulfilled their obligations
- **Length of Term**:
    - Typical commercially feasible period of exploitation during which the buyer/licensee can be expected to recoup their investment. Aka the economic life of that medium.
    - Therefore you want the term to represent this reality (typically 20-30 year terms) – **term is usually based on some customary economic life**.
        - **But,** as licensee you may want a provision that provides that "if, upon the expiry of the term, the initial investment has not been recouped, the licensee has the right to give notice to exercise their **option to extend** for X years"
    - "collateralization": want to get rights for all mediums (i.e. theatre, tv, dvds, etc) b/c allows you further opportunity to make back your investment

Mediums:

- **Theatrical**: display on a screen to an audience via projection
- **Non-theatrical**: *stuff exhibited to an audience but not in a theater* - generally means small venues and much smaller public simultaneous viewers (ex: hotels, airlines, prisons, schools, ships at sea, military, etc. are all non-theatrical distribution)…Swank is major company handling non-theatrical for WB.
- **Video/DVD**:…self-explanatory
- **Video on demand (VOD)**:
    - **VOD**: traditional VOD
    - **NVOD**: near-video on demand – repeating schedule of showings (rather than starting on demand)
    - **SVOD**: subscription video on demand – for a fixed fee (monthly) you get to watch lots of video on demand
    - **TVOD**: transactional VOD, includes PPV, for that one transaction you are paying a fee (ex: sporting events)
    - **AVOD**: audio on demand (ex: picking channels on airlines to listen to music)
    - **PVOD**: premium VOD (see *Tower Heist* reading)
- **EST**: Electronic Sell through – when you buy and download a copy of a movie (aka download to own)
- **Television tranches**:
    - Free TV (broadcast): ABC, CBS, NBC, FOX
    - Basic cable: non-premium pay but delivered over a cable/satellite dish
    - Premium/pay TV: HBO and the like
    - Pay-per-view + the VOD club
- **Ecosystem:** theory is correlation between younger and willingness to watch on smaller screen. Cloudspace: can watch on computer, tablet, phone, etc.
    - **Residual**: distinguish rates based on ownership vs. rental for residuals
        - **leasing vs. ownership**: way ppl want to have access to material. The model 20-30 yrs ago was based on collector value: you want to own collection on shelf to look at.
            - **Gins' theory**: chart of number of plays vs. weeks in owning CD/packaged music. Here's what happened: you got your fix of the song, and then you didn't play it that much anymore. His theory: lower the price…rental only will be enough

Clusters of Distribution Rights

- (1) Primary Rights: ***Traditionally, primary rights are the initial rights which the grantee intends as the first/initial medium of exploitation***.
    - Example: in an option to make a motion picture, the theatrical rights are the primary rights; if a publisher acquires a manuscript for a novel the primary rights are likely the print/publication rights
    - **NOTE:** Can become broader set of primary rights where **closely related rights** are used in close temporal proximity
        - Ex: hardcover publication + e-publication of a novel
- (2) Subsidiary Rights: ***rights which are subsidiary to the primary right (typically derivative works in other media)***

    - Ex: Primary rights are the right to publish/distribute a book and you will have secondary rights to turn that book into a movie
- (3) Ancillary Rights: ***the right to use characters/images/other elements in other context***
    - Rights that encompass elements less than the whole work
    - Ex: sound track rights, merchandising, music publishing
- (4) Allied and incidental rights: ***catch-all category***
    - Ex: sequels, prequels, remakes, spin-offs
- Note: videogames uncertain which category they fall into, the rule: "include them in a separate paragraph"
- **Standard phrase to catch unspecified rights**: *…the foregoing grant includes, without limitation, rights in all media either here known or hereafter devised or transmitted throughout the universe either now or in perpetuity.*
    - Covers (i) technology, (ii) transmission mode, (iii) geography, (iv) time
    - Note on "perpetuity": even though CR is limited in time, you seek perpetuity b/c certain rights exist forever (trademark) and you want to be successor for as long as legally permitted

Misc. other rights:

- Foreign rights/rights outside the USA
- Live-stage rights

Distribution "Windows" – Review and Recap:

Media Window Timeline

<table>
<tr><td rowspan="2">Initial Release</td><td>Domestic Theatrical</td><td>Non-theatrical: Airline/Hotel</td><td>Bumper</td><td rowspan="2">Ultraviolet and VOD/TVOD</td><td rowspan="2">DVD and BD</td><td rowspan="2">Pay-TV</td><td rowspan="2">Free TV</td><td rowspan="2">Syndi-cation</td></tr>
<tr><td colspan="2">Foreign Theatrical (can come before domestic)</td><td>S-VOD</td></tr>
</table>

- Assume large feature film for above model
- Traditionally there was a gap b/w theatrical and home video release, this gap has now closed and we are even seeing overlap
    - used to be 6 months but now shrinking to 120 days, 90 days.
- "day and date" released at the exact same time as…
- Foreign: formerly held back bc of piracy issues (esp. in China, India, Russia, and Canada)—but nowadays lots of simultaneous worldwide releases
- Bumper: rest period when not available-dead spot when not appearing in any medium. Nowadays, more or less a thing of the past

Territorial Windows

- Tend to be divided by language and/or geography
- Major territories: USA, Canada, Australia, UK

- Typically a large block of territories, rather than single countries (ex: German speaking Europe, South America, Spanish South America/Portuguese South America)
- Note: France usually acquires for France and its overseas territories/departments (former colonies
- Note: North America vs. USA:
    - Usually means Canada and USA
    - Can say USA territory or definition includes Canada
    - North America doesn't include Mexico
    - **Point…ambiguous so make the contract clear!**
    - "Domestic" rights: USA and Canada

Transfer of Title:

- How do you deal with payment in exchange for delivery for the film? When does title change?
    - Keep your eye on who has title
    - Distributor (?) can get security interest in the film and if don't get the film then can foreclose on it
    - Beneficiary of completion bond: can argue that distributor is not beneficiary, but can also argue that they do benefit because get what they want—on-time delivery!

Payability

- 1) Advance payments
    - Misnomer.

- Btwn 10-20% of the advance is usually paid as a deposit upon execution of the license, with balance paid upon delivery of the film to the license.
  - Usually not adjusted up for cost overages or down when film is produced below budget
- What triggers payment of the balance of the advance?
  - Typically → made upon delivery of film to licensee
  - Battle is thus – what constitutes "delivery"?
    - Licensors – wants it to mean that film materials are ready and available for duplication
    - Licensees – Want the right to inspect the physical material, and screen the film before paying
  - Industry Practice
    - Banks typically will not fund production of a film unless the licensee signs a notice that:
      - 1. Licensee WAIVES all conditions precedent to payment of the advance OTHER than availability of physical material.
      - 2. Licensee also WAIVES the right to withhold payment of the advance.
      - 3. Licensee's exclusive remedy for any breach of its control or approval rights is to sue for monetary damages
    - All the licensee can hope for is the right to inspect and accept the technical quality of the film, that the film be based on the scripts, and that the key cast include certain actors named as essential elements

- 2) Security and Letters of Credit: Producer (licensor) will generally insist that payment of the advance be secured in some manner (b/c distrustful that the distributor will actually pay on delivery). As such, may require:
  - 1) Large initial deposit that is subject to forfeiture
  - 2) Guarantee from a third party
  - 3) Letter of credit
    - Direct contractual commitment requiring the distributor's bank (the "issuing bank") to pay the licensor or its bank (the "beneficiary") the amount of the advance upon delivery.
    - Two types:
      - Standby
        - Distributor is expected to pay the advance directly, and the issuing bank stands by to make payment if distributor defaults
      - Payment
        - Distributor is not expected to pay advance, which is paid by issuing bank of letter
    - Draw-down documents: Documents that **trigger payment** under the letter of credit
      - Usually either:
        - A notice of acceptance signed by the distributor or
        - An arbitrator's award that delivery has occurred
      - Must be payable upon presentation of pre-agreed documents; there can be no requirement that the bank confirm anything outside the written docs

        - But three-day waiting period bw presentation of draw-down
    - docs and payment by issuing bank
- Conversely, the creditor will get a security interest in producer's work to make sure that he gets what he bargained/paid for

Turnarounds in Transfer Controls:

- **Turnaround**: ***what happens when according to the contract, some defined right is not exercised w/in the defined period.*** If either an option isn't exercised or an option is exercised but production doesn't go forward or a development deal doesn't go forward, then there's a **turnaround** where the rights shift from the studio back to the original producer, writer, etc.
    - Allows the producer, writer, etc to try to re-sell the project to another studio—they have the underlying rights, so they now have the opportunity to try to set up the script and unify the two.
    - Scenarios: 1) Option: never exercised, then title never moved; 2) Option was Exercised: Reversion clause: exercised, so title moved, but now reverted back.
        - usually about the scripts
    - Ex: You are optioning a script, and (as discussed) there is an option right to some future material. When that right/option is for a limited time. A second script has been prepared but the production wasn't completed before the underlying rights expired. *The turnaround period (stops short of reversion), would then kick-in to allow the holder of the underlying rights to sell the underlying rights and the script for a defined period of time*
        - Usually the rights are somewhere for 2 years, then sometimes even joint for a few years, then eventually in one location.
        - Note: to this the studio should attach some sort of **right of first refusal** to give them the opportunity to match that offer
        - Note: **Changed element clause** (nifty transfer control)—give notice to Studio #1 if there has been a "changed element" which is usually defined as some major change (such as George Clooney being attached to the movie)
            - *if an element that would have made a difference to them (in their sole judgment) during their decision making process has changed, then they need time to consider this* (ex: "if we knew George Clooney would have played the lead, we would have made the film)
            - Like ROLR, the original studio may have a changed elements clause in its contract, namely that if the writer, producer, etc. changes a material element from its original project (a star, a director, a new script), then they have to bring the project back to the studio so that the studio has another bite at the apple.
            - Have to have 1) notice, 2) elements affected (?), and 3) specified period of time
            - What if changed element is impossible one? It has to be an element that you can get or get access to. But in the industry, that means at some amount of money that can happen.
        - ***Therefore, must disclose (i) the offer to buy by Studio #2 and (ii) if you've attached an element they've never attached before. In either case, the original studio has the right to buy the rights at that price,*** *failure to satisfy either of these elements would either be a breach or a failure of grant of those rights*

        - ***Disclosure*** of transfer controls chills 3rd party involvement
    - Note: secondary definition: the time b/w release from work on day one and the time on the next day you must show up to work, SAG agreement provides a certain turnaround period **(not relevant)**

- ***Jurisdictional/Governing law clauses***: clauses which govern jurisdiction of dispute resolution is vital b/c we have a very international scene right now.
    - Consider: territorial jurisdiction, arbitration clauses vs. recourse to courts.
- Large companies prefer recourse to courts b/c can litigate forever. Have more resources to use litigation as a sword, rather than submitting to final jurisdiction of "some baby-splitter" ▭ *wealthy parties want to have the benefit of litigation*

Lectures 19 to 21 – Revenue and Contingent Payments SEE ONLINE

Contingent Revenues Intro:

- Core of this is some species of accounting mechanism (we've already analyzed at source points and who pays to whom, now we're looking at how the money is split)

Methods of Accounting

- Accounting rules: GAAP – not used as the basis of film accounting
- Tax accounting: what you use for your taxes (created by Congress, IRS, states)– not used as the basis of film accounting
- Equity accounting: for securities and investment compliance– not used as the basis of film accounting
- **Contract! -- The method used in film accounting is whatever the parties say it is! It is the definition of whatever the relevant measurement is (ex: gross after break-even definition)**
    - A contractual share of some species of contingent revenue
- **Point: everything we will be talking about in this module will be determined by the parties according to their leverage, their policies and their prior agreements**.
- Key is defining the pool of money out of which some definable share is measured and payed
- Note: "blended aggregate" distribution fees: is the total for all distribution fees amongst all medias, which have different fees

Beneficiaries

- Talent, writers, directors, producers…

Definitions: (from largest pool to smallest)

- "Pure gross" gross proceeds measured at source w/out any deductions for distributions fees or expenses or production costs
    - The most advantageous type of participation for participants (most transparent to calculate/audit and biggest pie)
    - Rarest
    - Note: most pure grosse definitions usually allow a recoupment of production costs (what the film cost))
- "adjusted gross" pure gross less certain off-the-top expenses
    - Off-the-top expenses are: checking costs (what it costs to make sure money was remitted), currency conversion costs, collection costs, tax costs, trade association dues

- Note: in some adjusted gross definitions, certain other expenses (usually distribution), are allowed to be w/held

October 20, 2011

- "cash break even (CBE)" pure gross less all distribution costs, production costs, interest and a **reduced (or zero) distribution fee**. (Tip: if distribution fee less than 35% usually cash break even)
- "actual break even (ABE)" pure gross less all distribution costs, production costs, interest and **full distribution fee** (Tip: full fee is usually 35%) [CBE therefore better for participants, therefore the more leverage an artist has the more likely they are to get CBE]
- "net profits" what is left (if anything) after all conceivable deductions are recouped and kept by the studio including all the other contingent participants.
  - If your participation is calculated based on net profits, the participations of all other participants are removed first (sort of like a priority system)
- Note on grade points – come in two flavors: ex: initial break even vs. rolling break even
  - Initial Grade Points:
    - Once you have reached the break even amount, no other deductions will be calculated for payment terms (expenses no longer considered)
    - Ex: 2nd quarter of film's release bring in $1,000,000 but have 500K expenses your participation would be calculated on $1M = more advantageous
    - ICBE = Initial cash break even
    - IABE = initial actual break even
  - Rolling Grade points:
    - In a rolling break, even as the revenue keeps rolling in, the studio gets to deduct from that revenue = **continuing deductions of expenses by distributor**
    - Ex: 2nd quarter of film's release bring in $1,000,000 but have 500K expenses your participation would be calculated on $9.5M = less advantageous
    - RCBE = rolling cash break even
    - RABE = rolling actual break even
- "Sums equal to" and "X% of 100%"
  - *Sums equal to*: this phrase is used to prevent any argument that the studio is holding the participation in trust (to counter the creation of a constructive trust)
  - *X% of 100%*: 100% makes sure that you're measuring it against a *constant pool*
- Note re: **distribution fees** – these are calculated on the highest gross, therefore on a 20% distribution fee w/ $40M in DE + PC, the Distribution fee will be $10 (20% calculated out of 50, not 40)

Formula to calculate gross Breakpoint:

$$\frac{DE + PC}{1 - X} = G$$

- DE: Distribution expenses (usually including off-the-tops) (ex $10)
- PC: Production costs + interest (ex: $30)
- X = applicable Distribution Fee percentage (Ex: 2% (CBE)) [note: the > the Distribution Fee, the later your break even will be]

- G = Gross at breakpoint

$\frac{10 + 30}{1 - 0.2} = \frac{40}{0.8}$ = 50 Million – therefore won't reach CBE before you have 50 million of revenue

October 25, 2011

- "hard floor" vs. "soft floor"
  - Typical in PFD deals. For example if a producer is getting 30% of Net Profits he will need to pay certain third parties out of his participation (ex: 5% for director, 12% for talent, etc.). If the producer only has to pay third parties up to a **hardfloor of 15%**, then even if the third parties amount to more that half, he will not get less. Studio will bear the rest of the burden.
  - **Hard floor**: lowest point at which costs will be deducted
  - **Soft floor**: after the soft floor is reached, the remainder of the costs are split between the producer and the studio
  - Therefore, **S**oft floor = **S**haring of future third party expenses. Producer bears some of future participations, but not all. Hardfloor means no further reductions whatsoever.

- *Distributor/Affiliate payments*:
  - If you represent talent you do not want distributors treating costs paid to their affiliates like other costs b/c they are just shifting profits b/w divisions
  - Concern is that distributor will pay affiliate an amount greater than the market rate to increase distribution expenses w/out it actually costing them anything and they are shaving money from participations
  - Have similar concern w/ sales to networks which are owned by the studios. Do not want them to under-price the content thereby benefiting the affiliate and shaving participations
  - Contractual provision to prevent this: "all contractual arrangements b/w distributor and an affiliate, whether wholly owned or otherwise, shall be done at arms length fair market value between arm's length parties arrived at in good faith"
- *Rebates*:
  - Closely related to affiliate accounting. Large studios usually have arrangements that give them rebates/discounts on production/distribution costs.
  - If you are representing a participant, you want them to credit the rebate to the film. Get the benefit of all ratable rebates.

Timing – When are these amounts measures:

- Expenses occur before revenue is generated (production costs, distribution costs, marketing costs)
- Accounting statements are usually set up for films to be rendered quarterly for the first two years after release.
- Therefore at each quarterly point you account for gross, expenses and participations. These are just arbitrary dates that are chosen for calculation purposes
- *Periodicity of accounting periods:*
  - Quarterly for first two years (maybe three) after initial release
  - Then, annually for a period of years (three to five)
  - Thereafter, only an annual report where revenue was received
  - Usually an added on right to request one statement per year

        - People tend to forget later on and stop asking
    - Distributors are often allowed to keep a reserve in case of residuals
        - Guilds may come after you later as a result of assumption agreement
        - Allow for reasonable reserves but negotiate term after which they will be disgorged and keep reserve at a cap dollar amount
        - If not in distribution can't keep it at all—if something becomes a library title that is not distributed anywhere
    - Audit right: can also ask for, if not provided (usually provided), an audit no more than annually (usually wait for it a year or two our)
        - At distributor's place of business, bring your own accountant and they provide all of their receipts—this is expensive
        - If the audit finds more than 10% error than you can potentially get cost of audit (if included in contract)
- Studios may reserve right to sell distribution interest in the picture—want flexibility
    - Participant has a share of forthcoming revenue, if any, so concerned about:
        - New distributor must be: (often among list of major or mini-
            - Financially responsible
            - Similarly situated
            - Often from pre-approved list (major and mini-major)
            - Gives choice of percentage of flat-sale price of rights (known liquidated value) OR waive any interest in the sale and look to future revenues of new buyer
        - What the terms of the new deal are
        - *Woood v. Lady Lucy Duff*-Gordon: Exclusive holder of exploitation rights has the obligation, unless waived, to use best/good faith efforts to exploit them
- Expenses accounted for when spent, but revenues deemed received on last day of accounting period. Result is that interest is earned on the expenses but not on the revenues. Therefore you want this to be removed and all cash to be accounted for when received to stop the interest clock.

Moore Chapter 13 – Four ways to calculate net profits

<u>Intro</u>:

- Four purposes for which studios calculate net profits:
    - 1) Calculating earnings based on **GAAP** for reporting to shareholders, SEC, lenders
    - 2) Calculating income/loss for **tax** purposes
    - 3) Calculating payments to profit **participants**
    - 4) Calculation cash available to make **distributions** to equity holders

<u>GAAP</u>:

- Goal is to report net profits as high as possible (increase share price)
- Achieve this by various methods: capitalize a number of items (ex: development costs); report income on "availability date"; deduct film costs slowly based on estimated future income during first ten years of release

<u>Tax Purposes</u>:

- Goal: report net profits as <u>low</u> as possible
- Achieve this by: report income when it is payable (vs. available); under-estimate future income to deduct things as fast as possible

<u>Participations</u>:

- Goal: report net profits as <u>low</u> as possible

- Calculation is governed by contract, not statute. Report gross receipts as low and late as possible, offset gross receipts for home video w/ a large reserve for potential refunds, report distribution expenses as early and as high as possible

Distributions to equity holders:

- Complicated calculation based on (i) cash on hand, (ii) contractual/corporate documents, and (iii) statutory requirements for distributions (ex: no bankruptcy)

Moore Chapter 15 – Contingent Payments to Talent and Licensors

Gross Receipts

- *Date of reporting Gross Receipts*: goal is to delay reporting as much as possible (by ex: offset income w/ large reserve for refunds (home video), only count income once received in US in US$
- *Exclusions from Gross Receipts*: Try to exclude as much as possible (ex: theme park exploitation license fees, litigation proceeds, "exclusivity fees" which cover multiple films are not counted towards gross receipts of any of the films)
- *Allocations*: allocating gross receipts from the film in question to something else is another way to minimize gross receipts. (ex: when selling films as packages, divide proceeds b/w all films rather than giving a lot to the successful film, which will have participation rights)
- *Licensing to Affiliates*: allocate rights to affiliates, and only count the money from the affiliate as gross receipts – so most of the income stays w/ the affiliate which has no participation obligations
- *Home Video*: industry practice is to include only 20% of home video gross receipts in the gross receipts. Guilds did not accept for VOD, so VOD is include d at 100%

Distribution Fee

- *Calculation Based on Gross receipts*: distribution fees are calculated on gross – not net – receipts. In an industry where distortion expenses (excluding distribution fees) average approx 40% of gross receipts, the practice of calculating distribution fees on GR inflates the fees
- *Rate*: distribution fee averages 25% and can increase to 40% for TV syndication.

Distribution Expenses

- *In General*: includes everything under the sun, do not reflect discounts the studios receive
- *Accruals*: film companies accelerate distribution expenses by accruing and deducting expenses to be incurred in the future – do not follow GAAP
- *Payments to Affiliates*: often deduct payments to affiliates services at actual or marked-up costs
- *Trade Dues and Trade Shows*: deduct all trade due/trade show costs, even though do not accrue to any one particular film (contrast w/ home video revenue where won't include in GR package revenue b/c doesn't relate to any one film)
- *Taxes*: deduct withholding taxes
- *Deducting Gross Participations*: standard practice is to calculate net profits after deducting gross participations payable to third parties.
- *Costs of Developing Ancillary media*:

Production Costs:

- Similar problems to distribution fees – typically include payments to affiliates
- Add the "overhead fee" of 15%
- Charge interest

Possible Alternative:

- Have participations tied directly to worldwide box-office (WBO) gross as reported in the trades
- Historical ratio of WBO gross for any film compared to the worldwide revenue from all media for that film received by the studio is ~1:1.5 (for each $1M in WBO, a film can be expected to generate a total of $1.5M from all media to the studio
- Other variables to include: (i) cost of the film, (ii) distribution expenses, (iii) distribution fee
- Benefits are: no audits, decreased legal fees, less litigation, faster payments, etc.

Casebook Document 15 – Guide to Deal Structures

Defined terms covered in class (CBE, Net receipts, etc)

Casebook Document 16 – Third-Party Participation Deal Memo Provisions

Example of different degrees of participation. The Ones at the top are much more favourable to the participant and decrease as you go lower on the page.

Casebook Document 17 – Contingent Compensation Analyzing Prospective Breakeven

Chart showing initial breakeven with a full distribution fee of 30%. As the fee moves, the break even point moves. Discussed above in class.

Casebook Document 18 – Gross Breakpoint Formula

Formula to calculate Gross Breakpoint

$$\frac{DE + PC}{1 - X} = G$$

DE = Distribution Expenses
PC = Production costs (plus interest)
X = Applicable distribution fee percentage; expressed as a decimal
G = Gross at breakpoint

Ex: $\frac{10 + 30}{1 - 0.20\ (20\%)} = 50$

Casebook Document 19 – Hard and Soft Floors

- Purpose: to ensure that the participant is not subjected to having all (or most) net profit shares being given away to other parties, thereby reducing the original participant's share
- Hard floor: defines the minimum pool from which sums due the producer will be calculated ▭ *participants participation is reduced by other contingent participants, but cannot be reduced beyond the hard floor (strict minimum)*
- Soft floor: defines a level below which any further payments to third parties will be split b/w the distributor and producer in agreed proportions ▭ *participants participation is reduced by other contingent participants, but, below the soft floor, the participations are borne by both the studio and the reduced participant*. Once you reach the soft-floor, burden of additional participations is shared b/w studio and participant.

Casebook Document 20 – Accountants put the bite on "Alien"

- Note: Article doesn't provide that the accounting was different from what the parties had agreed
- Alien took in $100 million at the box, but the movie finished $2.4 million in the red.
- Fox's response to article: "it's a little naïve for people to expect a payout so soon after a movie's release."

- Residuals pool gets eaten at by: distribution expenses, marketing expenses, studios' distribution fees
- Note how Fox debits its accounts when it has committed money but doesn't credit its accounts until it collects money…this makes sense to me as you have an obligation to pay but no guarantee to get paid

Casebook Document 21 – For Movie Stars, the Big money is now Deferred
• Upfront salaries for actors shrinking and more money coming from participation – therefore income is tied to success of a film • Shift from participation based on a *percentage of first-dollar gross receipts* to *cash-break zero (CB zero*) where the star or filmmaker begins collecting a share of profits after the studio has reached the break-even point

Lecture 22 – Agency and Management

October 27, 2011

CASE: *Celador*

- In this case, a jury awarded $270 Million to the original participant, the participants got $21M, their agents got $16M
- This case thus bridges participation and agency

Who's on the team (see doc #22)

- **Agents**: *means a person or corporation who engages in the occupation of* ***procuring***, ***offering***, ***promising***, *or* ***attempting to procure*** *employment or engagements for an artist or artists*
  - Note how broad the test is for what an agent is. Because of this, managers often cross over into agent territory without a license (think of E from Entourage)
  - ***Fundamental difference b/w agents and managers*** is that agents must have a license to practice.
  - If you perform the tasks covered under Section 1700.4 (California Labour Code) then you must be licensed as an agent
- **Managers**: according to labor code, advise on career choices (i.e. should they accept a role, cut rate to work with someone, etc.)
  - personal management contracts should be: (1) in writing, (2) "Calling upon to render advice upon your career and not to procure employment": (3) define nature of employment as disclaiming anything that comes under TAA
    - Some personal managers include express clause: in the event that it is determined that any of the services that I rendered pursuant to this agreement are deemed within purview of TAA they shall be severable
      - Consistent with public policy
      - Understood and agreed that coterminous of agreement you will be represented by an agent licensed under TAA so as to shift responsibility
      - Lawyer and personal management can lean on agent so they are ostensibly not the party procuring or attempting to procure
-
- **Business Managers**: generally accountants who manage the business affairs of high wealth clients. Usually work on a %. Might also advise as to other things, such as investments. Are not generally either procuring employment or recommending courses of employment that will affect an artists creative career.

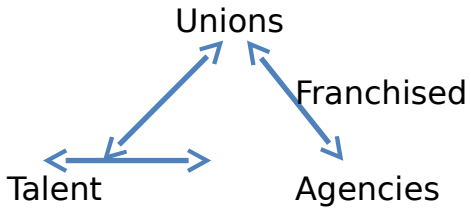
Client-Agent relations

- Mutual obligations
    - Clients must pay
    - Agents must use their best efforts to get their client's work (because in media they are typically exclusive, however they may have different agents for different services)
        - 1700 only governs the agent duties as defined in TAA (1700)
- Bound by agency agreement over some term
    - Unions have insisted that there are some measures of performance that allow this length
        - Continuity of management: artist names one, agent names one and maybe mutually agree on third—otherwise voidable
            - Typically artist signs the agent that recruited them and the agency selects president of agency (likely to maintain continuity of management)
            - As artist's get more leverage they typically list their personal agent and say they go where it goes
        - Offers of employment that are in good faith and at the artist's approximate rate of compensation presented to them not less frequently than X (some relatively short amount of time)
            - Otherwise tied to agency not getting you work

Talent Agent Act Sec.1700

- If performing a function governed by this act but not licensed under it then in violation and may be subject to penalties
- Attempt to regulate industry of purporting to find people work
- Engaged in occupation of procuring, offering, promising, or attempting to procure (by offering or promising) employment/engagements for an artist (except recording artists)
    - Recording contracts treated separately in order to make it easier for young musicians to get representation
- Agencies are protected
    - Agencies hold a master license and individual agents are covered under this, therefore sales agency may get money from investment in a film (in form of distribution agreement, presales or investment in films)
    - Also, getting money to invest in a film is not procuring employment so not covered within definition of "talent agency"
- Affirmative obligation to acquire license (by application) under 1700.6 before engaging in actions of talent agent as defined under 1700.4
- TAA prohibits personal managers from making phone calls to procure employment, in the absence of an agent, and taking commission
    - If done but later there is a breach then the client can go back and disgorge the manager for all funds paid for performing this function
    - Lawyers also cannot perform this function, though some are under the belief that they can and have acted this way for decades
        - Cannot take a commission for getting someone a job
        - *Solis v. Blancarte*: lawyer ordered to disgorge past fees for taking commission
- *National Conference of Personal Managers v. Brown*: clam that act is unconstitutional, and therefore unenforceable
    - District court dismissed the claim, on appeal to 9th Cir.

- Fee structure for representing artists as artists *for employment* is not defined by the Act, but is capped by unions' franchise agreements 10%
    - Managers have fewer clients and typically charge the higher fee of 15% so they do not want to be licensed as agents because of this pay cut
    - Labor commissioner has stated (persuasive authority) that 10% is cap
- Lawyers would not want to add the extra constraints



Commission:

- There is nothing in Section 1700.24 or anywhere in the statute that sets a maximum on the amount of commission you could ask for – matter of contract.
- Why is 10% the industry standard then? The fee caps are set out in the **union (franchise) agreements.** It is under these union agreements that the fee of 10% has been set out for talent agents.
    - Note: in 2002 the franchising agreement b/w SAG and the collective bargaining association for agents failed to negotiate an extension of the franchise agreement. The result was that the agencies were no longer subject to the limitations of the franchise agreement…and no longer bound by the 10% fee limitation. Document 29 shows the practical impact of this.
- There is however no cap on unlicensed managers' fees
- What about lawyers? Are they exempt from charging a 10% commission w/out being licensed? The answer is that they are subject to the talent agency act. Just being a lawyer does not exempt you. You cannot participate in a talent agency situation w/out being licensed. There is of course a little overlap, if you're negotiating the fine points of a contract that's fine, but if you're actually going out and getting the jobs, then you should be licensed

Packaging: additional type of compensation to agency when artist performs work outside scope of their services rendered as defined by the TAA

- Distinguish ***packaging*** (not subject to 10%) from ***personal services*** (subject to the 10% rule).
- If you are representing personal services, your fee is 10%
- In packaging, the agent represents some version of the producer or the production.
- They are representing the show or the movie. (originated in television)
- Historically, package together talent and a writer to package a production. In later years we see packaging where agents represent just a script or smaller things like this.
- Since they are representing the production, they are not limited by the 10% rule.
- Packaging commission is different from personal services commission b/c they are not taking commission from the talent, but rather are gaining revenue from the product. However, if the producer is picking someone who is outside of that package, then that person will have to pay the fee.
- "Package commission": commonly called 3/3/10…to be continued in next lecture

Package Commissions:

- "Package commission": commonly called 3/3/10%, is the standard commissioning arrangement for an agency that is representing a package instead of the personal services of the artist. Note: license fee is per episode.
    - **First 3% (calculated on license fee) -** The base on which these numbers are calculated are as follows: imagine a *license fee* of $1 Million. This is what the original broadcasting network is paying for the right to show the show over some number of runs and period of time. This is the base for measuring the package commission. It is not measured by the budget. It is based on the license fee. ***Paid out of the budget.***
    - **Second 3% (calculated based on license fee thus same amt as first 3%) -** usually comes out from a complex formula that basically looks like 100% of net profits. Point is, whatever definition the producer gets is the definition the agency will get for participating in those contingent proceeds.
        - ***That second 3% shall be taken out of a sum equal to 50% of what the Producer's contingent share is, until that second 3% is recouped. Paid out of back-end of the film.***
        - Whatever the definition is, that amount (ex: net profits) will be split into two streams, half targeted at the producer and half targeted at the agency. The agency will then get 3% **license fee base** out of their respective stream
        - Example: Net profits of $50,000. Split into Agency stream ($25,000) and Producer stream ($25,000). The agency will then get 3% (***calculated based on the license fee***) from only the pool of their stream. In this example they have a payable of 3%*100,000=$30,000…but their stream allocation is max $25,000 so they only get $25,000
        - Why has this developed? Because otherwise producers would lose out on their commission. This system guarantees that the producer will get some contingent proceeds if there are any
    - **The 10% -** If the back-end stream exceeds the second 3% for both the agency and the producer, the agency takes 10% out of the complete pool. Reverts to a standard 10% commission for the entirety of the projects life-cycle, again from back-end.
    - "3-3-10" model. That means that an agency gets 3 percent of the license fee of the show, payable when an episode is produced; 3 percent of the budget of the show, which is deferred until the show hits net profits; and 10 percent of the back-end of the show, when it is sold into syndication. CLARIFY THIS AT REVIEW SESSION
- "Agency Splits": When no one agency represents 100% of the package. They will arrange some form of split for the commission as between them. For our examples though, we will assume one agency is doing the entire package.
- Renegotiations – talent is generally set out a set amount per season. I.e. season one you get $10K/episode, with annual $2,500/ep increases. However, when a show takes off, what the cast does it renegotiate (i.e. threaten to quit if they don't get a pay increase)
- Commonly, a small agency will find talent and that talent will leave them later in their career for a bigger agency. If that happens in a series, that agency will still get the original commissions/back-end owed to it.
- Feature packaging exists when you presell certain rights (i.e. to another territory) then take 10% off of this sale???

CASE: Marathon v Blasi

- Prior to *Blasi,* a management/agency contract w/ an unlicensed party performing the duties of an agent would have been invalidated. This case, changed that and applied severability.
- Court found that it was unfair/unjust to invalidate the entire contract. Rather, apply severability and reduce commissions to remove unlicensed transactions. Services that don't require a license should not be disgorged.

Renegotiation

Season	Agency #1 Episodic	Agency #2 Fees
1	10,000	
2	12,500	
3	15,000	35,000
4	17,500	40,000
5	20,000	45,000
6	22,5000	50,000
7	25,000	55,000

If show is hot, can threaten breach (to force renegotiation)

Either because artist is investigating another agency or is approached by another agent that says they can do better. Second line is what the second agent says they can do or has actually done. (Express policy of big agencies not to poach from small agencies)

- Usually for a term of years: the younger the talent the longer the talent, the more successful the shorter
    - Need continuity of management and regular similar employment
- If still under contract with agency 1
    - Agency 1 can send cease and desist letter to agency 2 for tortious interference of contract
    - Second agency will offer to pay projected commission of first agency to buy the client out of their contract
        - Could even offer to give commission on the spread of new commission
- If agency 1 complains about losing potential commission off of stardom of artist
    - Speculative future commissions
    - Agency 2 could offer to pay some portion of commission
- Agent 1 really helps build careers by investing and working with talent during the hardest portion of their career, the first few years

Remedies

- Get full commission from first contract as projected, as it arose within the agency's time
    - (even if K with agent was 4 years and series was 7 agent would get commission from all 7 because the contract was created during their time)
- Sometimes get a little more
    - Spread of additional income on current contract
    - Some amount of commission from additional contracts picked up that would have been within the relevant years of contract with the agent

Casebook Document 22 – California Laws Relating to Talent Agencies

Excerpts from the California labour code – see Document 22, only covered here ones discussed in class

1700.4. (a) "**Talent agency/agent" means** a **person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist** or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

1700.24. Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency. Changes in the schedule may be made from time to time, but no fee or change of fee shall become effective until seven days after the date of filing thereof with the Labor Commissioner and until posted for not less than seven days in a conspicuous place in the office of the talent agency. **(does not set out maximum!)**

Casebook Document 23 – What You Really Want To Know About Managers and Agents

- Discusses the differences b/w agents and managers we went over in class
- Main point – don't act like an agent (i.e. book gigs) unless you are licensed agent in NY or Cal
- But, the California Talent Agency act has an exemption for managers helping get their clients recording contracts without being licensed. So you can get a recording contract w/out a license.

Casebook Document 24 – *Marathon Entertainment, Inc. v. Blasi*, 2 Cal.4th 974 (2008)

Facts: Marathon and Blasi entered into an oral contract for Marathon to serve as Blasi's personal manager in exchange for a percentage of her entertainment employment income. Blasi, who was represented by a licensed talent agent throughout the term of her personal management contract with Marathon, terminated the management contract in the fall of 2001. Thereafter, Blasi successfully invoked Marathon's alleged violation of the Act's licensing requirements as a defense to her obligation to pay Marathon a commission on her 2000-2001 earnings from the television series Strong Medicine,

Issues: (i) applicability of the act to managers; (ii) does procuring employment w/out a license void the entire agreement?

Holding: (i) Yes, applies to managers; (ii) No, can sever that part of contract

Reasoning:

Ratio:

- "**Agents** procure roles; they put artists on the screen, on the stage, behind the cameras; indeed, by law, only they may do so." - "**Managers** coordinate everything else; they counsel and advise, take care of business arrangements, and chart the course of an artist's career."
- Managers subject to Talent Agency Act if their conduct is under the definition of 1700.4;
- **Doctrine of Severability** applicable to manager-client Ks, thus manager entitled to pay for work performed, i.e. partial enforcement of these K, even if they violated the Talent Agency Act by procuring employment (That means if they did 1% of illegal conduct, they wont lose the other 99% of the stuff they did)

Note: Post-*Blasi* management contract:

Post-*Blasi contract* would be a written contract stipulating: fee; description of duties especially

prohibiting the procurement of employment; Agent clause might want to say that agent is procuring employment at all times and with a separate commission; Severability clause

Casebook Document 25 – Talent Agencies on Mission to Diversify
• Talent agencies are diversifying their business. • Especially important (i) b/c of writer's strike and (ii) b/c of change in the way people consume media • Strike-resistant business such as music (touring), publishing, reality TV, sports and **digital content** very important – TV/Film will be bread and butter but these areas increasingly significant • New international markets very important

Casebook Document 26 – "Millionaire Aftermath": Celador Leaves Door Open to Sue Agents
• Case highlighted the tension b/w agents' "package fees" (an off the top 5% fee taken from network license fees) and the participations that the clients get. Question conflict of interests where agents hurry/fight for package fee and do not pay enough attention to participations • Packaging fees put agencies in a conflicted position b/c they get paid if the show as a whole does well, not necessarily whether their clients are especially protected

Casebook Document 27 – Lawsuit Claims CAA Cheated TV Creators
Tension b/w packaging fees and contingent compensation for clients. The deal gave money to the agency (package fees and contingent) on a more favourable basis than the agency's clients (the creators of the show). But-for the Agency's high participations, the creators would have received residuals.

Casebook Document 29 – Comparing SAG Rule 16(g) to the GSA
• Point by point comparison of what SAG expected its franchise agents to govern their contracts and (since the franchise agreement failed to be extended) what the agents used in their contracts without being governed by SAG's minimum terms and conditions. • Shows that the Agencies responded by drafting their own minimum standards agreement ("GSA") to govern themselves. • In practice, the major agencies, just kept on with the same agreement which had been franchised. • A few smaller agencies, started using the GSA and offered decreased protection for talent • But most talent got the same deal as under SAG

Lecture 23 – Insurance, Litigation and ADR

Producer's Package Policy (Document 39):

- Standard group of coverages you get to cover the risks involved that arise in film-production
- Include: cast, props/sets/wardrobe, extra expense, foreign liability, aircraft, errors and omissions, etc.

Errors and Omissions Insurance

- Main protection for IP/rights related content of entertainment industry
- "Claims made" coverage: coverage that applies only to claims which are made during the coverage of your policy. For most policies, a demand letter is sufficient for a claim to have been considered as having been made
- Note: "tail" refers to post-term insurance, insurance which covers past the expiry of the first term of your insurance agreement. You want to keep the film under constant coverage until you sell the film (at which point the buyer will have to get the insurance

- If you deliver a film during the first term, typically, the producer's E&O insurance becomes superseded by the distributors coverage – ***transition from production to distribution coverage***
- What is covered in an E&O policy:
    - Libel, slander or other forms of defamation
        - Note: "trade-libel" where you defame a mark/business (ex: show a Ford having failing breaks)
    - Invasion of the rights of *privacy* or *publicity* (something in your film discloses something that the person had a right to believe would be private – more common in films based on fact than based on fiction)
        - [Note: there are **clearing houses** which run searches to make sure either no one or many people have the name of a character and insurance co's usually require that the production attorney sign-off on the script having been cleared]
    - Unauthorized use of names, trade names, service marks, ideas, characters, character names,
    - Infringement of Copyright:
        - Also includes cases like *Dodgeball*, where the expression was taken through a chain of passing it on
    - Worldwide coverage: important b/c lawsuits often originate from outside the USA
- Note: policies also set out a defence fund to defend against suits against you

Cast Insurance:

- Covers you in the event that there is a delay/loss of **scheduled** cast members
- To be considered a scheduled cast member, must have gone through a pre-coverage/pre-production physical exam

Other types of insurance

- *Negative, film, video tape coverage*: covers the loss of film that would repair/cover cost of re-shooting lost film….only really applies to shooting on film as opposed to digital
    - If you are filming in a remote location, these policies generally require that you send the film out of the remote location very frequently and have it processed asap
- *Faulty stock and camera processing*: problems w/ the film when it was made or processing problems which ruined the film…again not a digital issue

Litigation as it concerns the entertainment industry

- Rampant b/c of several factors:
    - (i) Informality in deals and/or oral agreements
    - (ii) Weird, incomprehensible and conflicting terminology
    - (iii) Old grants of rights – i.e. is VOD "Home Video" or not?
- **Governing law**:
    - Entertainment litigation is governed by the traditional bodies of law as well as Copyright law and many areas that are unique or uniquely important to the industry
- **Evidence:** Assume that all written documents will be submitted into evidence (emails, contracts, meta-language, track changes, letters, etc)
- **Attorney/client privilege**: Assume that there will be no bindingly assertable privilege as b/w a lawyer and his client b/c the client can waive it
- When on defence you want to defeat the claim on **summary judgment** (saves cost, lower settlement cost)

- **Forum shopping**: strategic choice of venue (ex: state vs. federal; which state; which country)

ADR – Alternative Dispute Resolution

- Increased reliance on ADR b/c of clogged courts
- Arbitration and mediation are the prime methods
- Arbitration
  - arises under union agreements and also under contractual provisions b/w parties (therefore can be compulsory or discretionary)
  - Problem is no appeal. Decisions not attackable unless there is fraud by the arbitrator, failure to admit pertinent evidence; or egregious conduct
  - Parties w/ more money prefer to litigate over arbitrate b/c you get more bites at the apple
  - Decision is imposed by arbitrator
- Mediation:
  - Mediator cannot impose a result on the parties. Parties must agree to the settlement
- **Finality in ADR**: what makes the case absolutely final once you've come to a settlement?
  - Remember, a settlement agreement is merely another contract. You want to be sure that the problem will go away permanently.
  - The technique for achieving finality is
    - (a) Plaintiff enters a ***dismissal w/ prejudice*** (prevents re-filing); and
    - (b) settlement agreement contains a ***section 1542 declaration*** (waives rights you would otherwise have). In the absence of a s.1542 waiver, you can go back and say "if I'd known these newly discovered facts, I never would have settled) [note: real fraud gets around waiver]

Moore Chapter 22 – Litigation
• *Reasons not to litigate*: counterclaims; legal fees; aggravation; 90% of cases settle, why not just settle up-front and skip the time/money trying to litigate • *Why arbitration is worse*: absence of discovery, stuck with the arbitrator's decision…right or wrong • *How to avoid litigation*: spot schemers and dreamers; keep structures simple; don't rely on oral agreements; use complete and concise contracts, not LOIs, term sheets and deal memos

Casebook Document 39 – Motion Picture and Television Production Insurance
Sample insurance

Lectures 24 & 25 – Copyright, *Droits Moraux* and Fair Use

Review CR Fair Use notes for Entertainment exam

Intro:

- Ginsburg read the copyright clause: science/useful arts; authors/inventors; writings/discoveries (**copyright**/**patent**); promotion of progress; limited time; exclusive rights

November 8, 2011

- 1st amendment and CR are balanced out by Fair Use
- Note: no need to memorize CR act sections
- *Harper Row* – Idea expression dichotomy strikes definitional balance b/w 1st amendment and CRA – CR does not protect ideas!
- Originality + Fixation in a tangible of expression for a more than transitory period of duration

- Originality means it arose through the creativity of the author. Test for the quantum of originality is very low. Level of expression/originality need be above level of *de minimis*
- Original vs. Novel = I came up with it vs. it is completely new. The test is not novelty in CR
- More than a trivial variation
- Copyright law differs b/w countries. Never assume a work protected in A will be protected in B (non-extratorial effect of CR)
- There are international conventions however
- *Scenes a faire*: stock elements not protected by CR. Cannot point to these similar elements (ex Western riding off into the sunset) when trying to show substantial similarity – routine/obvious components that flow from a certain genre/type of show
- Exclusive rights: make copies (prints), distribute, perform publicly
- Benefits of registration:
    - Need to have a signed writing and it must be recorded in the CRO to sue in <u>federal court</u>
    - Need it to claim statutory damages
    - Creates a presumption of access

<u>First Sale Doctrine</u>:

- The first sale doctrine applies to the physical copy of CR'd works you have legally acquired. Can do as you please with it.
- It is the basis for two large industries, which could not exist w/out the first sale doctrine: libraries (otherwise would be accused of distributing them), used goods stores, video rentals,
- Current issue #1: does it apply to all copies regardless of where procured? *Omega v Costco* – Omega sued Costco b/c Costco was buying the watches outside the USA and then selling them in the USA. The prevailing view in the USA is that there is no first sale doctrine for goods acquired outside the United States.
- Current issue #2: What about software/digital copies? David says FU probably doesn't apply – license vs. sale. Most ppl view it as not subject b/c not a physical copy.

<u>Substantial similarity</u>

- We will focus on the 9th circuit approach (*Croft v McDonald*)
- Court is required to subject the allegedly infringing material to two tests:
    - (i) Extrinsic test:
        - Objective taste based on expert analysis using filtration (look only at the protectable similarities, ex: remove the *scenes a faire* from the analysis) and on that basis see if they are similar
        - Note: *Metcalf v Botchco* – troubling case b/c said you could create a "compilation of ideas in an order" that was protectable. Creating the order of ideas protectable. All cases since this have hated on this case to the point that it is almost ignored.
        - It is up to the judge to determine whether <u>as a matter of law</u> a jury could conclude, based on substantial similarity, that there was infringement
        - Involved two elements: (1) copying in fact/actual copying and (2) copying at law (taking something that is protectable expression)…substantial similarity
        - If no substantial similarity, case is knocked-out in summary judgment
    - (ii) Intrinsic test:
        - Once a case survives the extrinsic test, the intrinsic test is then applied

<u>Fair Use</u> (S107)

- Four part test
- 1) Purpose and character of the use (commercial vs. nonprofit; consumptive vs. transformative)
    - Note: be able to distinguish b/w parody and satire. Parody attacks the original work whereas **s**atire is a commentary on **s**ociety in general. 1st amendment favors parodical treatment, take enough of the original to parody it.
- 2) Nature of the CR'd work
    - Factual vs. fiction; published vs. unpublished;
- 3) Amount and substantiality of the use in relation to the CR'd work as a whole (the P's work)
- 4) Effect on the market. (*Harry Potter* Lexicon)

[listen to lecture Nov 17, 2011 – first twenty minutes]

CASE: Lens v Universal: (**fair use and DMCA)**

- Baby dancing to a song taken down by Universal via DMCA take-down notice. Sued Universal arguing that they must make a *fair use* evaluation prior to sending a DMCA take-down notice
- Court agreed w/ this, holding that CR owners must at least make a *prima facie* determination about whether or not this is a fair use, prior to sending a take-down notice

Documentary Use Insurance

- Special breed for insurance for documentaries where you attest that you are using another's content but saying that it is up-front fair use.
- Three part test – filmmaker must attest:
    - (1) they needed the CR'd material to tell their narrative b/c
    - (2) they took no more than necessary to accomplish #1
    - (3) To the objective viewer, is the need and use, internally justified, explained or obvious to the audience

Moral Rights

- Doctrine grounded in the *inherent authorial rights of the creator*. Focuses on the inherent rights of creators (over what happens to their works), over market based analysis
- Classic 4 moral rights:
    - (1) Right of disclosure: only the author can determine when/by whom work can be disclosed to the public (sounds like US copyright law)
    - (2) Right of withdrawal of a work: when the work can be called back/modified
    - (3) Right of attribution: right to receive authorship credit by real name, pseudonymously, anonymously (sounds like the right to receive credit from guilds)
    - (4) Right of integrity: author may prevent the presentation of work in a manner or context which he deems harmful to reputation or damaging to the work itself
- These moral rights must be exercised in good faith
- Matters for US filmmakers for a couple of reasons: (i) international distribution; (ii) US CR adjusted to be (at least minimally) compliant w/ moral rights b/c of Berne Convention
    - US filmmakers have tried to enforce copyrights over their works by going to other countries where these types of rights are recognized – US director John Houston tried to copyright black and white and film noire, was unsuccessful in US courts, so took the case to France

Moore Chapter 17 – Copyright

Country-by-Country Determination

- CR exists on a country by country basis. Under treaties, publication in one country triggers CR protection in other countries, but subject to the CR laws of those jurisdictions

Protected Works

- CRA protects "original works of authorship" that are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or w/ the aid of a machine or device"

Derivative Works

- Works of authorship that are "based upon" a CR'd work ▭ substantial similarity standard
- Chain of title very important b/c to make (ex) a sequel to a film you will need the authorization from the CR holder of the rights in the Novel – Treatment – Screenplay – Film.

Term of CR

- Individuals: life + 70 years
- If licensed to a third party, obtain non-waivable right to terminate license after 35 years (not applicable to works for hire; not applicable to derivative works created by licensee under the license)
- Work made for hire: 95 years from the date of publication

Transfers

- CR is a bundle of rights, can give away very small individual rights (must be *exclusive* to be owner of that particular copyright)
- Exclusive rights must be granted ***in writing*** to be valid and must ***expressly*** grant exclusive rights

Competing Transfers

- In competing exclusive right transfers, that which is registered first w/ CRO takes priority

Fair Use Defense

- Fair use defence, vital and it's a mess

Casebook Document 40 – Copyright Act §§ 101, 102, 106, 106A and 107

Sect. 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title [17 USCS Sects. 101 et seq.], in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

[…]

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

House Report: CR does not preclude others from using the ideas or info revealed by the author's work.

§ 106 · **Exclusive rights in copyrighted works**

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to **reproduce** the copyrighted work in **copies** or phonorecords;

(2) to prepare **derivative works** based upon the copyrighted work;

(3) to **distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works,pantomimes, and motion pictures and other

audiovisual works, to **perform the copyrighted work publicly**;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display the copyrighted work publicly**; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a **digital audio transmission**.

§ 107 · Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
*(1) the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
*(2) the **nature** of the copyrighted work;*
*(3) the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and*
*(4) the effect of the use upon the **potential market** for or value of the copyrighted work.*
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Casebook Document 42 – Works Made for Hire

Requirements for WFH – two contexts:

- (1) **Employment context**: work prepared by "employee" within the scope of employment
  - Requires both employee-employer relationship and w/in scope of employment
  - Factors to consider to determine if "ee/er relationship":
    - Control by the employer over the work
    - Control by employer over the employee
    - Status and conduct of employer (if pays benefits, likely er/ee relationship)
- (2) **Commissioned work**: must be one of types of works listed in Section 101(2) AND express agreement in writing b/w the parties that the commissioned work is a WFH
  - (i) Contribution to a collective work; (ii) Part of a motion picture or audiovisual work; (iii) Translation; (iv) Supplementary work (e.g, a book's introduction, illustrations, index); (v) Compilation; (vi) Instructional text; (vii) Test; (viii) Answer material for a test; (ix) Atlas.
- **Term**: 95 years from date of publication or 120 years from creation, whichever expires first
- 35 year assignment termination rights do not apply to WMFH

Casebook Document 43 – Unbundling Fair Uses

Casebook Document 44 – Samuelson article fair use outline (summary)

Policies that underlie modern fair use:

- (i) Promoting freedom of speech and of expression
- (ii) The ongoing progress of authorship, learning, access to information, truth-telling or truth-seeking
- (iii) Competition
- (iv) Technological innovation

- (v) Privacy and Autonomy of interests of users

Lecture 26 – Reality Television

Classes of Reality TV

- Game documentaries – Survivor, Amazing Race, etc
- Real world documentaries – vouyeristic shows
- Dating/romance/marriage shows – The Bachelor
- Makeover shows – The Swan, Doctor 90210, etc
- Talent contests – American Idol, The Voice, etc
- Fish out of water shows – Wife Swap

How can these shows maintain protection in reality TV?

Levels of Protection / What is protectable in reality TV:

- (1) Creativity: (wholly original?)
- (2) Derivation: (expressive, but from some other source) protection of the originality in derivative works
- (3) Compilation: thinnest level of protection

Most protection at creativity, least at compilation.

Croft v MacDonald

- Originated the **"total concept and feel"** argument

FRAPA -

Plaintiff's like to claim copyright in format. Which is the core of the show. Format lies somewhere b/w idea and expression.

Very tough to establish exclusivity in a mere format

- ☐ All weight loss shows are necessarily going to involve a fat person who loses weight. So yeah, the format is going to be the same.

Copyright Analysis – Substantial Similarity:

- *Fragmented literal similarity:* Literal copying or close paraphrasing of dialogue
- *Comprehensive non-literal similarity:* Copying a works overall structure, plotline, mood…this is what is alleged in reality TV infringement cases
  - Plot: problem is we must ask what is the plot? Is it the concept (ex: swapped housewives) or is it what actually happens in a given episode (i.e. what happens to the lousiana housewife). If it is the latter, then you cannot allege plot was copied
  - Dialogue: very hard to show b/w any two reality shows that the "characters" or the people they interacted w/ say the same thing for the purpose of CR
  - Mood: comical, bleak (survivor case)
  - Setting: what is the specific setting of the show

    - Pace and sequence of events: very hard to show there is substantial similarity here beyond the basic elements/*scenes a faire*
    - Character: who are the characters in the shows, are they substantially similar
- Shows are compared in 2 ways:
    - 1) Idea/pitch is claimed to be source of defendant's show
    - 2) An existing plaintiff show is claimed to be source of defendant's show
- Courts are supposed to make a substantial similarity inquiry and compare things that are supposed to be compared
- Plaintiffs tend to assert a laundry list of similarities between defendant's work that was present in their own work:
    - Plot
    - Dialogue
    - Pace and sequence of events
    - Characters – contestants, judges, trainers/mentors
    - Plaintiffs tend to make long lists of similarities in such a way to make people think, how could the shows not be an infringement?
    - Think about how each of these can be proven under substantial similarity standard – it's very hard to imagine a plaintiff winning under any of these elements in reality TV
        - Of course, if during discovery a memo gets leaked where plaintiff tries to

SUBSTANTIAL SIMILARITY (Metcalfe, CBS, Burlette, Zella, Milano):

Metcalfe v. Botchco (9th Cir.)

- M presented idea to B via an actor. B declined and then created a similar show.
- Metcalf – even non-protected elements can be considered protected. **The particular sequence in which an author strings a number of unprotected elements can itself be protected.**
- This scared people because if P only had to show ideas that were arguably similar, they could prevail. However, other cases came down and each subsequent case seemed to narrow Metcalf to its facts.
- Scènes á faire – "scenes that must be done." They are not protected.
    - In a Western, there are gambling scenes, shootouts, cattle rustling, whores with a heart of gold, etc. These don't prove scenes a fair—they are obvious stock ideas. None of these are in one western.
- **Troubling case b/c it purported to allow for a case to win on a collection of ideas.**

CBS v ABC

- Advanced the analysis of Metcalfe one more notch. Metcalfe involved two fictional works so it was a standard CR case. CBS showed this analysis can be imported into reality TV. Notions of theme, dialogue, character can be compared between two reality shows.
- The case was ultimately dismissed by the plaintiff.

Burlette

- is important in the Metcalfe chain. To escape the clutches of Metcalfe, it limited it to the inverse ratio access. They didn't find much similarity. The CBS v ABC hurdle was overcome, but when they

looked at the two shows they concluded they were not similar and the similarities they did have were not as concrete as they were in Metcalfe.

Plaintiffs tend to err on the side of preparing laundry lists of similarities b/c it appears persuasive. Even if they aren't persuasive, it gives the appearance of substantial similarity. *Scenes a faire* is another reason.

Rule re: substantial similarity analyses "in comparing shows/any two purported works for substantial similarity – esp. in the 9th cir., a substantial similarity enquiry must take care to enquire only whether, as between the two works, the *protectable expressive elements, standing alone, are substantially similar*. Particularly at *summary judgment* under the extrinsic test.

Casebook Document 46 – CBS v. ABC, 2003 U.S. Dist. Lexis 20258 (**substantial similarity test**)

Facts: CBS sued ABC alleging copyright infringement of the show *Survivor* by ABC's new show *Celebrity*.
 	
Issues: Was there copyright infringement?
 	
Holding: No, insufficient substantial similarity. The case stands for idea that reality shows could be analyzed under substantial similarity standards (like scripted works)
 	
Reasoning:
 	
• Court went over long detailed analysis of the substantial similarity test and the importance of the ***total concept and feel*** approach to substantial similarity
• In this case it is crucial to *consider each program series as a whole* (like in *Castle Rock*) and not to segregate components rigidly
• Both shows combine well-known and frequently used generic elements of earlier works. They have several in common but also include well-known elements not present in the other
• Must consider these elements together with the *presentation or expression of those elements*
• Providing protection to a combination of generic elements without considering the presentation/expression of those elements, would stifle innovation and the creative process (ex: would stifle the process that gave us Jay Leno and Letterman, Bewitched and I dream of Genie)
• The total concept and feel is different w/ these two works:
  ○ (1) The tone of Survivor is one of unalterable seriousness, in contrast the tone of Celebrity is one of comedy
  ○ (2) Production values are very different for the two giving different feel (Survivor has professional high quality camera shots and Celebrity looks like home video)
  ○ (3) Audience participation – none in survivor vs. voting in Celebrity
  ○ (4) Host – the host in survivor is serious, host in Celebrity is comedic. Therefore expression of this generic element is very different
  ○ (5) Contestants: regular people vs. celebrities = different expression of generic element

- (6) Challenges: serious in survivor vs. light hearted in Celebrity

Rationale: Advanced the analysis of Metcalfe one more notch. Metcalfe involved two fictional works so it was a standard CR case. CBS showed this analysis can be imported into reality TV. Notions of theme, dialogue, character can be compared between two reality shows. **i.e. started applying copyright law analyses to realty tv case – she said, "let's just go through the standard CR test", no special analysis for reality tv.**

Zella v Scripps

- The full-blown evolution of substantial similarity after Metcalfe in the 9th Circuit. Involved P's show Celebrity Chefs and Rachel Ray.
- **Another case that distinguished away *Metcalfe*/held that *Metcalfe* didn't apply**. Underlines tendency in reality TV to find *thin protection*.
- **This case firmly establishes the *CBS* rule in the 9th cir.**
- Determined at the extrinsic point—court decided the similarities as a matter of law.
  - Plaintiff failed to state a claim under the extrinsic test
  - In the pitch treatment area of scenes a fair
  - General idea of a cooking show not protectable.
    - The protectable elements were dissimilar
    - Court didn't spend much time arguing that CBS had to be justified—it was assumed.

Casebook Document 47 – Zella v. Scripps, 529 F. Supp. 1124 (C.D.Cal. 2007)

Facts: P is suing arguing that the D's show, *Rachel Ray*, infringes on her show *Shobiz Chef's*. Access is established b/c P sent out a treatment of her script. (Note: After *Metfalfe*)

Issues: Is there substantial similarity b/w the two shows?

Holding: No, motion to dismiss granted. While there are similarities, the protected elements were sufficiently dissimilar. This case stands for the proposition that you go through the same substantial similarity approach from the ABC case – apply the rules of copyright law as if this was any other sort of protected work (doesn't matter that it's reality TV). (should it be? – possible paper topic)

Reasoning:

- Plaintiff must show:
- (i) Ownership of a valid CR; and
- (ii) Copying by showing (a) Access and (b) Substantial similarity
- Defendants do not challenge ownership of CR, and access established b/c of treatment sent out
- Re: substantial similarity ***court must apply to objective "extrinsic test" which focuses on 'articulable similarities b/w the plot, themes, dialogue, mood, setting, pace, characters and sequence of events of the two works'***
  - Note: substantial similarity generally requires the application of both the extrinsic and intrinsic test. But the intrinsic test is a matter for the jury, and is therefore not assessed

prior to a jury trial.

- The generic elements of a show are not protectable. The similarities b/w the two shows are limited to *scenes a faire*/stock elements, such as: a host, guest celebrities etc.
- Any protectable elements are dissimilar to *Rachel Ray*

Ratio: Extrinsic Test

Casebook Document 48 – Milano v. Universal, CV 06-3237-GAF (C.D.Cal. 2008)

Facts: D made a treatment called from "Fat to Phat", Fox declined to pick it up. NBC shortly thereafter came out with "The Biggest Loser" (TBL)

Issues: Is there substantial similarity

Holding: Not substantially similar. The treatment and TBL contain similarities but in elements that are not protectable. Furthermore, TBL contains important elements not found in the treatment. The court applied the same Zela and CBS/ABC test. The difference in this case is that the court used the prior art rule – there are a slew of other shows that use the same set of ideas; there are bits and pieces that amount to a scenes a faire sub category of weight loss shows.

Reasoning:

- To determine substantial similarity, the court employs the ***extrinsic test***, which objectively measures the ***'articulable similarities b/w the plot, themes, dialogue, mood, setting, pace, characters and sequence of events of the two works'*** **– look only at protectable elements**
- The treatment consists of mostly stock ideas, *scenes a faire*, and elements already in the public domain, such as: gameshow, weight loss competition, diet/exercise experts, prizes
- The elimination/team rivalry component is central to TBL and not found in the treatment

Ratio:

- Reaffirmed that the substantial similarity extrinsic test analysis must be applied in reality TV cases.
- **Prior art rule**: if you can show prior uses of the same tropes, ideas, *scenes a faire* which precede the plaintiff's work, then you cannot be said to have taken them from the plaintiff

Casebook Document 49 – Can Reality Be Copyrighted?

- *CBS v ABC* set the standard that the substantial similarity analysis could be applied to Reality TV
- What often arises in the reality TV cases is questions re: *scenes a faire*/generic elements
- *Metcalf v Bocho* is important b/ the 9th cir. said a particular sequence can itself be a protectable element. A sequence of unprotectable ideas could conceivably rise to the level of a protectable sequence.

CBS vs. ABC 2 – the main reason he posted this case was to show how hard it is to proceed with copyright claims in reality tv cases (glass house v. big brother)

Casebook Document 50 – Reality TV Participant Agreement:
• Paragraph 1: Grant of rights – right to film, interview, use film etc 24/7. • Paragraph 4: Participation – if selected contestant agrees to participate • Paragraph 6: Agree to follow program rules • Paragraph 11: Acknowledge and agree to limited freedom, no privacy and that participation may lead to physical, psychological and emotional strains and pressures on self and on family • Paragraph 12: Agree/release that their privacy may be invaded and distributed to the public • Paragraph 13: Agree to other parties divulging private info about them • Paragraph 21: Authorize producer to conduct medical and psychological evals • Paragraph 22: Authorize producer to investigate/collect info about statements I have made • Paragraph 28: Am not a candidate for public office and will not become one before initial broadcast • Paragraph 29: disclosure of any arrests • Paragraph 30: disclosure of any criminal/civil court proceedings • Paragraph 31: Excuse producer from obtaining health/accidence insurance and acknowledge that I am responsible for getting my own • Paragraph 41: Shall not mention/plug any commercial product • Paragraph 49: Confidentiality/non-disclosure • Paragraph 50: Release/grant of rights to producer in perpetuity to use me/my footage • Paragraph 51: Agree to obtain releases from all family members I discuss/make reference to • Paragraph 69: Arbitration clause

Lecture 27 – Right of Publicity

Intro:

- There is an inherent right of every human being to control the commercial use of their identity
- Covered some historical background
  - There was the long standing law of defamation – saying something untrue
  - Then law of privacy arose – things that were true
- The common law elements of the right of publicity are:
  - (1) Defendant has to be shown to have **used the plaintiff's identity** (name and likeness are most common);
  - (2) Appropriation of name or likeness to the defendant's **advantage** without consent(i.e. there was some sort of *commercial* use – does not require profit, Red Cross can be sued too); and
  - (3) **Injury** to the plaintiff.
- Injuries from violating the right of publicity:
  - Dilutes the marketplace for them selling their personality (counter: makes you more popular)

    - Removes control over their personality rights
    - Celebrities traffic in their name and likeness (counter: doesn't apply to normal people)
    - Everyone has a right to privacy, and this is part of the right of publicity (counter: today people plaster their lives all over the internet, defuses the right to privacy argument)
    - Everyone has some value right – courts no longer trouble w/ injury claim
- California has statutory protection (Section 3344 Civil Code):
    - (i) Knowing use of another's name, voice, signature or likeness in any manner
    - (ii) on or in products, merchandise or goods, or for the purposes of advertising or selling or soliciting purchases of products, merchandise or goods (seems to exempt Red Cross);
    - (iii) without prior consent;
    - (iv) such use shall give rise to damages sustained by the person interest
    - (v) injured parties are required to present proof only of the grosse revenue and the defendant has the burden of proving his expenses
- Note: not all states recognize a post-mortem right
- There are also differences in the length of time the right exists
- There is room however for **sufficiently transformative uses** where the taking is making a commentary on the subject party/putting what is taken to a transformative use. Exclusion of liability for these uses.
- **Not affirmative defense?**
    - De minimus
    - Disclaimers (i.e. celebrity voice impersonator)
    - Claim that the person is not a celebrity
        - In the past, the right of publicity was limited to celebrities. However, the modern view of the right of publicity is that everyone has it – though celebrities may have a more valuable right.
- Law of publicity cases tend to be in federal courts because they often go hand in hand with copyright claims, and also they tend to be diversity jurisdiction claims
    - Much of right of publicity law has been handled by state law; should it be handled by federal law?
    - Many states have the right of publicity last for life + 70 years
    - In Indiana it's life + 100 years
    - Ginsburg thinks federal law is one way

Casebook Document 52 – Celebrity Licensing
Intro • Right of publicity arose from (i) implementation of right of publicity laws; (ii) manufacturers seeking recognizable personalities; and (iii) advertisers wanting the magnetic draw of star power • Not fully recognized internationally, thus celebrities rely on trademark as well internationally • California publicity laws are for life + 70 years (mirror CR) Distinction b/w right of publicity and right of privacy:

- Right of privacy: protects emotional interests; personal right; damages measured by emotional distress; non-transferable right; extinguished by death
- Right of publicity: protects economic interests; property right; damages based on commercial injury to the business value of personal identity; transferable right; continues after death

Licensing:

- Very similar to other licensing arrangements
- Must specify the scope/purpose of the license b/c of variety of licensable characteristics
- Watch over how celebrity's image is used to not damage their reputation
- Merchandise campaign vs. Advertising campaign
    - Merchandise campaign: royalties against minimum guarantee (advance payment)
    - Advertising campaign: flat fee
- Premium for exclusivity
- Risks involved: celebrities can do unpredictable things that can tarnish your brand. That is the benefit of licensing deceased celebrities – "dead men don't screw up ad campaigns"

Casebook Document 53 – Boundaries of the Right of Publicity

Same as chapter 18, below

Moore Chapter 18 – Right of Publicity

Intro:

- Basically, putting aside defenses, there is a prima facie case *any time anybody uses anyone's name, likeness, or voice (or imitation thereof) for any reason*

Potential Defenses:

- *Incidental use*: for example people in the audience who are not singled out
- *Coincidental use*: no liability where the use of the P's name is merely coincidental
- *Indirect use*: cases have permitted liability for all kinds of indirect use (Here's Johnny toilets)
- *First Amendment*:
    - *Matters of public interest* protected
    - *Parodies* are protected (but not parodical advertisements)
    - *Expressive works*:
        - Three approaches:
        - (i) many cases provide first amendment protection against a right of publicity claim for *all* expressive works, w/out qualification
        - (ii) **California**: 9th cir. has held that 1st amendment protects **only transformative** works that reflect *significant transformative elements* of the P's persona
        - (iii) Missouri court has held that expressive works are protected against a right of publicity claim *only* if the predominant purpose of the use is to make an expressive

comment about the plaintiff – not merely exploiting their persona's commercial value
    - *Advertising*: if the underlying work is protected by the 1st amendment, then advertising for it will be protected. But not stand-alone advertising
- *Express or implied consent*
- *Fair Use*: courts have rejected this defense
- *Death*: in California there is no right of publicity for deceased persons

Defenses that should not work

- Copyright Act pre-emption
- Disclaimers
- Non-celebrities
- De minimus

Lecture 28 – Law of Ideas and Conclusion

- Note: *Montz* case is the up to date position of the 9th cir.
- Law of ideas is about protecting the purported disclosure of television elements which cannot be made out a copyright claim. Can't use CR so turn to law of ideas.
- Case where P is saying "I disclosed my idea to the D under the understanding that if it were to be used I would be paid for it"
    - P seeks to protect something that seeks to become the source of some other work but it is inherently not something that can be protected by copyright
- If a CR claim can be made, plaintiff will not turn to law of ideas
- The law of ideas protect, for example, a person who receives a pitch (David's example where an agent from CAA called him and pitched an idea and he used the law of idea as a shield because he could anticipate claims), and a person giving a pitch

Different Causes of Action that Protect Ideas

- #1 – ***Express contract***: party A and party B made an express contract, the subject of which was the disclosure of ideas
- #2 – ***Misappropriation/unfair competition***: misappropriation is an amorphous tort that is part of state unfair competition law – really means unjust enrichment. Taking another's product and representing it as your own. Requirements: (i) was the defendant enriched; (ii) was the enrichment at the expense of the plaintiff; (iii) was the enrichment unjust; (iv) does the defendant have some kind of defence; and (v) what remedies are available to the plaintiff
    - **Misrepresentation** – Passing off of one's product as that of another
- #3 – ***Conversion***: civil theft. Conversion applies to both tangible and intangible property
- #4 – ***Fraud***: involves the act of intentionally making a false representation of a material fact with intention to deceive and a 3rd party relies on this and is deceived

- #5 – ***Contract implied in fact***: you can't point to an agreement in words but the acts of the parties are consonant with an agreement. The facts point to an agreement even though the words were never used
- #6 – ***Contract implied in law/Quasi-contract***: contract that a court deems should have been formed, even though in actuality it was not in express terms. Created by law for reasons of justice and fairness. Court looks at what one side did and the other side got and then imposes a contract.
- #7 – ***Fiduciary duty***: the defendant owed a duty/trust relationship to the plaintiff (general note: agreements often have a disclaimer of fiduciary duty clauses)
- **#8 - Unjust enrichment**
    - P gave D something of value
    - D benefitted
    - P must show that it would be inequitable to enjoy the benefit without paying

Moore Chapter 16 – Law of Ideas
Skipped

Casebook Document 54 – The Idea Submission Case

- The gist of an idea submission claim is that "something" (an idea or expression) was disclosed to the defendant by or on behalf of the plaintiff; the defendant agreed/was obligated to (i) keep that something in confidence and/or pay the plaintiff the reasonable value for using it. That something was either improperly disclosed/used or there was a failure to pay. There has been damage and the use was not consented to or not paid for.
- Before 1978, federal CR law provided no protection for unpublished works, was the domain of "plagiarism" or common law copyright under state law
- Issue of federal vs. state jurisdiction. The CRA pre-empts state CR law. Therefore, any claim that is CR subject matter jurisdiction must be presented under the federal law.
- However, **Section 301(b) provides an exemption for rights or remedies under state law which are not equivalent to any of the exclusive rights of copyright**, generally thought to include claims for breach of contract, breach of fiduciary duty, fraud…
- The **determinative issue is therefore whether a state law is attempting to enforce rights "equivalent" to copyright rights**. Typically, courts look to see if state causes of action include an "extra element" and whether such element makes a qualitative difference.

Such elements include:

- *Breach of Express Contract*: parties agreed to compensate P for the disclosure of some idea, based on K NOT copyright

- *Misappropriation and unfair competition*, derived from an equitable doctrine
    - TWO components of unfair competition: (1) we are using it more narrowly, source confusion/passing off, actions that confuse consumers to the source of product; [we use this idea]; (2) other idea more related to unfair trade practices, [NOT what we are concerned with]
- *Unjust enrichment* – NOT unjust to use public domain material BUT may be unjust when someone for a fee agrees to inform you of top movies each month, even movies in the public domain
- Conversion – civil theft
- *Fraud* – NOT just taking it, taking it by some false representation
- *Breach of Quasi-K* – implied in fact (acts of party); by virtue of what should be the case, created for fairness and justice , implied in law is USUALLY OK, because pre-empted by copyright law
- *Breach of Fiduciary duty* – obligation to act in best interest of another party (e.g. D had fiduciary obligation as if there were a K – e.g. joint venturers, agent, partners)

Desny v Wilder:

- Factors to be considered
    - There was disclosure by the plaintiff
    - There was, at least allegedly, a reduction of the idea into a writing/fixed tangible expression
    - There was express expectation of payment. Testimony was that Desny said "I'm telling you about this, but if you use it I'm getting paid)
    - There is an important notion of confidentiality. Must ask 'but-for' the plaintiff sharing this idea, would they have known it? Ex: can't say 'well I said we should make a documentary about occupy wall street', because they would have thought of it
    - Was the context a business discussion, or was it a "blurt-out" – business context must be considered as a factor
    - Bilateral vs. unilateral
- **Point: some combination of the above factors will be held to be a cognizable claim**

Casebook Document 55 – Desny v. Wilder, 46 Cal.2d 715 (1956)

Facts: P sues film producer to recover for use of plaintiff's story, which he alleges he sold to the D. P called D's office to pitch the story and talked to secretary, giving a synopsis of his idea. This story was based on a news event, but P alleges there were specific added elements he had that weren't in the news.

Issues:

Holding: Novelty and originality – Idea didn't have to be the newest or most original to be protected by law of ideas

Reasoning:

- Has become standard in copyright and substantial similarity pleading
    - Until year 2000 to get around generality (e.g. Talk Show similarities), NY required P to

allege **novelty** to the buyer, party to whom you disclosed it did NOT know about Carson, Letterman, better shot of prevailing (subjective novelty) on talk show idea

- **Elements of Wilder:** (relative of promissory estoppel – more like unilateral K)
  - (1) **Disclosure** by P
  - (2) **Reasonably concrete** synopsis – judged by court that it was more than mere abstract ideas, sufficiently concrete
  - (3) **Alleged to be Original** by P, like NY thing
  - (4) **Respondent Superior** – was NOT pitched to Bully Wilder, given to secretary – secretary acting as his agent in fact
  - (5) **Expectations** – expectation that it was going to be in a **business** environment
    - Pitchee, the listener, has to voluntary accept it – prevents 'blurt out' cases, has to be in business environment NOT at parties, social events etc.

Ratio: **The court recognizes an implied contractual right to compensation when a writer submits material to a producer with the understanding (on the part of both parties) that the writer will be paid if the producer uses the concept**

Blaustein (extended and clarified the *Desney* rule)

- Result of this case is that now parties enter into disclosure agreements

Casebook Document 56 – Blaustein v. Burton, 9 Cal.App.3d 161 (2d Dist. 1970)

Facts: Wanted to make a film based on *Taming of the Shrew* but with a series of creative elements and modifications. Added elements like Franco Zapharrelli, an Italian musical director which no one new about.

Issues: Protected by the law of ideas?

Holding: Yes, there is an implied in law contract. There was a business discussion, clearly a solicitation of the Burtons to participate, business context, the concreteness was there, but there was nothing written (thus making it an idea). Blaustein wins

Reasoning:

- All of the elements which Blaustein brought to the table were actually included in the final film, especially 2 particular scenes
- We have disclosure, business context (multiple business meetings), expectation, did not have a written out reasonable synopsis

Ratio:

Outline:

- Looked like such an idea case, make movie on taming of shrew, had cast, had opera director direct it,

begin film with main body of story as if no frame existed, add wedding night scene, film picture in Italy … sounds very concrete, pitched in business environment thus finds for relief

Casebook Document 57 – Montz v. Pilgrim, 98 U.S.P.Q.2d 1569 (9th Cir. 2011) **(main case)**

Facts: Screenplay writers sued film producers/tv network for producing/broadcasting a cable tv series that allegedly violated federal copyright law by unauthorized use of the writers' materials and violated state law by breaching an implied contract and breaching the writers' confidence.

Issues: Is the state law claim for (i) breach of implied contract and (ii) breach of confidence pre-empted by copyright law?

Holding: No, both claims may go forward

Reasoning:

Historical Legal Basis

- In *Desny* the Supreme Court of California recognized an implied contractual right to compensation when a writer submits material to a producer with the understanding that the writer will be paid if the producer uses the concept;
- In *Grosso v Miramax*, this court applied *Desny* to hold that such an implied contractual claim is not pre-empted by federal CR law. The contractual claim requires that there be an expectation on both sides that use of the idea requires compensation, and that such bilateral understanding of payment constitutes an additional element that transforms a claim from one asserting a right exclusively protected by federal CR law, to a contractual claim that is not pre-empted by CR law.
- We recently followed *Desny* and said that "contract law, whether through express or implied-in-fact contracts, is the most significant remaining state-law protection for literary or artistic ideas.

In this case

- ***We again hold that CR law does not pre-empt a contract claim where plaintiff alleges a bilateral expectation that he would be compensated for use of the idea, the essential element of a Desny claim that separates it from pre-empted claims for the use of copyrighted material***.
- It makes no difference whether that compensation would be cash (*Desny*) or shares in a partnership interest, as in this case
- The plaintiff revealed his concept to defendants reasonably expecting to be compensated if the concept was used, thus the essential element is satisfied.
- P disclosed his idea under standard industry custom: (i) that disclosure of ideas/concepts was confidential, (ii) that defendants would not disclose or use the P's concept w/out compensating plaintiff; and (iii) that by accepting the P's disclosure, the D accepted to abide by the foregoing

Court says: this is a contract case, don't focus on the reality TV aspect – focus instead on the idea disclosure aspect of the case. Reasserts the rule of *Desny*.

- Case went en banc and court reversed/remanded – What this is case is about is whether a non-copyright claim can survive the claim that the written material was not the subject of protection,

but the idea was severable. There was an added element of Montz to be a producer – no matter what the subject matter was, that they had a partnership agreement was a difference in this cases

Note: in NY there used to be a requirement that the idea had to be **novel**, and then in 2000 NY changed its rule. No longer required that it be novel, only that it was novel to the defendant. (modified novelty rule)

Novelty to the buyer – might not be easier to show, but still don't have to show that it was completely new idea