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May 17, 2016

<u>Via e-mail</u>
toddbrabec@gmail.com
Mr. Todd Brabec

<u>Via e-mail</u>
eic.lawreview@mitchellhamline.edu
Editor in Chief, Mitchell Hamline L. Rev.

Re: The Performance Right—A World in Transition
By: Todd Brabec
Originally published at 42 Mitchell Hamline L. Rev. 16 (2016)

Dear Mr. Brabec and Editor:

The referenced article has been judged one of the best law review articles related to entertainment, publishing and/or the arts published within the last year. As such, it has been selected for inclusion in the 2016 edition of the ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK, an anthology published annually by Thomson Reuters (West). As editor of that HANDBOOK, I am privileged to congratulate you on the selection.

If you are agreeable to the reprinting of your article in the HANDBOOK, please complete the attached form indicating your permission. Please return the form to me by return e-mail (in PDF) if possible or by mail at my address above. Also, West requests a PDF of the article, or two actual reprints of the article or copies of the law review issue containing your article, from which they may create proofs to print your article in the HANDBOOK. Photocopies and scanned copies cannot be used. <u>Print ready electronic copies are preferred.</u> I would appreciate your sending me the PDF of your article by the internet, or if easier for you, two reprints or two copies of the issue by UPS, FedEx, USPS, or other overnight courier, *next day standard delivery*. Please feel free to bill me for the overnight shipment (as recipient)—please call me for a charge number for your use. I need to receive your reprint permission and the reprints or copies of the issue by **May 26, 2016**.

Again, congratulations on the selection of your article as one of the best of those recently published. I look forward to including it in the HANDBOOK. Please call me at (713) 658-9323 (office) or (832) 798-7576 (cell) if you have any questions.

Sincerely yours,
/s/Karen B. Tripp
Editor, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 2016

ADVISING THE BEGINNING INDEPENDENT FILMMAKER

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I. PERSONAL ASSESSMENT – The seasoned know the importance of this assessment.

A. Available time commitment – ability to see project through to completion.

B. Personal inventory – discipline, perseverance, resourcefulness, stability, adaptability, equanimity, comportment.

C. Sales prowess – ability to enchant.

D. Credibility of experience and extent of knowledge.

E. Credibility of venture

F. Willingness to ask favors (and more) of family and friends.

G. Ability of family and friends to provide favors (and more).

II. PUTTING RIGHTS IN ORDER

A. Secure rights in story or script.

B. Secure rights in other necessary film elements, i.e., life story, book adaptation, music, other footage, etc.

C. Don't give up rights prematurely – meaning, don't give outright grants of rights in one's project but instead provide options based upon critical conditions.

D. Issues to explore:

1. If personal story rights are critical, what is level of cooperation of key person? Any health issues? Will want to have person available not only for purposes of production, but for promotional purposes as well when film is launched.

2. Any archival material or documents or artifacts required? If so, any access complications?

3. Any story verification issues – how will story be backed up if challenged?

4. Any special location access complications?

5. Any secrecy, non-disclosure, or non-competition issues with respect to any member of the production team or key subject?

6. What pre-existing material will be incorporated in the film – footage, photos, music – and what terms will be available for their use?

7. Any time constraints on the availability of any person or material, or the timeliness of the film subject?

8. Any competing projects that the producers are aware of?

9. Any adverse claims made with respect to the production of the film?

10. Any aspect of the film developed within the scope of any contributor's employment, or developed with the assets of another?

11. Who have been contributors to the script, and what have been their contributions? What has been the intention of the contributors with respect to the ownership of their contributions – rights retained separately, or has there been a merger of rights?

12. Has the script been circulated for comments, what comments have been received, and in what form, and what has been done with the comments?

13. Any copyright registrations undertaken? If so, who is claimant and what other information is disclosed, such as pre-existing works?

14. Any title searches undertaken? Any title registrations done?

15. Any intent-to-use trademark applications undertaken for ancillary products?

16. Any URLs obtained?

17. Any social media accounts set up?

18. Any personal issue with respect to any potential claimant to the film or production entity that might impact rights in the film or production entity?

    a. Grant of general security interest to collateralize an obligation.

    b. Marital separation or divorce proceeding.

    c. Bankruptcy

    d. Health or disability

III. ASSEMBLING (OR DISASSEMBLING) THE PRODUCING TEAM

A. Identify the members of the producing team.

B. Determine respective rights and responsibilities.

C. Distinguish producing functions from other roles, such as directing, writing, etc.

D. Distinguish co-ownership of project from percentage income interest in project, such as percentage of profits.

E. Attaching others to (or detaching others from) the project

F. Resisting the urge to be egalitarian or too inclusive.

IV. DEVELOPMENT OF PRODUCING ENTITY

A. Identify the entity from which the project originated – individual, general partnership (perhaps undeclared), within scope of employment, etc.

B. Identify the entity that will undertake pre-production activities as producing team emerges – a new general partnership, LLC, or corporation, or certain producing team members may be merged into existing entities, or existing entities may employ other members of the producing team.

C. The actual entity that obtains production funds and produces the film may be the same entity that originated and developed the project or a new entity that obtains rights developed by the originating entity and in which the originating entity becomes a partner, unit interest holder, or shareholder.

V. REALISTIC POTENTIAL FINANCING SOURCES

A. Unlikely sources and why:

1. Commercial finance companies – the producing entity generally does not have business assets to loan against or sell.
2. Venture capital firms – few fund individual projects, and they generally can't investigate and control the project as they might other investments.
3. Debt instruments – producing entity generally does not have forecastable revenue.
4. Unsecured bank financing – new venture, and high risk.
5. Government funding – not there, unless operate as a not-for-profit.

B. Likely sources:

1. Personal funds
2. Personal loans secured by personal or business assets or assets of friends or family.
3. Loans from friends or family
4. Investors
5. Presale of rights
6. Financing of tax credit
7. Co-production agreements – like a pre-sale, but not to a rights user.
8. Loans secured by pre-sold rights – guarantees under such agreements can secure a loan.
9. Contributions through fiscal sponsors. www.fracturedatlas.org; www.fiscalsponsordirectory.org.

10. Crowdfunding web sites

C. Assessing potential for pre-selling rights.

1. Suitability of project for pre-sale (ability to meet theatrical release requirements, genre, foreign values, rating, etc.)

2. Foreign rights vs. domestic rights

3. Advance funding, guarantees, or letters of support.

4. Fractionalized agreements (separate parties get rights to home video, cable, broadcast, etc.) vs. all rights to distributor.

5. Selling potential profit to finance film?

a. Upside reduced in exchange for certainty of funds

b. Possible impairment of ability to sell other rights

c. May trigger residual payments to talent

D. Assessing availability of bank financing secured by pre-sales.

1. Domestic vs. multiple foreign territory sales

2. Creditworthiness and production history of buyer.

3. Availability of letter of credit to fund pre-sale obligation.

4. Availability of completion bond, either to complete project or fund short fall

5. Availability of insurance coverage to fund producer breaches of warranty.

VI. UNDERSTANDING THE INVESTOR'S POINT OF VIEW

A. Investors risk present assets for the promise of future benefits. The producer must project to the investor the value of his or her proposal and instill confidence in the investor in the predictability and potential of the project's success. The producer must be prepared to give the investor full information, good and bad, to allow the investor to make an informed investment decision.

B. The producer controls the circumstances of how his or her project is developed and marketed; the investor does not. Thus, the investor views the risks of production and financial return as greater than the producer does.

C. Film financing must be judged on the economic merits of a project, since there are no significant tax incentives to cause an investor to invest regardless of the likely success of the project.

D. Investors know film success is dependent upon public taste, which is unpredictable and subject to change without warning or explanation. Further, information about the film production industry as a whole and the experience of individual independent film productions is imprecise and anecdotal. Consequently, producers sell into a market where investor perceptions have been forged to reflect the belief that film investments are risky ventures.

E. Since financing is generally done on a film-by-film basis, there is little or no business history (balance sheet, income statement, management stability and performance, etc.) for an investor to investigate as part of his or her due diligence, which usually results in an investor ultimately putting his or her faith in the assessment of the personal skills and reliability of the producer to develop and produce the film.

F. Unless the principals of the project risk what to the investor's mind appears to be a significant loss (either financial or otherwise) if the project is not properly handled to completion, the investor may lack confidence in the principal's long term commitment to the project.

VII. WHAT THE PRODUCER <u>SHOULD</u> DO BEFORE SEEKING INVESTORS.

A. Identify the producing team.

B. Secure rights.

C. Obtain professional feedback on marketability of project.

D. Establish relationship with professional advisors.

E. Gather and gauge level of support and financing available from family and acquaintances.

F. Prepare business plan, including development of likely projections of income gauged to expected performance of film and source and amounts of revenue.

G. Have budget vetted.

H. Consider producing a trailer.

VIII. WHAT THE PRODUCER SHOULD <u>NOT</u> DO BEFORE SEEKING PROFESSIONAL ADVICE – CHECK TO SEE IF ANY OF THESE HAVE OCCURRED.

A. Place advertisements looking for money

B. Conduct an unsolicited mailing or other general quest for financing.

C. Convey rights in script or story.

D. Promise a position or responsibility to people beyond that which the producer can deliver.

E. Engage a fund raiser.

F. Accept money from an investor.

G. Sign any written agreement.

H. Give a written agreement to somebody to sign

IX. POTENTIAL CONSEQUENCES OF DOING IT WRONG.

A. Return of investor funds.

B. Cloud on title adversely affects marketability of film.

C. Funds from rights users (distributors, licensees, etc.) may be withheld pending resolution of conflicting claims.

D. Expense and inconvenience of defending lawsuits.

E. Costs erode or consume entirely potential profit of project.

F. May be required to compromise legitimate claims in exchange for other interests.

G. Get cut out of transaction.

H. Diminishment of professional credentials.

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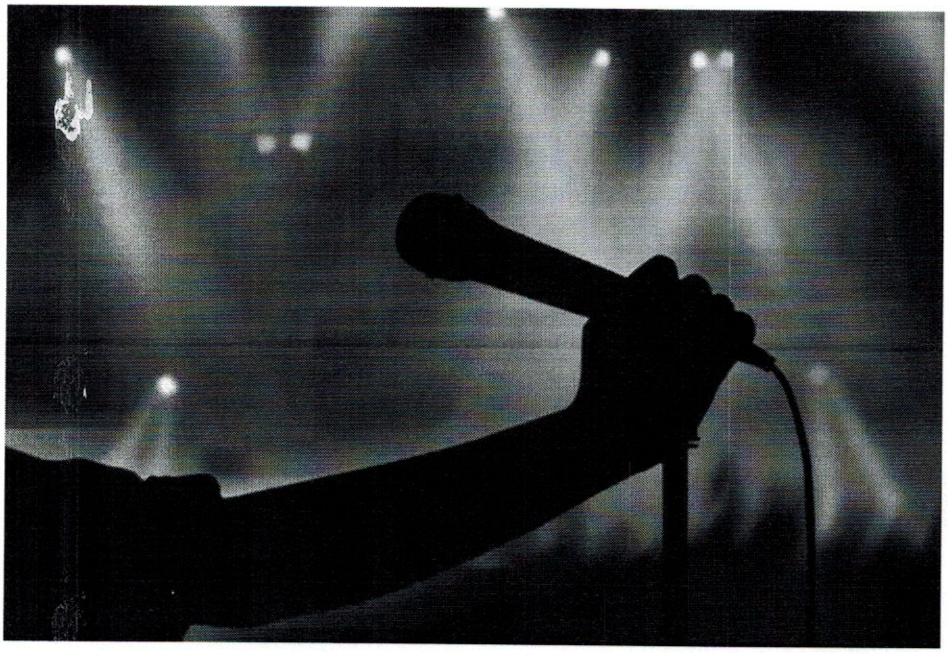

Unique Aspects of Labor Law in the Entertainment Industry

BY HOWARD D. FABRICK

The title of this article presupposes that there exists some well-defined and universally recognized definition of the "entertainment industry." There is no such definition but rather diverse forms of entertainment, each with its own definition. The classic story about the circus elephant keeper is illustrative. At his retirement party when asked how he could have spent 40 years following the elephants with a shovel and wheelbarrow, he replied, "I love being in show business."

The definition of "entertainment industry" is comparable to the definition of beauty—it's often in the eye of the beholder. There are a multitude of activities that fall within the very broadest definition of the term. It could be defined as every activity on which the public spends its leisure time dollars. The hotels in Las Vegas consider themselves to be in the entertainment industry, as do Carnival and Princess cruises.

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The Performance Right
A World in Transition

BY TODD BRABEC

Section 106 of the Copyright Act provides:

> Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:
>
> (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; [and]
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[1]

These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, the rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

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continued frome page 1

THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—radio and television primarily—the music licensing process has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC (performing rights organizations or PROs), which negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If the PRO and a user cannot come to an agreement as to license fees, courts intervene and determine "reasonable fees" for music use.

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered as "promotional" tools to drive sales. A record company's main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the online/digital world—a technological revolution that changed everything.

A rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly changing and complex business.

MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a nonexclusive basis in the negotiation, collection, and distribution of music performance license fees. The organizations are the American Society of Composers, Authors and Publishers (ASCAP, 1914); Broadcast Music, Inc. (BMI, 1939); and SESAC (1930). They are referred to as performing rights organizations (PROs). The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately $100 million of a total annual U.S. domestic PRO collection of $1.4 billion). Royalty distributions are made 50 percent to writers and 50 percent to music publishers after operating costs are taken into account (approximately 12–13 percent in the case of ASCAP and BMI). There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers' and publishers' works are represented and paid for when performances occur in foreign territories.

In the case of ASCAP and BMI, both entered into consent decrees with the government in 1941, with amendments to those decrees in 1950, 1960, and 2001 in the case of ASCAP, and in 1966 and 1994 for BMI. One aspect of these decrees that has had a significant effect on the determination of license fees is the existence of a separate "rate court" for ASCAP and for BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what "reasonable" license fees should be in any given area. The decree allows any party to apply to the court (U.S. District Court for the Southern District of New York) for a determination of interim and final fees. These rate courts have been in existence with ASCAP since 1950 and with BMI since 1994, and have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television, as well as, in recent years, the online music community. It is in these latter "new media" decisions and settlements where most of today's complex issues have arisen.

SESAC, the smallest of the U.S. PROs, operates on a for-profit basis as opposed to the nonprofit operations of ASCAP and BMI, is not governed by a consent decree with the government, and does not have a "rate court"–type procedure for license fee adjudications and disputes. Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. A final settlement approval hearing is set for March 2015 in the U.S. District Court for the Southern District of New York.[2]

In the online world of music licensing, the ASCAP rate court has been instrumental in deciding not only what "reasonable" license fees should be but also what is actually licensable by the U.S. PROs. Interim fee and final fee decisions have involved many of the biggest players in the "new media/technology" world and have resulted in license fees significantly below what the PROs and copyright owners were requesting. To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately $1.4 billion in domestic U.S. license fees (radio, broadcast and cable television, live, etc.). Of this amount, approximately $100 million was generated from all online/digital uses. An additional $700 million is received each year by the U.S. PROs from foreign collection societies (PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO, etc.) for performances of U.S. writers' works performed in foreign countries, with a small portion of that money attributable to online uses. Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through subpublishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, rate court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others.[3] A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing:

The AOL/RealNetworks/Yahoo rate court case had major worldwide significance, as there was a summary judgment ruling that the downloading of a music file did not constitute a public performance under the Copyright Act—a ruling totally contrary to the laws of most other countries with the exception of Canada.[4] This decision was affirmed by the Second Circuit Court of Appeals,[5] with cert denied by the U.S. Supreme Court.[6] The Second Circuit also remanded the fee formula back to the district court for further proceedings.

The 2009 Verizon Wireless rate court case reaffirmed the AOL "no performance in a download" decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance, and that the mechanical ringtone rate of $0.24 per download was the only appropriate right and compensation involved.[7] The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered "fair use" rather than licensable performances.[8] The court ruled in favor of ASCAP, and a customer's previewing of ringtones was therefore licensable by the PROs. An interim fee 2009 decision regarding YouTube was a good example of the size of court-set "reasonable" music license fees, with an order of $70,000 a month.[9]

The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting that set a three-tiered license based on the music intensity of the program. The music intensive fee was 0.9 percent of defined revenue, with 0.375 percent for general entertainment and 0.1375 percent for news and sports programming.[10] The Second Circuit affirmed the lower court decision.[11]

All of the aforementioned cases were eventually settled, with additional settlements and agreements entered into with Apple, Rdio, Spotify, Netflix, Hulu, and others. Practically all settlements in this area are confidential.

DMX and Pandora

Two additional rate court cases, DMX and Pandora, involved not only the determination of reasonable license fees but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI consent decrees, the agreements that writers and music publishers sign with ASCAP and BMI are nonexclusive—members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that provides preprogrammed music for business establishments via direct broadcast satellites or on-premises delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners that eventually resulted in direct licenses representing over 7,000 catalogs, including one major music publisher, Sony. DMX was requesting from ASCAP and BMI a "through-to-the-audience" blanket license that reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July 2010, the BMI rate court entered a final rate for the blanket license subject to adjustment of DMX's BMI performances directly licensed.[12] In a separate decision, the ASCAP rate court ruled that ASCAP is required to issue to DMX a blanket license with "carve-outs" for the direct licensing program.[13] Both decisions were appealed to the Second Circuit, which in June 2012 affirmed the district court decisions.[14] The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a noninteractive service as opposed to an on-demand/interactive service where the user chooses what he or she wants to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012, respectively. In the case of ASCAP, Pandora applied to the court for a through-to-the-audience blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

Based primarily on the small license fees that were awarded by the ASCAP and BMI rate court judges commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogs for online licensing purposes. The majors felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior rate court decisions and the subsequent settlements emanating from those decisions. These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree, and further that the ASCAP repertory subject to that license is all works in ASCAP at the time Pandora applied for a license (January 1, 2011)—not when the final license is arrived at.[15] In short, an application for a license is treated as a license in effect, and in this case no works could be removed by any ASCAP member during the period 2011 through 2015. And when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar motion for summary judgment in the BMI case, Judge Stanton allowed the removal of works that occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired.[16] If BMI cannot offer those compositions to new media applicants, their availability does not meet the standards of the BMI decree and they cannot be held in the BMI repertory. The BMI-Pandora rate court trial is set for 2015.

To put both judges' "all in or all out" summary judgment decisions into real world perspective, if one were to remove works from the current $100 million PRO annual license fee area of the online world, one would be forced eventually to remove those works from the other $1.3 billion in PRO domestic license fees being generated by traditional media (radio,

broadcast and cable television, live, etc.). Not to mention the effect that such withdrawals would have on the reciprocal "flow through of money" agreements between foreign collection societies and the U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media (radio, television, etc.) include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multicasts.

On March 14, 2014, Judge Cote issued her "determination of reasonable license fees" 136-page decision in the ASCAP-Pandora rate court case.[17] The judge ruled that the appropriate fee for the years 2011–2015 was 1.85 percent of revenue less certain deductions. ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. Pandora had requested a rate between 1.7 percent (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005).

Two of the more important issues in the Pandora rate court proceedings involve the concept of the divisibility of copyrights, which allows a publisher/copyright owner to make deals with various classes of users for their catalog, and the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.

As to the latter issue, the AOL/RealNetworks/Yahoo 2007 rate court case provided evidence of the over $30 million paid by these services to the major record companies over a two-year period, whereas their fees to the PROs were, in comparison, very small. As to Pandora, the company expended in 2013 approximately $315 million of its total revenue of $600 million on content acquisition. Of that amount, close to $290 million went to SoundExchange for artists and record companies, with all three PROs collecting a total of less than $25 million for songwriters and publishers. As a point of additional reference, total 2013 limited performance right statutory royalties to SoundExchange were $650 million in addition to significant record company interactive streaming license fees and payments negotiated with the services, whereas combined ASCAP, BMI, and SESAC revenue for all new media uses from all licenses and services was less than $100 million.

In July 2014, ASCAP, along with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors, filed an appeal from the two district court opinions with the Second Circuit.[18] The basis of the appeal was that the district court erred in ruling that the amended final judgment of 2001 prohibited ASCAP from accepting partial grants of public performance rights, and that the district court in setting a final license fee ignored recent arms-length relevant benchmark agreements.

As to the "partial grants" prohibition, ASCAP's position was that the consent decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users. Further, such a prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Universal Music, Sony/ATV Music, and EMI Music Pandora direct license deals were all in excess of the 1.85 percent court set fee, as was the 2013 negotiated ASCAP Apple iTunes radio license—all "arms-length willing buyer and willing seller agreements." Further, the Second Circuit, in its 2010 RealNetworks/Yahoo decision, confirmed that a 2.5 percent rate was a valid benchmark even though it vacated the district court's across-the-board application of that rate to all of RealNetworks' and Yahoo's services.[19] Accordingly, the current district court erred in ignoring the Second Circuit's guidance in RealNetworks/Yahoo, which established that a rate of 2.5 percent revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora's.

Direct Licensing

The ability of a copyright owner to directly license a work to a music user and bypass the PROs was a major issue in the ASCAP and BMI DMX rate court decisions as well as the current Pandora litigation. Language in both the ASCAP and BMI consent decrees guarantees the right of any member or affiliate to directly license their works to a user. SESAC, as it is not under a consent decree with the government, incorporates language in its writer and publisher affiliation agreements that insures the right to directly license—"publisher retains the right to issue nonexclusive licenses directly to any third person for the public performance in the United States, its territories and possessions, of any work subject to this Agreement."

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the nonexclusive right to license the nondramatic public performances of their works. Though each PRO contract and governing documents are different as to their terms, length of contract, withdrawal of works and resignation/termination provisions, dispute resolution procedures, payment schedules, distribution rules, and benefits, they all are nonexclusive agreements whereby the writer or publisher can license a work directly. The PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to directly license as well as the effect of a direct license has been standard in many types of industry license agreements, including work-for-hire/employee-for-hire contracts, for many decades. A sample clause might read:

> The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable performing rights organization with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing rights licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third-party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performance rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer's share of such fees.

Additional variations of a direct license clause are as follows:

> Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction, and distribution rights implicated by the delivery of programming embodying publisher's catalog, and publisher is willing to grant such right to license on a nonexclusive basis.

> The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from "payments to be made based upon the prevailing PRO rates for the specific use," "compensation to be negotiated in good faith," "reasonable fee," "fee subject to arbitration," "a complete buyout with no further compensation or continuing royalties,""or "50 percent of any license fee received."

A further unresolved issue as to an allowable and effective direct license under court or consent decree interpretation involves the situation where a music user (traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license—a fine distinction but an important one in current litigation and consent decree interpretation.

Department of Justice Intervention

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice (DOJ) announced that it would review both the ASCAP and BMI consent decrees "to account for changes in how music is delivered to and experienced by listeners [and to determine] what modifications would be appropriate."[20] The DOJ allowed a 60-day period for comments from any interested party (music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.).

A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators v. users scenario.

On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the Radio Music License Committee (RMLC), the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments. The creator/copyright representative side included comments from the PROs ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), and SIAE (Italy), as well as the Society of Composers and Lyricists (SCL), the Nashville Songwriters Association International (NSAI), the National Music Publishers' Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the rate court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current decree prohibits ASCAP from licensing any right other than performance) and allow partial grants of rights from its members.[21] The arguments centered on the fact that new media users need multiple rights in their business, that publishers need flexibility to manage rights and negotiate contracts terms, and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the consent decree mandate.[22]

The SCL (film and television composers and songwriters) was in favor of consent decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, the transparency and accountability of the PRO collective licensing model would be affected, and further that in a bundled rights situation it would be difficult to ascertain the value of the performance right in bundled transactions.[23] Most writers in this field sign "work-for-hire" contracts where the backend performance royalties represent a substantial portion of their income. The 165,000-member organization SAG-AFTRA, the largest labor union representing working media artists, commented that the scales have tipped too far in favor of licensees' interests over those of artists and that the rate setting process set forth by the consent decrees is inefficient, expensive, and burdensome on the PROs, and if not modified will significantly devalue a writer's works.[24]

Sony/ATV Music supported amending the consent decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require the PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was not in favor of allowing the PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be costly and disruptive.[25]

As to the foreign PROs that submitted comments, widespread concern centered on the belief that the current consent decrees were outdated in today's world and that changes were essential if music was to be appropriately licensed and compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. rate court. PRS for Music in the United Kingdom, which receives over $100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present decrees and stated that it would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.[26]

DiMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that the PROs must be subject to oversight as their anticompetitive behavior continues to this day. Further, if the DOJ does allow all the PROs to bundle rights as well as permit partial withdrawals, then substantial oversight must be put in place; songwriters should be allowed to keep their rights with their PRO if that's what they wanted, regardless of whether the publisher removed the works.[27]

The RMLC strongly felt that the decrees were necessary to keep the market power of ASCAP and BMI in check.[28] If publishers were allowed to withdraw from the PROs, they could leverage their outsized market share to extract exorbitant license fees from licensees. Both the NAB[29] and Television Music License Committee also shared these views. As to Netflix, its position was that the decrees were in place to constrain the PROs market power.[30] It was against allowing partial publisher withdrawals, but if the DOJ allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the rate court must stay in place though it does need to be streamlined.

SOUND RECORDINGS

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972. The owners of the copyright therefore had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. Pre-1972 recordings remained subject to the protection afforded by state laws.

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was nonexistent for records. No performance royalty existed in any medium for sound recordings. That changed in 1995 with the passage of the Digital Performance Right in Sound Recording Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed "by means of a digital audio transmission."[31] The 1998 Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right.[32] This new right applied specifically to satellite radio (e.g., Sirius XM), Internet radio (e.g., Pandora), and cable television music channels (e.g., Music Choice).[33] Broadcast radio continued to be exempt.

It is important to note that the statutory license applies only to noninteractive services. The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.

These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress. SoundExchange, a nonprofit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from noninteractive webcasting, digital cable, and satellite transmissions and satellite audio services. Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009.[34] Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding. The categories are webcasting, satellite radio, preexisting music services, other cable and satellite music providers, and business establishments. An example of one of these proceedings involved Sirius XM satellite radio, which concluded in 2012 and set rates for a five-year period at 9 percent of gross revenue for 2013 increasing to 11 percent in 2017.[35]

Webcasting IV—the proceeding regarding future webcasting rates—commenced in early 2014 and will conclude at the end of 2015 and will set rates for the period 2016–2020.[36] The most recent five-year CRB per-performance statutory webcasting rates were $0.0019 for 2011, $0.0021 for 2012 and 2013, and $0.0023 for 2014 and 2015.[37]

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates ("pureplay" rates) with certain webcasters. For nonsubscription services and broadcasters streaming their content on the Internet, the "pureplay" per-performance rate started as $0.00102 for 2011 and increased to $0.0013 in 2014 and $0.0014 in 2015. The rate applicable is the greater of the per-performance rate or 25 percent of U.S. gross revenue. The "pureplay" per-performance rate for subscription services started at $0.0017 in 2011 and increased to $0.0023 and $0.0025, respectively, for 2014 and 2015.[38] No percentage of revenue figures applied to the subscription rate. Under those agreements, webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange "pureplay" rates.

As to the current *Webcasting IV* CRB proceeding, SoundExchange's initial rate proposal for the 2016–2020 period was a "greater of" formula taking into account a per-performance rate and a percentage of the service's revenue. Specifically, the per-performance rate for commercial webcasters would commence at $0.0025 in 2016 with escalations to $0.0029 in 2020. The percentage of revenue would be 55 percent for all five years. Its proposal was based on the fact that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on-demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50–60 percent of a service's revenue, with allocations based on each record company's share of total streams.

Music services, on the other hand, argued in their direct case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements. Pandora, Sirius XM (streaming component), and the broadcasters, through NAB among others, came up with proposals ranging from a royalty of $0.0005 per performance for all five years, to $0.0016 pending study of the direct deals, to a $0.000125 rate similar to the Canadian rate. Pandora supported a "greater of" rate of $0.0010 per performance or 25 percent of revenue.

SoundExchange Distributions/Direct Licenses

SoundExchange collected $650 million in 2013 pursuant to the statutory license and distributed $590.4 million to artists and sound recording copyright owners.[39] Collections and distributions for 2014 are projected significantly higher than 2013. Royalty distributions are allocated 50 percent to sound recording copyright owners (many times the label), 45 percent to featured artists, and 2.5 percent each to nonfeatured musicians and nonfeatured vocalists via the Intellectual Property Rights Distribution Fund administered by the American Federation of Musicians and SAG-AFTRA. An additional $6 million was collected from foreign country collection societies that handle the performance right in sound recordings. As to this latter collection, it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (noninteractive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to noninteractive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

Pre-1972 Sound Recordings

As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright, and any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.

In September 2014, in *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, the U.S. District Court for the Central District of California ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording, and that Sirius XM's streaming of the 1960s band the Turtles' pre-1972 recordings without authorization and without paying royalties constituted copyright infringement.[40] In November 2014, the U.S. District Court for the Southern District of New York in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, ruled that Sirius XM had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie.[41] These cases and their appeals as well as similar pending cases regarding the same or similar issues need to be watched, as they could have a very significant impact on future sound recording license fees and royalties to labels and artists.

WHERE DO WE NOW STAND?

Of the two performance areas under discussion, musical composition rights and sound recording rights, the sound recording side seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past 10 years, this has been, percentage wise, by far the biggest growth area for sound recording copyright owners.

The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only do you have unresolved rate court cases and issues affecting every aspect of the licensing of music in the "new media" world (not to mention the effect on traditional media licensing) but also the entrance into the field of new types of PRO models (music publishers, business entities, administration services, foreign territory rights management organizations, etc.). This could, depending on your point of view, significantly complicate the existing licensing structure for music users, achieve "willing buyer, willing seller" market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, royalty advance deals, bonus and "rewards for success" policies, and other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online "new media" world of music licensing but also traditional media music licensing practices. Finally, the DOJ review of the ASCAP and BMI consent decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of over $1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of "overseas" royalty payments. The issues in this area are more significant for songwriters and composers than music publishers, as many publishers collect their monies directly from foreign societies as members or via subpublishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50 percent of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements, and any change in those relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—"prepare for every contingency and possibility," as they may very well come true.

Welcome to the "new world of performance licensing."

ENDNOTES

1. 17 U.S.C. § 106.
2. *See* Meredith Corp. v. SESAC, LLC, No. 1:09-cv-09177-PAE (S.D.N.Y.).
3. *See* Todd Brabec & Jeff Brabec, *Online Music Licensing: From PROs, AOL, and MobiTV to SoundExchange, AT&T, and the CRB*, Ent. & Sports Law., Oct. 2011.
4. *See* United States v. ASCAP, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).
5. United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).
6. ASCAP v. United States, 132 S. Ct. 366 (2011).
7. *In re* Cellco P'ship, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).
8. United States v. ASCAP, 599 F. Supp. 2d 415 (S.D.N.Y. 2009).
9. United States v. ASCAP, 616 F. Supp. 2d 447 (S.D.N.Y. 2009).
10. *In re* MobiTV, Inc., 712 F. Supp. 2d 206 (S.D.N.Y. 2010).
11. ASCAP v. MobiTV, Inc., 681 F.3d 76 (2d Cir. 2012).
12. Broad. Music, Inc. v. DMX, Inc., 726 F. Supp. 2d 355 (S.D.N.Y. 2010).
13. *In re* THP Capstar Acquisition Corp., 756 F. Supp. 2d 516 (S.D.N.Y. 2010).
14. Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012).
15. *In re* Pandora Media, Inc., Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013).
16. Broad. Music, Inc. v. Pandora Media, Inc., Nos. 13 Civ. 4037, 64 Civ. 3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).
17. *In re* Pandora Media, Inc., 6 F. Supp. 3d 317 (S.D.N.Y. 2014).
18. Pandora Media, Inc. v. ASCAP, No. 14-1158 (2d Cir. Aug. 4, 2014), ECF No. 143, *available at* http://www.ascap.com/~/media/files/pdf/advocacy-legislation/pandora_media_v_ascap_ascap_opening_brief.pdf.
19. *See* United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).
20. *Antitrust Consent Decree Review*, U.S. Dep't of Justice (June 2014), http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.
21. Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf.
22. Public Comments of Broadcast Music, Inc. (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf.
23. Comments of the Society of Composer & Lyricists (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307971.pdf.
24. Comments of Screen Actors Guild-American Federation of Television and Radio Artists (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307818.pdf.
25. Sony/ATV Music Publishing LLC Comments Submitted to the Department of Justice in Connection with Its Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf.
26. Antitrust Division Review of American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Consent Decrees ("Review") (Aug. 5, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307652.pdf.
27. Comments of Digital Media Association ("DiMA") (2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307972.pdf.
28. Comments of the Radio Music License Committee, Inc. and the Television Music License Committee, LLC (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307977.pdf.
29. Comments of National Association of Broadcasters (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307974.pdf.
30. Comments of Netflix, Inc. (Aug. 6, 2014), http://www.justice.gov/atr/cases/ascapbmi/comments/307908.pdf.
31. Pub. L. No. 104-39, 109 Stat. 336 (1995).
32. Pub. L. No. 105-304, 112 Stat. 2860 (1998).
33. *See* 17 U.S.C. §§ 112, 114.
34. Pub. L. No. 110-435, 122 Stat. 4974 (2008); Pub. L. No. 111-36, 123 Stat. 1926 (2009).

35. *In re* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, No. 2011-1 (C.R.B. Dec. 14, 2012), *available at* http://www.loc.gov/crb/comments/2012-12/Public_Initial_Determination.pdf.

36. *See In re* Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Webcasting IV*), No. 14-CRB-0001-WR (C.R.B. 2014).

37. 37 C.F.R. § 380.3.

38. Notification of Agreements under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 17, 2009).

39. *See* Comments of SoundExchange, Inc. 3, 20 (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SoundExchange_Inc_MLS_2014.pdf.

40. Order Granting Plaintiff's Motion for Summary Judgment, *Flo & Eddie*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

41. Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, *Flo & Eddie*, No. 13 Civ. 5784(CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).

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CUTTING EDGE MUSIC BUSINESS CONFERENCE / NOLA

FILM AGREEMENTS AND THE MAKING OF THE BUDDY HOLLY BIOGTRAPHY FILM

PANELISTS

- **Darryl Cohen, Esq.** Cohen, Cooper Estep & Allen, Atlanta, GA (Moderator)
- **Richard "Rick" French,** CEO, French/West/Vaughan, Filmmaker, Board Member, Buddy Holly Foundation
- **Christophe Szapary, Esq,** Provosty & Gankendorff, LLC, New Orleans, LA
- **Stephen J. Easley, Esq.,** Law Office of Stephen J. Easley, Esq.

THEMES:

- The ramification of streaming on the economic structure and development of bio pics.
- The impact of Covid-19 on the production and financing of motion pictures.
- The rise of the documentary film and docu series and its effect on life rights.

PANEL DISCUSSION

1. Introduction: Panelist introduce themselves and provide brief career background.

2. Buddy Holly Bio Pic: Introduction to the life of Buddy Holly and the inspiration behind the Buddy Holly Biography Film.

3. Underlying Rights:
   a. *Securing the Life Rights to Buddy Holly's life story*.
      i. Life Rights Chain of Title:
         - Heirs
         - Option/ Purchase
         - Credit
         - Participation

ii. Bio Pic vs. Documentary: Splitting scripted and non-scripted rights
    . Separate and Independent scripted and non-scripted agreements with life right holders
    . Structure: option/purchase v. attachment v. material release.
    . Profitability of documentary film/series in the age of Covid/Steaming
    . One financier vs. two financiers for production of the documentary and bio pic.
    . The timing of releasing on documentary and bio pic
    . Holdback and Freezing of rights.

b. *Securing Rights to Buddy Holly's Music.*
    i. Buddy Holly's Master Recordings.
    ii. Buddy Holly's Publishing

4. <u>Development:</u>
    a. *The Production Entity Structure:*
        i. Two-sided LLC for investors and service providers- Theatrical
        ii. LLC for equity holders only- Streaming.
        iii. Conflict of interest for attorneys who help package production/ conflict waivers
    b. *Development Funds/The Role of BMG.*
    c. Writer Agreement/Producer/Director/Actor Agreements
        i. Compensation and Participation streaming vs. theatrical
            . Fees
            . Contingent Compensation
            . Bonus

5. <u>Production</u>:
    a. Investors, Financiers and Distributors.
        i. BMG or other independent Investors- and Sales Agency Agreement
        ii. Studio or Negative Pick Up Agreements –Covid and Completion Bond Issue.
        iii. Steaming Platforms and its effect on film finance and Distribution.

CUTTING EDGE CE 27th

NEW ORLEANS

August 2019

Ch Ch Ch Changes

by Peter Dekom[1]

J.J. ABRAMS
Director, upcoming "Star Wars: The Rise of Skywalker"
"For a long time, people have been saying the business is changing, but that's undeniable now. It's on."
New York Times, June 20, 2019

For those of us who have lived through decades of changes and challenges in practicing entertainment law, nothing begins to approach the level of structural, social and economic change we face today. So, I thought I'd write down what I believe are the biggest challenges of practicing entertainment law, especial today, focusing primarily on audio-visual content:

I. Globalization is a Bitch!

ELIZABETH BANKS
Actress, director of upcoming *Charlie's Angels*
"It's interesting, because there's a lot more work, but it's a lot harder to make money on anything."
New York Times, June 20, 2019

We are more dependent on international exploitation of our entertainment assets than ever before. Take away international revenues, even beyond the English-speaking world, and just about every segment of the U.S.-based entertainment industry would collapse. But with that incredible new source of revenues comes a litany of problems.

Not only are the production resources in other nations increasingly being deployed for their own local productions (or regional co-productions), but those old "quota" ratios are rearing their ugly heads again. Not to mention that we have real competition: K-Pop and Korean movies, for example, are fan favorites all over Asia these days… and spreading. Lots of this content is more popular than some of the best creative content from the United States.

Locally produced Chinese (PRC) movies are consistently outperforming American fare as well. And for revenue sharing content, the PRC quotas for allowing in international theatrical movies are severely limited: 34 films per year as of this writing with the proviso that at least 14 of those

[1] A graduate of Yale University and the UCLA School of Law, Mr. Dekom has practiced entertainment law for over four decades, being named by both the Century City Bar Assn and the Beverly Hills Bar Assn as entertainment lawyer of the year.

films be in either 3D or IMAX format. Then try exporting your Chinese-generated profits back to the United States! Donald Trump's disfavor with Hollywood has also moved "entertainment content" issues to a very back burner in his trade negotiations. The censorship issues are, well, obvious.

If money from ancillary rights was a driver, perhaps also the fuel that enables coproductions (note the United States has no coproduction treaties), then anything that threatens the deep European pockets that write those checks also threatens indie productions across the board. Cord-cutting and multinational competition are definitely pushing European presale and coproduction values lower. Mega-huge French "Canal Plus has confirmed its plan to trim nearly 20% of its workforce in France where the pay TV group has been facing the continued decline of its subscriber base.

"Canal Plus said in a press release on [June 9, 2019] that it met with the company's social and economical committee to lay out its plan to cut up to 492 jobs through voluntary departures and said it will be holding further discussions on July 15 and 16… In its statement, Canal Plus said it was struggling to cope with the 'revolution"' going on in the TV industry, with the 'global platforms, digital native and international which boast considerable financial muscles and are not under the same fiscal and regulatory constraints than the Canal Plus Group,' said the company." Variety.com, June 9, 2019.

Europe offers us even more problems as well. With the U.K. poised for an even uglier Brexit, Ireland remains as the only English-speaking country in Europe. Might seem like slight change, but all those lovely European Union benefits (like nice TV license fees, access to co-productions, the ability to use any EU resident and quota compliance) we used to get by shooting in heavily tax-subsidy-incented England are slip-sliding away. Yet we hunger for European audiences (the largest still for US product) and increasingly for European subsidies.

The cost of making audio-visual productions – film, television, digital, long format, short format, music, multiple platform, etc. – has so escalated that we have become addicted to so-called "soft money," government production incentives that literally absorb significant production costs. In the states (especially Georgia, New Mexico, Louisiana and New York) and overseas (everywhere!). We're always looking for the next good deal. Problem is, these incentives keep changing, getting challenged, "adjusted and amended," recalculated … country by country. Are their crews sufficient and good? English-speaking? Production facilities? Comparable work ethic? Visas and local taxes? Costs to transport and house talent? Getting stuff in and out of customs? Local laws? Co-production potential (the U.S. has no co-production treaties, by the way). Need a local attorney too. Who's good? Foreign Corrupt Practices Act issues? Bribery Act issues (UK)? Ramifications of moving money across international boundaries? U.S. taxes?

European Union laws, beyond the General Data Protection Regulation (GDPR), are threatening to move Europe into becoming a single digital market (sell digital rights in one market and you may in the future have sold digital rights to the entire EU). Under the guise of copyright reform, the EU is redefining the notion of a "safe harbor" to internet service providers, making digital platforms responsible for copyright infringement, artist rights and fake news carried on those sites. "The overhaul contains two controversial provisions that will make online platforms liable for illegal uploading of copyright-protected content on their sites, as well as force Google, Facebook and other digital companies to pay publishers for press articles they post online." Variety, April 15, 2019. The new rule was signed into law on April 17, 2019.

Privacy laws, sprouting up all over the world are picking up the log line in the GDPR as well. The California Consumer Privacy Act of 2018 was the seminal U.S. state statute in the space, several other states have followed and are following suit (Washington State appears to be working on the next big bill), and Congress is exploring national requirements. Opt-in requirements, the ability to erase your online footprint (to disappear), the notice for hacked sites and the crushing penalties for violation should put the fear of God into the hearts and minds of all entertainment practitioners whose clients access the web, particularly those who reach across international boundaries. Are you ready for 'dis?

That's what's happening in nations where "free speech" has few limitations. While you cannot sell Nazi memorabilia online in Europe, generally across the West, the counter to the press for privacy regulation and responsibility for disseminating fake news is countered by that "free speech" value (or more, like our First Amendment). Those values are tempered in other parts of the world, even ostensible democracies like India and Singapore.

Murders by Hindus against local Muslims based on fake news gone viral made India particularly sensitive to the impact of too much free speech. Look back at their pre-election planning back in early April of 2019: "As India, the world's largest democracy, gears up for a gigantic general electoral process, global social media companies are putting their own houses in order. The election runs in seven phases from April 11 through May 19, with results known on May 23.

"Approximately 900 million Indians, many of whom are constantly exposed to social media via their phones, are eligible to vote in the elections. Facebook counts approximately 300 million subscribers in India, making the country its largest single market.

"On Monday [April 1, 2019], Facebook removed hundreds of pages associated with the opposition Indian National Congress party and the ruling Bharatiya Janata Party for 'coordinated inauthentic behavior.' With ongoing tensions between India and neighboring Pakistan, the company removed 103 Facebook and Instagram pages with links to the Pakistan military.

"The specter of fake news is all too real in India and, in a bid to curb this, on Tuesday, WhatsApp launched 'Checkpoint Tipline' where users can report suspicious material. The company will confirm whether the shared information is verified or not.

Earlier, on March 20 [2019], the Social Media Platforms and Internet And Mobile Association of India, which includes representatives of Facebook, WhatsApp, Twitter, Google, ShareChat, TikTok and others, presented a voluntary code of ethics to Indian election commissioners. The code consists of several steps to prevent abuse, and to maintain a transparent flow of information to the Election Commission.

"The Election Commission has an exhaustive model conduct code that all political parties are expected to adhere to, beginning with 'No party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or causing tension between castes and communities, religious or linguistic.'" Variety.com, April 2, 2019.

Another regional democracy, aghast at both its own issues and the ugly example of "fake news" roiling through the United States, decided to crush that movement with swift legislation, virtually certain to become law. "The Singapore government has introduced legislation to combat the spread of misinformation online. The proposed law puts responsibility on media and social media platforms, requires online corrections, and threatens to take away profits of repeat offenders.

"The Protection from Online Falsehoods and Manipulation Bill was introduced by the Ministry of Law, and put to parliament on Monday. Given the government's solid majority it could become law in a matter of weeks.

"The government says that the bill targets falsehoods, not opinions and criticisms, satire or parody. Corrections will be the primary response to a harmful online falsehood that is actively spreading, and that corrections will usually require the facts to be put up alongside the falsehood, so that the facts can travel together with the falsehood." Variety, April 2, 2019.

But the implications for American companies crossing international boundaries is not just the massive uptick in complex, detailed and exceptionally expensive (both as to compliance and fines) impact of new laws and regulations. The financial realities overseas are equally in flux. To make bad matters "much badder" and adding to the complication, the entertainment-related financial picture from overseas is also undergoing other rapid changes. The foreign territorial sales marketplace (discussed below – in *Rescinding the Indies*), for example, was already bad and is just getting worse.

As hungry as Hollywood may be for subsidy money, it is positively ravenous for international investment capital. On August 18, 2017, when Chinese President Xi Jinping gave the order, China put the kibosh on exporting PRC investment capital into overseas real estate and entertainment ventures. The squeal of brakes was heard across the U.S. entertainment industry, from "independents" hall all the way up to the loss of a billion dollar off-balance-sheet investment fund for Paramount Pictures.

Already slowing before the announcement, PRC money that was not already outside of China just plain stopped. Lots of schemes and dreams exist to get that tap turned on again. Nuffin'! Trade war didn't help either. China announced stricter censorship rules, and many U.S. film and television conglomerates fear the possibility of a total closing of the Chinese marketplace to U.S. product. China's done it before – with South Korea – so it is certainly not out of the question.

"Chinese film officials have told some local buyers to steer clear of U.S. movies. One Chinese distributor says he was advised by various platforms not to submit U.S. titles for consideration, while another has heard through unofficial channels that private companies can no longer import U.S. content. American actors working in the Middle Kingdom say their careers have nosedived without explanation.

"Industry insiders stress that there is nothing in writing – no officially published decree – putting a freeze on U.S. content. The Chinese government tends to exercise such controls internally and unofficially, which allows it to publicly deny the existence of any restrictions and to make exceptions when it suits them. Three years ago, when China blocked South Korean films, pop bands and other cultural exports out of anger over Seoul's decision to deploy U.S.-made missiles, it took six months before Beijing publicly acknowledged the policy." Variety.com, June 5, 2019. Even if a trade agreement is consummated, the tensions between the two powers will continue. South Korea is small and local; the U.S. is the enemy.

How about Middle Eastern money? The March 8, 2019 The Washington Post: "A bid by a Hollywood power player to return a $400 million investment to the Saudi Arabian government after an outcry over the murder of Saudi journalist Jamal Khashoggi has been fulfilled, a person with knowledge of the talks told The Washington Post. The person spoke on the condition of anonymity because of the matter's sensitivity.

"Endeavor, the Hollywood talent agency and content company, had accepted the money last spring from Saudi Arabia's Public Investment Fund after, Ari Emanuel, the company's co-chief executive, became enamored with the idea that Saudi Crown Prince Mohammed bin Salman was on the path to reform. The capital was quickly spent as Endeavor looked to pay down debt on a host of corporate acquisitions, which in recent years have included mixed martial arts and professional bull riding leagues." Ouch! Endeavor's alternative – going public – is discussed later.

II. Rescinding the Indies.

JORDAN HOROWITZ

Producer, *La La Land, Fast Color*

"I don't feel particularly optimistic about the traditional theatrical experience, especially for independent films."

NY Times, June 20, 2019

With about 4,000 new English-speaking feature-length independent motion pictures still being produced annually, you'd guess that that world is robust and lucrative. Guess again. Under 1% of that batch ever find anything close to a genuine release anyway, and most of that product finds its way onto the small screen, digital or otherwise. Well-structured documentaries are doing better than in recent years, although competition for distribution is still horribly competitive, but dramatic fare is struggling. With a few exceptions – *my category of five,* where sharing the experience with an audience has value or where an older audience still make the trek: truly spell-binding horror films, fall-on-the-floor hard comedies, faith-based/"patriotic" specialty releases, films that made a splash overseas and films targeting kids (especially animated) – the U.S. theatrical market (release in movie theaters) is all-but-closed to indies, particularly those with modest to lower budgets. Hot preexisting IP rules, and most writers don't have the money to option those titles.

As Hollywood studios up their production budgets, with concomitant increases in marketing spends, the ability of "festival favorite" independent features to penetrate the U.S. theatrical marketplace has all but vaporized, as was the case for this May 24, 2019 wide release: "Despite film festival raves and endorsements from celebrities like Ryan Reynolds, Taylor Swift and Mindy Kaling, Annapurna's 'Booksmart' wasn't able to earn high marks during its opening weekend. Olivia Wilde's coming-of-age comedy sputtered with $6.9 million, a disappointing start for a movie that debuted in over 2,500 theaters across North America.

"The raunchy R-rated movie is a stark reminder that even glowing word of mouth and strong reviews aren't always enough when punching up against big-budget blockbusters. 'Booksmart' is one of a handful of indie hopefuls trying to cut through and find an audience amid a crowded summer slate. Will its underwhelming ticket sales signal trouble for other film festival favorites coming down the pike?" Variety.com, May 29, 2019. Everything about making and releasing an independent theatrical film has gotten exceptionally challenging.

While soft money has absorbed some of the financial pain of film and television production, the fall in demand for indies internationally is not good news for lawyers whose bread and butter is based on these films. This is also particularly challenging to filmmakers who have typically relied heavily on international territorial presales to provide production capital (usually discounted by banks relying on completion bonds). International buyers increasingly add the demand for a wide theatrical release in the United States as a precondition to payment, but U.S. distributors have learned that smaller films cannot compete against the mega-productions from Hollywood majors. The scoundrel: marketing and distribution costs for a domestic theatrical opening have skyrocketed. U.S. theatrical deals for indie films have become as rare as hens' teeth. Some films, however, are either so inexpensive or have such an obvious international cachet that they can avoid this U.S. release mandate.

Where an indie still needs that U.S. theatrical release (remember those international buyer conditions), it is often required to put up all releasing costs to open their film – $15 million and up for a release on at least 1500 screens – without getting a dime in the way of an advance against their production costs. Many of the distributors who are open to indies also require an advance of six figures against the ultimate distribution fee and often require that all the ancillary exploitation flow through their deal as well.

What you say, at least in this digital world we don't have to strike old-world prints; think of the savings! Sorry, it could actually cost more! When a distributor books a screen for a theatrical movie, where the projector is digital (they almost all are these days), the distributor must pay either the theater owner or the financier of the digital projector a set fee, called a virtual print fee. It may depend on the nature of the equipment (3D/IMAX vs regular formats), the size of the theater and/or the number of weeks of the run. It ain't cheap! It used to be to cover the amortization cost to buy those cool projectors, until recouped, but you just know those fees are not only never going away, they are like to increase.

So now the risk to the indie is not just the cost of making the movie but the significant cost to release that film theatrically in the U.S. marketplace. Majors and their specialty labels seldom pick up indie films anymore, but if a film has already opened well overseas, particularly in English-speaking markets, they are more open to picking up that proven content.

As the theatrical distribution pickups for U.S. independent films dwindle, likewise those who have traditionally provided so-called "P&A funding" (literally "prints and advertising," but today a general reference to theatrical releasing costs, usually within the United States) have left the marketplace or made the cost of such funding so high as to be prohibitive. This has sent filmmakers scrambling in desperation, and many have simply relinquished their hopes for a U.S. theatrical release.

Even assuming you can get over the above U.S. release requirement, in the past five years, the "average" presales from the foreign market for films that are not heavily skewed to a U.S. audience (e.g., a baseball or American football themed movie) have fallen from 60% of an average budget (capped on really big films) to 40%... and falling. The strong dollar along with international instability (Brexit, too much national debt, too much competition, etc.), coupled with bigger companies (like Lionsgate and STX) absorbing capacity, have tightened purses everywhere.

There's still plenty of activity in pick-ups and production supported by domestic streaming services, but audience consumption of feature films (original and aftermarket) from a successful streaming service generally caps out at about 30% of total content watched. The continuity of *series* (characters and storylines), the added plus of binge viewing, tends to drive most of that other 70%. Live sports are an area that viewers enjoy as well and is increasing finding its way into the streaming universe. And exactly what is a "movie" anyway?

As you can tell from the battle between traditional "big-screen" filmmakers and streamer-Netflix – evidenced in the Oscar squabble over *Roma* – the opportunities for indies has so narrowed that there is a push to allow a film with a token theatrical release that is intended primarily for the small screen to be accorded the same respect and treatment as a film specifically produced for a mainstream theatrical release. The writing is on the wall, and if "quality" productions are to have a shot against escapist Hollywood blockbusters, this seems to be inevitable.

But there's one more ugly reality that has frightened indie filmmakers with "quality" on their minds: theatrical releases from digital streamers are tanking on par with all other indies… even festival darlings and award-winners. "Five months after strutting out of the Sundance Film Festival with a bag full of splashy acquisitions, Amazon Studios has been thrown off balance by a box office losing streak and the departure of one of its top executives [marketing and distribution chief, Bob Berney].

"One of its highest profile Sundance buys, Mindy Kaling's 'Late Night,' has proven to be a painful failure. It has earned only $11.3 million in North America, where it's been playing on over 2,000 screens for the past two weeks. That's a poor result given that Amazon plunked down a hefty $13 million for domestic rights to the picture. What's worse, the marketing budget on 'Late Night' topped out at $33 million. Rival studios project that Amazon could lose roughly $40 million on the comedy's theatrical run." Variety.com, June 27, 2019.

U.S. theater owners, awash in available screens, see the problem. Our largest exhibitor, AMC Entertainment with 8,380 screens, is resurrecting a program it has tried in the past: a special structure aimed at supporting smaller quality films in search of a theatrical release. "The program, dubbed AMC Artisan Films, will seek to boost certain movies that might have trouble gaining traction as moviegoers increasingly choose well-known brands, such as Marvel Studios and Pixar, over midbudget dramas, comedies and quirky independent fare. The dominance of movies such as 'Avengers: Endgame' has made it tough for critically acclaimed pictures such as 'Booksmart' and 'Late Night' to get oxygen at the local multiplex, according to box office analysts.

"'[W]e aim to expose more moviegoers to specialized films and increase their theatrical success," Elizabeth Frank, AMC's head of worldwide programming and chief content officer, said in a statement… The company did not immediately provide details on how many of AMC's locations would be participating in the new program…

"According to AMC's announcement, a movie that gets the AMC Artisan Films seal is 'an artist-driven, thought-provoking movie that advances the art of filmmaking.'… The company will promote such pictures in part by keeping them in theaters longer and by seeking to give them earlier runs in limited release, Frank said." Los Angeles Times, June 27, 2019. These programs have not worked well in the past, but perhaps times have changed.

Smaller studios (entities with both production and distribution arms), holding hope for many indie filmmakers, have not fared well in recent years either. In early July of this year, The Wrap suggested that STX Entertainment was on the block, looking for a buyer, although company executives denied the story. "The independent studio STX Entertainment is looking to merge, raise capital or find a buyer following a string of box office disappointments and the scuttling of a planned [Hong Kong] IPO last fall, TheWrap has learned…

"This year, the studio has suffered one disappointment after another at the box office, with one notable exception: In January, STX released the $108 million-grossing domestic hit 'The Upside,' a release by The Weinstein Company [defunct for other reasons] successor Lantern Entertainment for which STX collected a distribution fee and some back-end profit… STX's most recent release, 'Poms,' grossed $13.6 million at the box office in May in a distribution deal with producer eOne. STX took on the cost of prints and marketing. Another spring release, 'Best of Enemies' starring Taraji P. Henson and Sam Rockwell, took in just $10.2 million on a $10 million production budget.

"But the most painful misstep came with a May [2019] release of star-studded animated feature 'UglyDolls,' which cost roughly $95 million between production and marketing spend and brand tie-ins and brought in only $26.4 million worldwide. The studio had hoped for a hit that would become a franchise based on the popular children's toys… The studio's financial difficulties are one in the latest in a string of indie studios to struggle or fade from view in the last few years — including Open Road, The Weinstein Company, Relativity and Annapurna — as Hollywood has become dominated by superhero franchises and a wave of major studio consolidation." TheWrap.com, July 7, 2019. Yet, every part of the U.S. theatrical motion picture is challenged.

Even the greenlighting of those Hollywood blockbusters has changed. Making a move based on the presence of a movie star has been replaced by hot titles and subject matter recognized by the general public as well as the presence of a very, very few hot directors. The era of "first dollar gross" actors has pretty much been relegated to the history books. With the new mindset of younger audiences, used to hyper-accelerating change, their "what and who is cool next" perspective has decimated the movie star system. "Star" actors who survive tend to eschew the leading man/women cachet of old in favor of becoming character actors creating a *new-next* persona in each film they pursue.

Without independent films, however, there is simply not enough product to fill the over 40,000 screens in the United States. Experts suggest that we are 15,000 screens too many. Given the high production costs, the number of super-high-production value films is of necessity limited, so theater owners have been having a terrible time, saved only by one record-breaking blockbuster – *Avengers: Endgame.* "AMC Entertainment as the world's biggest exhibitor, felt the burn from a series of flop films and underperforming blockbuster hopefuls during its most recent [first] quarter. The company's revenues fell 13.2% to $1.2 billion, while the company suffered an adjusted loss of $1.21 per share. It also recorded a net loss of $130.2 million…

"The movie business was in a funk for the first three months of 2019… AMC wasn't the only chain to see its fortunes fade. U.S. movie admissions slid 14.9% in the first quarter to 265.6 million and box office receipts plunged 16.3% to $2.39 billion. AMC did manage to outperform the industry — its domestic attendance per screen only declined 10.1% in the first quarter of 2019." Variety.com, May 9, 2019. Strange. The exhibition business needs films, there are lots of screens available virtually any time of the year, but with all the entertainment alternatives, indie films still underperform to the point of near extinction. But wannabe filmmakers are out there, shaking the trees for production financing.

Even some of those expensive, effects-laden Hollywood franchises seem to be unable to impress a jaded audience with too many entertainment alternatives. The less-then-expected performance this May of this year of Warner Bros' *Godzilla: King of the Monsters* (opening at disappointing $49 million domestically – almost half of 2014's *Godzilla* [$93 million] and behind even 2017's *Kong: Skull Island* [$61 million]) followed immediately, in June, with of Fox/Disney's *X-Men: Dark Phoenix* (the worst opening for an X-Men franchise), Sony's *Men in Black: International* (opening at slightly above half the U.S. box office of prior MIB films) and Universal/Illumination's *Secret Life of Pets 2* (generating 15% less than the original) remind us that success is anything but consistently automatic even for those mega-budgets studio films.

Are consumers experiencing "franchise fatigue," as some pundits suggest? Then along comes a blockbuster opening, a $185 million Fourth of July U.S./Canadian box office – *Spider-Man: Far from Home* – suggesting that there might be more to these audience shifts than a simple "franchise fatigue" explanation. Perhaps, because It was uniformly viewed by critics and audiences alike as a high-quality film and was a necessary part of the continuing saga of the Marvel Universe. Audiences are still willing to go… "if"… and that's the question. If it's hard for major studios, it's ever so much harder for indies, but wannabe filmmakers are out there, shaking the trees for production financing.

And that leads to another dreaded plague in indie-land. Too many lawyers – who are in the "everybody does it" school – also seem to forget that raising passive equity money to finance film production and/or distribution is usually subject to federal securities and state Blue Sky laws and regulations. There is no entertainment industry exception. And filmmakers continue to have a "my film is an obvious success" mentality that has them telling investors all kinds of "facts" that fly in the face of contemporary statistical realities. Will lawyers involved in such financing efforts find themselves as the guarantors of success to the relevant investors? Bankruptcy may not be available to those who are accused of skirting these statutes and regulations. I'm skipping over that "felony" thang, because enforcement at that level is generally relegated to extreme abusers.

But raising passive equity by hyping a nascent film project in an obviously down market for indies has never been this legally risky.

So, what happens today to indie filmmakers here in the United States. For very low budget productions, the ability to show content via one or more online services at least gets a filmmaker a shot at building credibility. But the online world seems to have genuine mass-audience slots for a very few filmmakers – well-established superstar creators and those who have weathered the film festival circuit and come out with accolades. Maybe not even those creatives. What really generates values in the new streaming world: *series*. A word that is the new focus of just about everyone in Hollywood these days.

"Reality" and semi-scripted series – docuseries, competitions, talk shows, voyeuristic celebrity showcases, variety programming, eSports, etc. – have lost some of their cachet from too many years of oversupply, relegating the most of programming that does get produced to the bigger program suppliers and well-established creator/executive producers. Budgets get bigger as competition increases, and newbies are often forced into tiny participations for their original ideas as the big boyz and girlz eat most of the pie. With luck and time, some of these newbies rise into the system.

The hot commodity: scripted series. There were an estimated 487 scripted series (cable, satellite, terrestrial, digitally-transmitted) in the U.S. market last year; a projected 520 for calendar 2019. This is way, way above the 140 series that the U.S. audience consumed thirty years ago, and since the population has not grown proportionately, except for the biggest such productions, the average revenue per series today has plunged proportionately. The crowded aftermarket also has contracted the value of that "long tail" everyone continues to discuss. Traditional 22-26-episode order patterns have dropped to 13 or fewer for an entire cycle, a challenge to talent pay levels. Fewer and lower paychecks for most…

That said, some of the numbers paid to produce scripted series seem a whole more like feature numbers. Let's hear it for the bell curve and the fact that premium product in the sweet spot has never been hotter. We were all shocked with the initial season (2013) of the Netflix hit, *House of Cards,* commanded a whopping $3.9 million per episode produced. A massive premium above the cost of production replaced the potential for upside. Netflix has since dropped their upside structure – now mostly fixed fee premium bonuses based on series that go beyond the first cycle – and there is no percentage upside accorded on any of their productions.

But that dramatic $3.9 million soon became dwarfed when extremely high-production value series, like HBO's *Game of Thrones,* cost $9-$10 million an episode to make in the first year, with rumors of individual episodes costing as much as $20 million in subsequent cycles. Whew! For A-titles at the tip of the bell curve, the sky seems to be the limit. Hot TV creators were offered tens of millions of dollars to take their talents into the digital streaming world, leaving behind their old-world telecasters.

Indie filmmakers take note: if you morph your passion for making two-hour movies for theatrical release, a business that is all but gone, into a storyline that can continue, perhaps for years, you just might soar. Learning to write bibles (summaries of characters, scene, continuous story vectors with outlines of five or six episodic storylines) and the pilot teleplay are the "next-gen" skills that writers need to embrace. Hint!

Writers writing originals for theatrical films, not based on preexisting hot intellectual property that they own or control, need to know that their two-hour screenplays are little more than writing samples. Why? Without preexisting name recognition, especially in the United States, the extra marketing cost to create that awareness, always a risk anyway, is often in the tens of millions of dollars over the tens of millions already needed to open a film in the U.S. that already has that awareness. Majors can spend $30 to $80 million (or more) toward a single U.S. theatrical release. Television/digital programmers don't have those marketing costs, so they are a more open to such content (they just need some "names" – actors and/or a hot director to vindicate their choice). There is also another path.

Turn it into book, place that book into the market and pray (prey?). Example: picture *Fifty Shades of Grey* as an original script seeking a studio production deal. No shot! Zip! Nada! Rejection city! Self-published as the very successful first book of a trilogy, studios were tripping all over themselves for the film rights. To date, that trilogy has sold over 125 million books worldwide. English author, E. L. (Erika) James, a former studio manager's assistant at the National Film and Television School (Beaconsfield), sold those film rights, with real upside, for a fortune.

As we shall see in my section on Consolidation below, increasingly, the definition of percentage upside for television production is vaporizing, particularly as streaming services do not want to report viewership or be forced to track exploitation revenues. In feature distribution, "net profits" have become an illusory waste of paper. Replaced by more meaningful definitions of "breakeven" often embellished with box office bonuses as advances against percentage upside, it still remains that except for that short list – *my category of five* types of films listed above – the probability of significant upside from a theatrical film appears to be relegated almost exclusively to the majors and their specialty labels.

Bottom line: the places where talent can expect to make huge salaries and upside may still exist, but those opportunities are rare and far between. For most of us in this industry, we are going to work twice as hard to make half as much on the rest. The individual units of production have multiplied, but the audience has not. So, while aggregate earnings across the entire spectrum may have gone up, it is spread across a vastly greater pool of content. There are still big winners, but under the law of averages most of us will make content for less, a factor that only will be multiplied by my next section.

IV. Consolidation.

JASON BLUM

Producer, *Get Out, Whiplash*

"I've never felt the nervous energy in Hollywood that I've felt over the last 12 months, and it increases every day. There's an uncertainty about the future, because the change is happening in an incredibly dramatic way… I make a show for Apple. They sell a million more phones — how are you ever going to connect those two things? With Amazon and Apple, they don't ever have to be just in a profitable business on movies and TV shows. That's crazy! And it makes people go nuts, because people have worked so hard to put a business model around content, and now they're competing with people who don't need to make that profit." NY Times, June 20, 2019

The future seems to belong to those who control the most content. Netcasters like Netflix, Amazon and Hulu have staggering values, easily competing with old-world content monoliths. With 5G mobile access just around the corner, the ability to view elegant, rich media content, delivered with almost no latency at download speeds that *start* at 10 times 4G speeds, being able to provide massive of "whatever I want, when and wherever I want it" has become a corporate goal for major media players around the world. Younger eyes – Y and Z generation – have no issues with a small, smart phone screen… older viewers, it's a push! Tablet-size?

But is there a limit? Consumers are being charged left and right for online/mobile subscription fees while some streamers have managed to bury those fees with bundled packages (internet carriers/mobile providers, Web-retailer/streamer Amazon, etc.). Cable is/was expensive, but is the aggregation of cord-cutting alternatives turning out to be even pricier? Add an expected recession, and will the cord cutters start paring their selections to just a few "vital" services? Those with the most "best" content? Will AVOD (advertiser-supported video on demand streaming) grow? Or will advertiser skepticism and more reflective metrics create further credibility, and hence revenue, challenges there too?

We all sense that the numbers on the wall for traditional pay television are not particularly encouraging; many such services have added digital subscription services (OTT, over-the-top) as insurance policies. "Subscriptions to traditional pay TV remained flat at 65 percent, says [accounting/consulting giant] Deloitte [in the survey noted below], which changed the way it asked about pay TV, so the 2017 data is not directly comparable to 2018's… Many households (43 percent) have both pay TV and a streaming subscription. More than half (52 percent) of Generation X consumers (ages 36-52) do.

Let's start with the big picture: "Last year, half of Americans aged 22 to 45 watched zero hours of cable TV. And almost 35 million households have quit cable in the past decade… All these people are moving to streaming services like Netflix (NFLX). Today, more than half of American households subscribe to a streaming service… The media calls this 'cord cutting.'

"This trend is far more disruptive than most people understand. The downfall of cable is releasing billions in stock market wealth… Combined, America's five biggest cable companies are worth over $750 billion. And most investors assume Netflix will claim the bulk of profits that cable leaves behind… So far, they've been right. Have you seen Netflix's stock price? Holy cow. It has rocketed 8,300% since 2009, leaving even Amazon in the dust…

"But don't let its past success fool you… Because Netflix is not the future of TV. Let me say that one more time… *Netflix is not the future of TV*… But for now, let's talk about Netflix's biggest problem…Netflix changed *how* we watch TV, but it didn't really change *what* we watch… Netflix has achieved its incredible growth by taking *distribution* away from cable companies. Instead of watching *The Office* on cable, people now watch *The Office* on Netflix.

"This edge isn't sustainable… In a world where you can watch practically anything whenever you want, dominance in distribution is very fragile… Because the internet has opened up a whole world of choice, featuring great *exclusive* content is now far more important than anything else…

"Netflix management knows content is king. The company spent $12 billion developing original shows last year. It released 88% more original programming in 2018 than it did the previous year… And spending on original shows and movies is expected to hit $15 billion this year… It now invests more in content than any other American TV network… To fund its new shows, Netflix is borrowing huge sums of debt. It currently owes creditors $10.4 billion, which is 59% more than it owed this time last year." Stephen McBride writing for Forbes.com, May 21, 2019.

You mean make or break content like HBO's *Game of Thrones*? Or like that massive accumulation of content that Disney controls that will soon be Netflix worst nightmare? We know. Traditional television is fading fast. Content consumption patterns are changing almost as fast as the weather. Through all of this, Netflix continues to borrow heavily, debt predicated on continued growth. But what happens when a market gets saturated – not very many households left to sell – or new competition puts pressure on pricing and choice? See some serious issues down the road for Netflix? Exactly how fast is all this going to happen anyway? Faster than most think.

"Traditional pay-TV subscriptions do continue to trend downward. Last year, the major pay-TV providers lost about 2.9 million subscribers, after accounting for about 640,000 new subscribers to streamed live TV services such as Sling TV and DirecTV Now, according to Leichtman Research Group. Overall 89.1 million subscribe to pay TV, down from 92 million in 2017, the research firm says." USA Today, March 19, 2019. But it's not just the major pay services that are suffering; it's a macro-trend. And entertainment conglomerates are more than acutely aware of these changes, as I will illustrate in greater detail later.

As we have seen, most recent reports illustrate how "cord-cutting" is just accelerating across the board, and clever repackaging into fewer available networks ("skinny bundles") isn't stemming the hemorrhaging. "The pace of cord cutting is continuing to accelerate this year, according to a new Convergence Research Group report, with 4.56 million TV households opting to ditch pay TV. By the end of the year, 34% of U.S. households won't have a traditional TV subscription, according to the research company's latest 'Battle for the American Couch Potato' report.

"In the report, Convergence estimated that the pay TV industry will see a 5% decline in pay TV subscribers in 2019. That's up from 4% in 2018, when an estimated 4.01 million U.S. subscribers ditched their TV service. Based on the top 66 online video services, the number of streaming subscribers will actually surpass the number of traditional pay TV subscribers this year (households can subscriber to both).

"Attempts to convert cord cutters to skinny bundle subscribers won't pay off for the industry, Convergence predicted. 'With ARPU [average revenue per user] half the traditional TV average, lackluster margins, programming gaps and technical issues, live multichannel OTT provides little counter to category killers Netflix & Amazon that sell at lower price points and essentially without advertising,' the report outlined. 'We believe a number of OTT plays, including large and niche, will fail due to insufficient subscriber traction, cost, and competition.'

"Altogether, online video services are poised to bring in $22 billion in 2019, up from $16.3 billion in 2018, according to the report. Last year, that revenue already grew by 37%. However, even with this growth, traditional pay TV is still expected to bring in more than 3 times as much money per household, and more than 4 times as much across the entire industry, as much as over-the-top video." Variety.com, April 22, 2019

Desperation is driving some providers to attempt to stem their losses by increasing the prices of even their cheapest skinny bundles, which in turn drives away potential subscribers. "The price for the cheapest DirecTV Now bundle went from $35 to $40 last summer, and the telco phased out virtually all of its promotional pricing, which allowed some wireless subscribers to stream DirecTV Now for as little as $10 per month.

"The latter already contributed to significant defections over the holiday quarter. Over the past two quarters, AT&T lost a total of 350,000 DirecTV Now subscribers. It's likely that the service will see additional cancellations from price-sensitive customers in the coming months: AT&T further increased the price of the cheapest DirecTV Now bundle to $50 per month in April…

"[Even] new entrants [like Hulu and YouTube TV] may not be immune to defections as the prices for these so-called skinny bundles are getting fatter across the board. Sports-focused fuboTV announced a $10 price hike in March, and Hulu and YouTube TV both raised their prices by $5 over the past couple of months.

"These massive pay TV defections are increasingly impacting the media industry at large. Discovery reported a 4% decline in subscribers to its cable networks for Q1, despite the addition to online TV bundles… [Research firm, BTIG, LLC's analyst Richard] Greenfield expects that cord cutting will also 'negatively impact broadcast and cable network programmer retrans/affiliate revenues' in the current quarter. And he doesn't expect online TV bundles to make up for those losses, despite the fact that programmers get paid more per online subscriber since 'churn is dramatically higher' for online bundles." Variety.com, May 3, 2019. The ship is sinking, and moving the leaks around isn't going to reverse the obvious.

The trends are even more pronounced, particularly as you look at millennials and Gen-Z: "For example, 70% of Gen Z households had a streaming subscription, closely followed by millennials at 68% and Gen X at 64%. About 70% of Gen Z and millennials stream movies compared with 60% of Gen X viewers on a weekly basis. Some 96% 'MilleXZials' multitask while watching TV." Variety.com, March 20, 2019.

When you mix in the general population, the streaming numbers are less pronounced. "Parks Associates' OTT video research finds household spending on subscription OTT video services has held steady for three years, averaging just under $8 per month since 2016. Given the growing adoption of OTT video services over the past three years, these figures suggest that adoption of multiple services or expensive services by some consumers is offset by a larger base of consumers who either subscribe to one or two relatively inexpensive services, including 30 percent of consumers who do not spend any money on OTT video services." MENFN.com, March 20, 2019. For those households with streaming services, they average a much larger $38 per month, which is growing fast.

Thus, it is clear that television as a medium is rapidly migrating into "all digital," mostly as a subscription-fee-supported format (streaming video on demand, SVOD) with some AVOD and hybrid subscription/advertising platforms in the mix. AVOD is sneaking up on the industry with some surprising numbers. Streaming service Hulu is an A/SVOD hybrid, but "the majority of Hulu subscribers are on the $5.99-per-month ad-supported plan, which is half the price of the $11.99 no-commercials version." Variety.com, May 29, 2019. Is this a reflection of increasing consumer price-sensitivity?

Deloitte examined these Web-delivered-content trends in its latest and 12th annual Digital Media Trends survey released on March 19, 2019, which polled 2,003 American digital consumers from December of last year through February of 2019. 69 percent of those surveyed subscribed to at least one SVOD service (up from 55 percent last year), with the average such consumer subscribing to three.

"Even as more consumers subscribe to video delivered over the internet, nearly half (47 percent) of those surveyed say they are experiencing subscription fatigue… There's now more than 300 streaming services to choose from – up from 200-plus a year ago – and consumers may be feeling overwhelmed, says Kevin Westcott, Deloitte's vice chairman for U.S. telecom, media and entertainment.

"'Well over half (of consumers) say they are frustrated when shows they like disappear or are no longer on a streaming service and that they have to have multiple subscriptions to get what they want,' he said. 'So there is a little bit of subscription fatigue.'

"Those consumer sentiments could concern a marketplace that's bracing for the arrival of two major players later this year – a Disney+ subscription service with Disney, Pixar, Lucasfilm and Marvel movies and original TV series, and an AT&T offering with HBO [to be available online solely through Warner's nascent streaming service] and other Time Warner content – and an NBCUniversal subscription service in early 2020.

"Also growing: subscriptions to streaming music services such as Spotify and Apple Music (41 percent, up from 26 percent a year ago), and video game services including Xbox Live and PlayStation Plus (30 percent vs. 26 percent last year).

"These consumer behaviors could lead streaming providers to develop 'the next generation of the home entertainment platform,' Westcott said. Such services would have coveted original content, but also 'a broad swath of entertainment options inclusive of music and games,' he said. 'It may not be their own content, but they have to have that available to try to keep me under their umbrella.'" USA Today.

Streaming is big business and getting bigger, $2.1 billion a month here in the United States. These numbers are great motivators. Fatigue or not, there is a rush among entertainment conglomerates, with the cash and credit to engage in the race, to aggregate as much content under one roof as possible. They believe that this is the way to ensure that as consumers ultimately pick and choose which services to keep and which to cut, these massive content providers will be on that "must subscribe" list.

But then why is CBS, which has its eyes on its former owner Viacom, offering Lionsgate $5 billion for that mini-major's Starz pay television channels? Until that offer, Lionsgate's stock had plunged 40% in a single year, analysts saying it failed to replace aging motion picture and television franchises. Without Starz, what is Lionsgate anyway? It is an offer that's simply too good to ignore, but what exactly would Lionsgate do that substantial sum? If they couldn't manage to create value for the rest of the company, what would their business plan be going forward without their greatest asset?

For CBS? It's content, library fare and original series. And content, even from an old-world pay service, can easily migrate to a full-digital only stream. Lionsgate countered at $5.5 billion, and the deal slid from view. Permanently? Who knows? CBS then turned its attention to acquiring its former parent, Viacom, which owns Paramount, Nickelodeon, the MTV Networks to name just a few of its assets. CBS is hungry. It's main network (broadcast and its streaming component) plus Showtime (pay television) just aren't enough to compete with the rising streaming behemoths. So…. Time will tell who the winner and losers are, but consumers are getting new ways to receive content.

There are future trends suggesting that consumer demand for content is likely to escalate as 5G mobile services come online and as Uber, Lyft and driverless cars give passengers even more time to consume content. The volume of such content offers opportunity, but that same volume suggests that the revenue margins will only get thinner. Some are predicting that the chopping up of a consumer day, clearly referring to changing commuting patterns, will give rise to greater demand for short-form audio-visual content, mostly intended for small-screen smart phones. Certainly, Jeffrey Katzenberg's and Meg Whitman's billion-dollar Quibi is being built on that assumption. One way or another, the world of content control seems increasingly divided between buyer/aggregators and exit strategy sellers. Existential.

That little mobile-viewing trend just might not be so little, and 5G is going accelerate the transition. "In the United States, adults will spend an average of 3 hours and 43 minutes each day on their smartphones, feature phones and tablets this year, eight more minutes than they'll spend watching TV, according to a forecast released [June 5, 2019] by research firm EMarketer.

"The change has been years in the making, as smartphones have become nearly ubiquitous and the ways people use their devices have shifted. Phones now let you do more than steal quick glances at social media, and streaming shows and movies on the smaller, portable screens has become commonplace… 'There is far more content today than there was even a couple of years ago,' said Monica Peart, a senior forecasting director at EMarketer, referring to the growth of streaming platforms such as Netflix and Hulu. 'All of this is driving the need or desire to be on the smartphone.'

"The gap between the amount of time spent on mobile devices and TV has narrowed dramatically over time. Last year, American adults spent nine minutes more watching TV than looking at their phones and tablets, EMarketer said. But TV watching used to be more dominant; just five years ago, adults spent two hours more watching TV than using mobile devices, the firm said.

"The forecast follows other reports, including one by Nielsen, that indicate audiences are spending less time with traditional television. In the third quarter of 2018, Nielsen said, American adults on average spent 4 hours and 14 minutes each day on live or time-shifted TV, 11 minutes less than a year earlier. Time spent on apps and the web on smartphones and tablets in the third quarter was 3 hours and 14 minutes, 17 minutes more than a year earlier, Nielsen said." Los Angeles Times, June 6, 2019. Which content will benefit most from the migration to this small screen? Too much content? Confusing to consumers? Overwhelming? A big shakeout? Time will tell.

While this article has focused mostly on audio-visual content, there are lessons to be learned from our neighbors in the music business. Just as digital delivery is altering the film and television industry in a huge way, changing the landscape on access to audiences and slowly replacing older models, the Napsterization of the music industry moved the big bucks for major artists to live performances – hmmm, sort of like the domination of the theatrical world (especially in the U.S.) by high-production value/"must see" motion pictures; the rest have found "new TV" – and almost totally replaced physical compact discs with downloads and increasingly rapidly by streaming services.

From a "moribund and falling" music business model two plus decades ago, the transitional growth in digital delivery has been monumental in recent years. "The global recorded music market grew by 9.7% in 2018 — its fourth consecutive year of growth — to $19.1 billion, according the latest annual report from the International Federation of the Phonographic Industry (IFPI).

"Streaming revenue grew by 34.0% and accounted for almost half (47%) of global revenue, powered by a 32.9% increase in paid subscription streaming, according to the report. There were 255 million users of paid streaming services at the end of 2018, with paid streaming accounting for 37% of total recorded music revenue. Growth in streaming more than offset a 10.1% decline in physical revenue and a 21.2% decline in download revenue." Variety.com, April 2, 2019.

Ah… it is clear that glomming on to content, volumes and volumes of it, is increasingly viewed by the behemoth entertainment conglomerates as their only path to survival. Owners of digital systems are be equally aware that having lots of branded content could well be the key to keeping consumers on their networks. And so it is and has been for a while.

Comcast bought NBC/Universal including all of its basic networks. AT&T bought DirecTV and then Time Warner (now WarnerMedia, which includes Turner, CNN and HBO). And then there's the voracious Disney: In 1996, Disney bought Capital Cities/ABC for $19 billion, in 2006 Disney acquired Pixar for a combined stock and cash value of $7.4 billion, in 2009 it picked up Marvel for $4.3 billion (in 2013, $100 million more to buy out distribution rights to a few Marvel titles held by Paramount), buying Lucasfilm in 2012 for $4.06 billion, but the piece de resistance, 21st Century Fox (minus the Fox lot and some broadcast assets retained by the Murdoch family and their shareholders), was acquired by Disney for a whopping $71.3 billion.

The driving force behind such massive acquisitions? CEOs watched nothing entertainment companies grow so fast that their values equaled or exceeded the values attributed to entire major studios. Streaming and the extreme values that both Amazon and Netflix generated in a very short period of time. From its founding in 1997, Netflix has grown into the largest streaming service in the world, about 150 million subscribers worldwide as of this writing.

"Netflix — whose name has practically achieved verb status — was the fastest-growing brand from 2018-19 among American companies, according to a new study by Brand Finance, a global brand-valuation consulting firm.

"The streamer's estimated brand value more than doubled over the past year, growing 105%, to $21.2 billion, per the study. Brand Finance calculates values of brands using 'royalty relief' methodology, which involves estimating the likely future revenue that are attributable to a brand by calculating a royalty rate that would be charged for its use." Variety, March 28, 2019. The very word, "Netflix," send quivers of fear and anger through the bodies of big-company CEOs in the entertainment industry. Time Warner, Disney, Comcast, and AT&T CEO's were no exceptions. Obviously. They were playing catch-up, and they clearly did not like dealing from so far behind.

There's a lot of competition brewing, and many believe that has Netflix maxed out, at least in the U.S. market. The PwC Global Entertainment & Media Outlook 2019–2023 (released June 5, 2019) said it simply: "Netflix appears to be nearing its peak subscriber point in the U.S… The first-mover advantage in streaming video that Netflix has capitalized on to date continues to be eroded, as the industry begins to fragment, with more and more companies entering the market, from pay-TV heavyweights to specialized, niche players." The recent acceleration of major corporate mergers and acquisitions in the entertainment space seemed to be focused on building streaming competition. The dollars involved were staggering.

After the Fox acquisition in March of this year, which required approval from governments all over the world, Disney controlled a full 27% of the U.S.-based theatrical motion picture industry, picked up a greater ownership share of Hulu (in May, it subsequently closed a deal with Comcast to buy the rest) and began a push to create a new streaming service able to compete with Netflix.

In the course of its negotiations to acquire Fox, facing competition from Comcast, Disney was forced to up its bid by $20 billion, and that extra cost literally pushed Disney to justify that extra sum by generating extra revenue fast – not really possible – or by slashing costs every way it could. In March, when the acquisition closed, it announced an immediate cut of Fox/Disney employees from top to bottom of an initial 4,000 employees, with experts predicting at another 3,000 would be let go in the near term. Disney issued a "layoff" warning on May 15, 2019.

With the two most profitable motion picture franchises in history, *Avatar* and the recent *Avengers: Endgame*, ownership of Hulu, you'd think Disney is just killing it: "Conventional wisdom may hold that the Walt Disney Co. has been firing on all cylinders, with its $71.3 billion partial merger with 21st Century Fox closed, streaming service Disney+ on pace to launch Nov. 12 and *Avengers: Endgame* rewriting the record books. But there are signs that a perfect storm of (gasp!)

mediocrity for the $240 billion conglomerate may be on the way thanks to digital investments and the film calendar — at least for the short term.

“Disney CFO Christine McCarthy disclosed May 8 that the creation of Disney+ and ramp-up of ESPN+ will dent operating income to the tune of about $460 million in the current quarter alone. The company intends on spending about $2.5 billion on original and licensed content for Disney+ in fiscal 2020, rising annually to $4.5 billion in fiscal 2024. Peak operating losses for the upcoming streamer are expected from 2020 to 2022 before it hits profitability in 2024. Oh, and its $400 million investment in Vice Media is essentially worthless.

“These digital expenditures will occur as Disney services its debt load, which swelled to $57 billion post-Fox, and as its TV business suffers from 2 percent annual cord-cutting (operating income at Disney Media Networks fell 3 percent in fiscal 2018). Plus, CEO Bob Iger [completed a purchase of the remaining non-Disney stake in Hulu, which required] Disney to shell out about $5 billion to purchase Comcast's one-third stake in that streamer.

“‘The costs are definitely making their way to the financial statements,’ says Moody's lead analyst Neil Begley. ‘I'd say Disney is entering a high-scale investment cycle, and they'll eventually feel a hangover.’ And Disney may also have to contend with a (relatively!) soft 2020 film slate, with *Avatar 2* pushed a year to Dec. 17, 2021, while the next *Star Wars* movie won't debut until Dec. 16, 2022.” HollywoodReporter.com, May 13th. Are you listening, entertainment bar?! How do studios respond to such pressures in their deal-making?

Here’s another little tidbit apparently under consideration, how Disney may well deploy its new and massive leverage against competitive program suppliers with their Hulu streaming service: “Most shows in the future will originate from Disney-owned studios, but where another studio wants to sell a show to the service, Hulu will ask that a Disney shop (like ABC Studios or 20th Century Fox Television) come on as co-producer, ensuring long-term profit sharing.” SeekingAlpha.com (investment analysis), June 21, 2019.

And then there’s the combined WarnerMedia AT&T debt of $170 *billion* generating somewhere around $6.7 *billion* a year in interest payments alone. It’s no secret that this new conglomerate is putting together its own massive layoff and cost-cutting plans. Turner, CNN and HBO, part of the WarnerMedia group, have already offered buyouts to long-standing employees willing to leave their companies early. Having passed global judicial and administrative reviews with little resistance, these combinations are here to stay.

Even with a very successful final season of *Game of Thrones* (WB/HBO), the post-merger world of AT&T/WarnerMedia did not begin with numbers that made anyone feel good, well beyond the massive debt noted above. With all the expect red ink, all that debt, AT&T needed to ramp up its cash flow. In March of 2019, “AT&T [began] overhauling its DirecTV Now pricing and packaging strategy — including hiking prices for existing customers by $10 across the board — a move that could lead to more subscriber losses for the company's flagging pay-TV business.

"At the same time, AT&T [announced that it] is launching two new DirecTV Now packages: Plus, at $50 per month for up to 46 channels; and Max, $70 per month for up to 59 channels. Both include AT&T-owned HBO, HBO Family and HBO Latino along with networks from WarnerMedia (Turner), NBCUniversal, Disney and Fox, and exclude channels from A+E Networks, AMC Networks, Discovery and Viacom." Variety.com, March 13, 2019. The old DirecTV packages were no longer available to new subscribers. A little over a month later, the initial results were in.

"AT&T missed on the top-line with first quarter 2019 sales coming in under Wall Street targets. DirecTV continued to bleed subscribers — including a net decline of 83,000 DirecTV Now customers — partially offset by 3.3% revenue growth at WarnerMedia although sales in the media segment were lighter than analysts expected.

"The telco's revenue for Q1 of 2019 was $44.83 billion, with net income of $4.10 billion (down 12% from $4.7 billion in the year-ago period). Adjusted earnings per diluted share were 86 cents. Wall Street analysts' consensus estimates were revenue of $45.1 billion and EPS of 86 cents.

"WarnerMedia revenue of $8.38 billion was up 3.3% year over year, below analyst estimates of $8.45 billion. Each division reporting operating income gains. Warner Bros. operating income was up 42.8% on theatrical revenue gains of 12.7% (largely from 'Aquaman' carryover); Turner was up 7.0%; and HBO grew 6.0% year over year.

"HBO revenue declined in the 7% in first quarter, to $1.5 billion, which was related to its ongoing carriage dispute with Dish Network since November 2018, according to AT&T. Turner revenue was down 0.4% in Q1, to $3.4 billion; Turner ad revenue dropped 6% in Q1, which AT&T said was primarily due to the shift of NCAA Final Four games (which occurred in Q2). Warner Bros. revenue was $3.5 billion, up 8.6% year over year.

"AT&T noted that the 'Game of Thrones' season 8 premiere broke HBO's viewership records — and the show drove record subscribers to HBO Now — and that DC Entertainment's 'Shazam!' has already grossed more than $300 million worldwide.

"Meanwhile, the AT&T Entertainment Group lost a whopping 544,000 net subscribers for DirecTV and U-verse TV, to stand at 22.4 million at quarter's end (down 2.4% sequentially). It dropped 83,000 DirecTV Now subs, declining 5.2% in the period to 1.5 million over-the-top customers, as AT&T ended promotional pricing and hiked rates for OTT subscribers. Revenue in the Entertainment Group (which includes AT&T's broadband and legacy wireline businesses) dropped 0.9%, to $11.33 billion, while operating income increased 12.9% to $1.48 billion.

"The company's key Mobility wireless segment generated revenue of $17.57 million (up 1.2% year over year), with a 4.5% decline in equipment sales offset by higher service revenue. Wall Street had pegged $17.65 billion in Q1 revenue for the segment. AT&T reported 80,000 postpaid phone net adds vs. 49,000 postpaid net adds in the year-ago quarter." Variety.com, April 25, 2019. Ouch!

Some said it was a tech/telco giant trying to compete in a non-linear story-telling world, an uncomfortable marriage at best. Would that mean that the Fox-Disney merger had a better chance, since Disney was well-established in the original content space? What would the WarnerMedia streaming universe – conveniently labeled "HBO Max" – look like, and how would it generate enough content to compete with Netflix and Disney+? Whatever the underlying story, the sheer dollars at risk put huge pressures on these new media structure at levels never experienced before in the entertainment industry. They also created new, mega-powerful combinations that seemed able to dictate massive competitive changes imposed on an already-terrified Hollywood. With a hint of desperation to "make it work" at all costs.

You can bet that Disney and WarnerMedia have already started looking very carefully at reducing what they pay to produce content – are you reading this, lawyers? – pay for people who do not generate more than their cost and the spend on overhead. It isn't going to be pretty, and it presents an opportunity, in a field of fewer networks and studios, for every such company in entertainment to pay less to providers and talent. It's all about the big boyz now. Even as Congress moves to level the playing field to favor consumers in some arenas, like reversing the F.C.C.'s elimination of "net neutrality" requirements – which reversal allows carriers to prioritize online transmission of content or delivery ("discriminate" or "play favorites" might be better descriptions) – pro-business-crony Donald Trump has promised to veto that effort.

Feeling the pressure yet, everybody? Consolidation, merger fever and new business growth, has also redefined the talent agency business. In the spring of 2019, as agents and the Writers Guild of America (WGA) battled over the greatest profit center for all the larger agencies – a percent of the aggregate budgets/license fees paid to such agencies as "packaging commissions" plus direct content ownership – television networks and program suppliers were grinning in the hopes of getting rid of those fees entirely. Let the agents go back to the 10% of talent and rights fees that they gave up in order to get the vastly higher packaging commissions. Laughing harder because everyone was already feeling the downward pressure on talent and rights fees and payments.

It was an old story, at least as far as Hollywood was concerned. Back in the 1960s, under the John F Kennedy administration, MCA/Universal found itself in a similar bind: an agency with a massive production capacity. "In the midst of the grand jury's [antitrust] investigation, MCA purchased Universal Pictures and its parent company, Decca Records. The government immediately went to court, seeking to block MCA's takeover of the corporation. However, after lengthy negotiations between attorneys for the Justice Department's Antitrust Division and MCA, a consent decree was issued and the case was considered closed. The litigation forced MCA to choose whether it wished to be either a talent agency or a production company. Considering that its production efforts yielded nearly ten times more money than the talent agency, the decision was an easy one: MCA dissolved its talent agency." Dan E. Moldea, *Dark Victory: Ronald Reagan, MCA, and the Mob* (Viking Press, 1986), Chapter One. Cut to: present day.

Relying on revenues from personal service income, money tied to the very personal relationship between agents (who are notorious job-hoppers) and individual talent, was not a business plan that Wall Street investors and fund managers found reliable. Celebrity and fame were hardly permanent, particularly in an era of changing values. Packaging entire television series and directly owning the content itself – asset-based structures – were the stuff financiers understood.

The larger and most powerful agencies had engaged in heavily-leveraged mergers and acquisitions, and the debt levels required a growth-directed business strategy. These agencies *needed* investors now! Some agencies carried *billions* of dollars of debt. If payment deadlines passed without extension, if interest rates climbed, they faced ruin. Loyalty to individual creative talent, starting with writers, was clearly no longer the driver of the "agency" business, perhaps now a misnomer.

Amidst all of this industry reconfiguration, larger talent agencies have taken on private equity partners, diversified into parallel businesses, are as much content producers and distributors, corporate consultants with marketing and data-metrics groups, etc., etc. To create liquidity, respond to their existing investor demands for higher-level rates of return and manage large tranches of debt with approaching payback dates, there has been a pressure to turn service-driven agencies into asset play.

On May 23, 2019, Endeavor Group Holdings, Inc. (the parent of the old-world William Morris and Endeavor legacy talent agencies/later WME) filed an S-1 (intention to file a public offering) with the Securities and Exchange Commission. Did underwriters Goldman Sachs, KKR, J.P. Morgan, Morgan Stanley and Deutsche Bank Securities think this was a good time for an initial public offering on the New York Stock Exchange or did Endeavor feel pressure from its lenders? What is Endeavor anyway? A talent agency or a lot more?

"'There are no other publicly traded companies like this,' says Matt Kennedy, senior IPO market strategist for Renaissance Capital. Kennedy points to the company's lack of free cash flow and a high debt-to-earnings ratio as potential red flags for investors.

"Endeavor is composed of a disparate set of assets — from Professional Bull Riders to the Miss Universe pageant to the Miami Open tennis tournament to the Frieze art fair franchise — which don't offer a lot of natural synergies to generate economies of scale. In its IPO pitch, Endeavor emphasizes WME's role as a wellspring for relationships with stars such as Dwayne Johnson, who can work across the Endeavor 'platform' to launch live event businesses, secure endorsement deals and licensing and merchandising pacts, as well as launch a YouTube channel and a production venture, all while WME helps him land top movie and TV roles…

"The financial figures disclosed in the company's prospectus filed May 23 with the Securities and Exchange Commission show that Endeavor is burdened by heavy debt, steady losses in some units, negative cash flow and big capital needs for start-up efforts such as Endeavor Content and Endeavor Streaming… After a spree of more than 20 acquisitions since 2012, Endeavor has more than doubled in size and now has 7,000 employees in 20 countries.

"There are questions about the long-term health of the company's single biggest driver of earnings, the mixed martial arts giant UFC. And WME, the agency that's central to Endeavor's strategy of leveraging its access to top-tier talent, is in the thick of a nasty fight with the Writers Guild of America that threatens a key source of income: TV series packaging fees [charging a percentage of the budget of production plus a hefty piece of the upside; the Guild forced writers to fire their agents who would not accept a new code eschewing packaging fees in April of 2019]. The sudden loss of WME's writer clients in April, amid the industrywide dispute, underscores the volatility of the talent representation business." Variety.com, June 4, 2019. That talent agency war with the Writer's Guild would seem challenging to say the least.

The working relationship between agencies (represented by the Association of Talent Agents – ATA) and the WGA had been governed for 43 years by a negotiated Artists' Managers Basic Agreement. When that agreement expired, the Guild set about trying to force the agencies to restore their primarily loyalty to the creative individuals behind everything Hollywood does. They demanded a new code of conduct from agencies. Packaging commissions and the ability to fund, operate and own production companies was, in the eyes of the WGA, an unsustainable conflict of interest. To the agencies, not being able to engage in this lucrative aspect of the entertainment industry represented an inability to attract and hold traditional investors, now desperately needed to support these huge new agency-based combinations.

Litigation between the Guild and ATA-member agencies intensified. Challenging traditional statutory and judicial antitrust exemptions accorded labor unions, agency giants WME, CAA and UTA claimed that the WGA had stepped outside of that exemption and was exerting unprotected market manipulation.

As of this writing, WGA has forced their members to fire their agents and attempted to allow lawyers and personal managers to negotiate for writers without licensed talent agents in the mix. But under an obviously archaic law, California forbids entertainment employment deals from being secured, or even negotiated, by anyone other than licensed talent agents… even by fully-licensed lawyers. While New York's restrictions are less draconian (but woe to the NY lawyer who sends a client to California to work without an agent in the mix), the ATA announced to the world that they would inform the California Labor Commissioner (or its NY counterpart) as to lawyers and managers who were violating the law. Aside from being able to issue "cease and desist" letters, the California Labor Commissioner has let it be known that where there were such employment transactions, such unlicensed representatives were not entitled to be paid. Ugly! More disruptions seared through the entertainment universe.

The industry also found other material consumer patterns changing. Competition? Apples, oranges and video games? According to the April 11, 2019 Variety, "In a study of 94 countries, Eurodata estimated that average daily TV viewing time in 2018 was down only one minute from the previous year, although that number varied significantly from territory to territory – in the U.S. it decreased nine minutes, whereas in parts of Asia the number grew.

"According to Eurodata Worldwide vice president [Frédéric] Vaulpré, 'If we put this into perspective by looking at how these figures change over the long term, in the most recent years, viewing times around the world are down slightly, but are still at a comparable level to the early 2000s. The American continent and Europe have broadly exceeded the global average since the beginning of the 1990s. Over the last 25 years, daily viewing time has been stable in North America and has even increased in South America and in Europe. TV is in good health and is also benefitting from new consumer practices.'"

Nevertheless, there are little hints in those numbers. Nine minutes less in the U.S.? What does that really mean? Netflix sees the real competition for eyeballs only in part from other television programmers… but also from the massive growth of online video gaming. Gamers now average in their mid-30s and are 45% female. Netflix' January 17, 2019 shareholders' report is remarkably candid, making a special reference to the changing competitive landscape: "In the U.S., we earn around 10 percent of television screen time and less than that of mobile screen time,' the report states, noting 'a very broad set of competitors.' Then comes the line, 'We compete with (and lose to) *Fornite* more than HBO.'… According to ***Deadline***, which cites Neilsen estimates, *Fortnite*, a free-to-play game with in-game purchases, generated the most annual revenue of any game in history, $2.4 billion in 2018…

"Video games, in summation, shouldn't be written off. Do you know what the most lucrative piece of entertainment of all time happens to be? It's not a movie or a TV show. It's a video game, *Grand Theft Auto V*, which last April had **sold more than 90 million units** (roughly $6 billion). Now, gaming sales and movie ticket sales aren't exactly comparable statistics, but it's still an impressive number that is routinely lost in this conversation." Nick Romano writing for the January 18, 2019, ew.com (Entertainment Weekly). Nine minutes… and falling.

But competition battles are not just among and between entertainment conglomerates, governments and consumers. There are other forces seeking to redefine entertainment creative relationships from the ground up. Unions and trade associations, long used to some level of statutory and/or judicial relief from antitrust laws may not be happy with governmental agencies deciding to take another look at an industry that Donald Trump appears to hold in particular disdain. Try this little battle on for size: "The Justice Department has warned the Academy of Motion Picture Arts and Sciences that its potential rule changes limiting the eligibility of Netflix and other streaming services for the Oscars could raise antitrust concerns and violate competition law.

"According to a letter obtained by *Variety*, the chief of the DOJ's Antitrust Division, Makan Delrahim, wrote to AMPAS CEO Dawn Hudson on March 21 to express concerns that the new rules would be written 'in a way that tends to suppress competition… In the event that the Academy — an association that includes multiple competitors in its membership — establishes certain eligibility requirements for the Oscars that eliminate competition without procompetitive justification, such conduct may raise antitrust concerns,' Delrahim wrote.

"The letter came in response to reports that Steven Spielberg, an Academy board member, was planning to push for rules changes to Oscars eligibility, restricting movies that debut on Netflix and other streaming services around the same time that they show in theaters.'" Variety.com, April 2, 2019. But even as some biggies are being questioned, the potential of other biggies rising and dominating looms large. Opportunities or another set of gatekeepers?

Indeed, said the agents and lawyers generating income representing talent and rights holders, there's at least one more player who could change everything. One of the biggest companies on earth Apple (NASDAQ: APPL)! Perhaps?! On March 25, 2019, Apple CEO Tim Cook mounted the presentation stage and, after introducing a new Apple credit card format, proceeds to tout Apple's new streaming service. But what followed looked a whole lot like a standard "here's what next season will look like" that the major broadcast networks had been doing for decades. The industry was underwhelmed; you could hear the sigh from executives at Netflix, Amazon, Disney and AT&T.

"How underwhelming? Netflix (NASDAQ: NFLX) was widely expected to face a tough competitor in AAPL's new Apple TV+ video streaming service. Finally! A competitor with really deep pockets. But instead of Netflix stock taking a hit on the announcement, the script was flipped: NFLX closed up 1.45% while Apple stock was down 1.2% at the end of the day." InvestorPlace.com, March 26th.

Are we having fun yet? Litigators perk up your ears. All of this consolidation may have received federal regulatory approval, but it does not vitiate private antitrust violations and the massive complexity that mergers have created for the acquiring companies. While the new behemoths might be able to mitigate the damage in new agreements with talent and rights holders going forward, these melded entities have to deal with upside agreements inherent in content deals they have now acquired. There are so many new interrelated entities, so many allocations and pricing decisions that are always questionable. No one really believes that "arm's length" pitch. The "Chinese wall" is made of see-through paper.

First, we all need to laugh at any of these new combined studios when they use the word "precedent," always the argument of a weak mind in stagnant times. For example, the day the 21st Century Fox/Disney deal closed, March 20, 2019, ***all*** Fox and Disney precedents died. Totally new company with a totally new structure. Still, Disney has announced all over the entertainment trades that they are placing all their high-profile content on their new streaming services, with less than subtle hints that they will be able to do this at below market rates.

Two years ago, Disney withdrew all of its Disney/Marvel shows from Netflix. Netflix also let Disney know that they were no longer interested in any Disney content, anyway. A complete break? Not exactly. It seemed that way… until you really look: The "Walt Disney Co. parted ways with Netflix Inc. in a public declaration of war. The owner of 'Star Wars,' Marvel and Pixar movies would stop licensing films to the world's most popular paid online TV network. Instead, Disney planned to keep them for its own streaming services.

"Yet the media giant left out a key detail: Under their current deal, every movie released between January 2016 and December 2018 — including epics such as 'Black Panther' — will be back on Netflix starting around 2026, people familiar with the matter said… Similar issues confront other media titans such as NBCUniversal and AT&T Inc., the owner of HBO and Warner Bros. Netflix, which has about 150 million subscribers worldwide, has some of their most-popular shows locked up for years." Los Angeles Times, June 2, 2019. But the handwriting is on the wall, and clearly Disney and its competitor-brethren streaming services are not about to continue to let their product enhance Netflix for long. Big companies feeding their own new or newly acquired services are absolutely going to use their best content to drive up the values of those nascent services. Not Netflix!

Folks who made deals with upside at Fox now are stuck in the Disney universe, and Disney participants are going to watch Disney build a network, probably by placing their work into a Disney streaming network at below market and alienating the other buyers by becoming their competitor. So, Disney can also claim that there are no other buyers for their controlled content.

Why do I think Disney will be dumping its best content into their streaming service at below what that content might otherwise generate in an open bidding? Their fee structure says it all. As Netflix upped its "basic" monthly subscription plan effective in May of 2019 to $8.99, the "standard" plan (adding an additional device and HD) to $12.99 and its "premium" plan (four devices and ultra-HD) to $15.99 and Warner suggesting its HBO/Cinemax-driven SVOD service (probably going into a beta test in the fourth quarter of 2019 and fully online in the first quarter of 2020) would be between $16-17/month, Disney was looking to begin with an exceptionally low price that should attract consumers.

With pressure on Disney to justify its $20 billion *increase* from their initial offer to acquire Fox (to $71.3 billion), cost controls – from layoffs to cutting content-related expenditures – are the order of the day from both Wall Street and senior management. You can be pretty sure that they are not going to account to upside participants in a way that would reflect full market pricing for content placed on a start-up streaming service.

And then there's the short-content Quibi SVOD service from Jeff Katzenberg and Meg Whitman, noted above, that nobody seems to understand. Mostly small screen smart phone fare. Well-funded, with investments including from Warner Bros., Viacom, NBCUniversal, Sony and both U.K.'s BBC and ITV, Quibi is being sold as scontent for those "on the go." But what would it look like, and how would it compete with the other streaming services? Scheduled to go live as 5G cell phones are rolling out, Quibi is betting on segmented series (two to four hours presented in ten or fewer minute bits) and mirrors Hulu in offering a variable pricing structure.

"According to Katzenberg, the service will have two pricing tiers at launch on April 6, 2020. The first will cost $4.99 with one pre-roll ad before each video segment — a 10-second ad if the video is less than 5 minutes and a 15-second ad for 5-10 minute videos. The ad-free option will cost $7.99. Whitman also said they expect to have approximately 7,000 pieces of content available within the first year…

"Quibi will pay [top content creators their] cost [of production] plus 20% up to $6 million an hour… In terms of ownership, two versions of each series will exist. The first will be the Quibi version divided into segments, which will be owned exclusively by Quibi for seven years. At the same time, the creator of the project will edit together a full-length version with no segmentation. After two years, the creator will fully own the full-length version and can sell it globally." Variety.com, June 8th. Sounds very pricey for a start-up, but if the programming is good enough… A big maybe, even as their first effort in generating ad support seemed positive.

In mid-June of 2019, the company reported that they had booked $100 million is ad sales towards their first year of operation, two-thirds of the entire first year ad inventory. "Advertisers that have committed ad spending to Quibi include Google, Procter & Gamble, PepsiCo, Walmart, Progressive and AB InBev, according to the company." Variety.com, June 19, 2019. With all these streaming services, however, most experts are focusing on Disney+ as the likely winner in the SVOD race.

"Disney+ will launch in the U.S. on Nov. 12, 2019, and will be priced at $6.99 per month, the company announced… The subscription VOD service represents Disney's next major foray into the video-streaming wars. By pricing it well below Netflix, the Mouse House is betting it can rapidly drive up Disney+ customer base with a mélange of content that appeals to multiple demographics, including movies and TV shows from its Marvel, Lucasfilm's Star Wars, Pixar and Disney brands." Variety, April 11, 2019. Obvious, yes. Subtle, no. Unlike the opposite result when Apple made its streaming announcement (Apple shares down, Netflix up), Wall Street rewarded the Mouse House the day after the above announcement with a stock rise of 11.5%, dropping Netflix shares by 4.5%. And that was *before* they acquired all of Hulu in May of 2019, a service that accelerates Disney's digital streaming capacity.

Want a concrete example of how premium Fox/Disney product is driving Disney+? Love *The Simpsons*, the longest running scripted television series in U.S. history? Starting on November 12, 2019, all 30 seasons will *stream exclusively* on Disney+. Seasons 31 and 32 are already ordered; by the time season 32 ends, there will be a total of 713 episodes. "In its first year, Disney Plus will offer 10 original films and 25 original series, including three 'Avengers' spinoffs… along with nearly all the 'Star Wars' movies, the entire Pixar library and family-focused movies and shows from its Fox library like 'The Sound of Music' and 'Malcolm in the Middle.'

"Disney said it intended to roll out the streaming service in Europe and Asia starting next year. It expects subscribers to total 60 million to 90 million by 2024… 'We are all-in,' [Disney CEO Bob Iger said as he announced his plans]." New York Times, April 11, 2019. While Disney touted an investment in original productions for the channel of $1 billion in fiscal 2020, the content-devouring new channel would need to feast on Disney's vast library at start-up-justified pricing. Represent anyone having upside in a Fox or Disney product?

Smell the opportunity… and the risks? Does the backend now involve puts, fixed payments against a percentage upside – box office bonuses in film and fixed sums as more series cycles are produced against points for TV. Litigators start your engines, from the fees one operating division of affiliate pays another – no matter what the contract appears to waive – to the allocations of revenues between commonly-controlled companies… to potential antitrust violations.

V. Conclusion.

If you aren't shaking in your shoes, you should reread the above. Add to this quagmire the impact of bankruptcies past – from MGM to The Weinstein Company – to the bankruptcies that will inevitably ripple through the entire industry. Rights and income lost, as post-Chapter 11 libraries are now bought and sold like baseball trading cards.

Notice how I mostly skipped over social media? Oh, a little on privacy and a touch of "fake news" regulation, but the *phenomenon* of social media is now old news. While issues still abound, Europe and Asia will beat up Facebook, Twitter, Google, etc., etc. Don't worry about it. But practicing law in this brave new world requires much more than complicated statutory and compliance. Pretty much everything has changed.

Now is not the time to use those same-old, same-old forms. Most forms are going to need a ground up redo. It is also not the time to take your last deal and up it by 10% on your next; deals are likewise going to require a ground-up revaluation, from cash upfront to upside or the very necessary substitutes we need going forward.

Entertainment lawyers, unite. Change is upon us. Change like we have never seen before. Hyper-accelerating change. Prepare! One more time: Equally, now is the time to laugh, and laugh hard, when some studio or network business affairs executive utters a word that needs to be banned from the entertainment industry forever: PRECEDENT.

OPTION AGREEMENT
SCREENPLAY

As of August _______, 2017

____
____
____

Re: [NAME OF PROJECT]

Dear _______,

The following will confirm the Agreement between _________, of __________ (sometimes called "Producer"), and you (sometimes called "Writer"), regarding the screenplay written by you entitled "_______" ("the Screenplay"). The first theatrical feature based on, or substantially based on, the Screenplay is called the "Picture".

1. Option: In consideration of the sum of One Dollar ($1.00) (the "Initial Option Fee") and other good and valuable consideration, Writer hereby grants to Producer the exclusive option ("Option") to purchase all rights in and to the Screenplay, for exploitation in all media now known or hereafter devised or discovered throughout the universe, in perpetuity, including but not limited to motion picture, television, home video, digital transmission, ancillary, subsidiary, underlying and merchandising rights to the Screenplay, as such rights are more fully set forth in Exhibits "A" and "B" affixed to this agreement.

2. Options

(a) First Option Period: The length of the term for the initial Option ("First Option Period") shall be for two (2) years following the date of this Agreement.

(b) Second Option Period: Producer may extend the Option for an additional eighteen (18) months from the end of the First Option Period ("Second Option Period") by giving written notice to Writer, along with a payment of One Dollar ($1.00) prior to the expiration of the First Option Period.

3. Purchase Price:

(a) If Producer exercises the Option, as consideration for all rights granted and assigned to Producer and for Writer's representations and warranties, Producer agrees to pay to Writer, and Writer agrees to accept, ______ percent (______%) of the direct certified production budget for the Picture less contingencies, financing costs, bank fees, interest, and bond fees (the "Purchase Price"), payable upon exercise of the option to acquire the Property or the commencement of principal photography of a Picture based on the Screenplay, whichever occurs first, but in no event less than __________________________ Dollars ($_________) and not more than ___________________ ($__________).

(b) The Purchase Price shall be paid to you upon our notice to you that Producer is exercising the Option, but not later than the first day of principal photography of the Picture.

(c) In addition to the above and if you receive screen credit as a writer for the Picture, you shall be paid a sum equal to either (i) _________ percent (_____%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the Picture if you are accorded a shared Screenplay By or Written By credit on the Picture; or (ii) _______ percent (___%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the Picture if you are accorded a sole Screenplay By or Written By credit on the Picture.

(d) For the purposes hereof, "Net Profits" shall be defined, computed, accounted for, and paid as follows:

(i) if a single entity both finances one hundred percent (100%) the production of the Picture and distributes the Picture in all territories of the world, then in accordance with the standard definition utilized by such entity, subject to such changes as the parties may agree to in writing following good faith negotiation within customary motion picture industry parameters for a person of Writer's professional stature; provided, however, that the definition of net profits applicable to Writer hereunder shall be no less favorable than the definition applicable to the individual producer of the Picture (excluding any so-called over budget penalties or cross-collateralization provisions);

(ii) if one entity does not so finance and distribute the Picture, then in accordance with Producer's standard definition of net profits, subject to such changes as the parties may agree to in writing following good faith negotiation within customary motion picture industry parameters for a person of Writer's professional stature; provided, however, that the definition applicable to Writer hereunder shall be no less favorable than the definition applicable to the individual producer of the Picture (excluding any so called over budget penalties or cross-collateralization provisions).

4. Rights Granted: In consideration of the above Purchase Price, and on condition that the Option is timely exercised and the Purchase Price is paid to Writer, Writer hereby grants and assigns to Producer all rights (including but not limited to motion picture, television, home video, digital transmission, ancillary, subsidiary, underlying and merchandising rights, and Rental and Lending Rights as defined and agreed to in Schedule 1 of Exhibit “B” to this agreement), throughout the universe, in all media, in perpetuity in and to all writings by Writer concerning the Screenplay, including but not limited to the story, all treatments, and all drafts of the Screenplay, and any other drafts or rewrites written to date or in the future (herein collectively called the "Writings"), which Producer shall own in its entirety. Such grant of rights is further set forth in Exhibits “A” and “B” to this agreement, which Exhibits are incorporated into this agreement by this reference.

5. Credits.

(a) Writing credits on the Picture shall be determined and given pursuant to the WGA West Basic Agreement and Credit Manual, whether or not the Writers Guild has jurisdiction. If the Writers Guild has jurisdiction, the Writers Guild will determine all writing credits on the Picture. If the Writers Guild does not have jurisdiction, and the parties cannot agree on writing credits, they shall be determined by expedited arbitration conducted in Chicago, Illinois under the rules and procedures of the American Arbitration Association, using a single arbitrator who shall be a neutral attorney familiar with the entertainment business. The arbitrator shall use the Writers Guild Credit Manual. Whether or not the Basic Agreement applies, the writing credit shall be given on screen and in paid ads as required by the Basic Agreement.

(b) All other aspects of such credit shall be determined by Producer in its sole discretion. Producer shall contractually require all distributors with whom Producer enters into agreements to honor all credit obligations to Writer, but no casual, inadvertent or third party breach of the credit provisions of this agreement shall constitute a breach of this agreement. In the event of failure to give credit, Producer shall use its best efforts, on a prospective basis, to require such distributors to correct any omission or failure to give Writer credit.

6. Representations and Warranties. Writer represents and warrants that (a) Writer has the legal right and authority to enter into this Agreement and to grant the rights being granted hereunder; (b) the Writings are and shall be totally original with Writer, do not infringe upon the copyright of any third party, and do not invade the privacy of any third party, defame any third party or in any other way violate the rights of any third party; (c) Writer is the sole author of the Writings; (d) the Writings have not been published; (e) no written or oral agreements or commitments whatsoever with respect to the Writings or with respect to any right therein, have heretofore been made or entered into by or on behalf of Writer; (f) there are no monies due third parties by reason of the execution of this Agreement and/or the exercise of the Option hereunder; and (f) there are no claims, demands or any form of litigation pending or threatened with respect to the Writings. Writer agrees to indemnify, defend, and hold Producer and its officers, employees, successors and assigns harmless from and against any and all claims and costs, including, without limitation, reasonable attorneys' fees and disbursements, arising, directly or indirectly, from or out of any breach or alleged breach of such representations and warranties, the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers. Producer similarly indemnifies Writer with respect to any material Producer or its assigns furnishes to Writer or adds to the Screenplay, and hold Writer harmless from and against any and all claims and costs, including, without limitation, reasonable attorneys' fees and disbursements, arising, directly or indirectly, from or out of the use in the Screenplay or Picture of any material furnished by Producer or its assigns.

7. Short Form Option and Assignment: Attached to this agreement is Exhibit "A" (Short Form Option) and Exhibit "B" (Short Form Assignment). Writer shall date and execute all copies of Exhibits "A" and "B." Exhibit "B" shall be held in trust by Producer. If the Option expires without being exercised, Producer shall return all copies of Exhibit "B" to Writer.

8. Notices: All notices to be given under this agreement shall be in writing, and shall be personally delivered, mailed with delivery confirmation, sent by ground or air freight with delivery confirmation, faxed by confirmed fax (by a printout confirming delivery of the fax), or given by confirmed email (by a printout of the email) to the parties at their respective addresses as follows:

Producer: ______________________

____

____

____

With a simultaneous copy to:

____

____

____

____

ATTN: ______________

Writer ______________________

____

____

____

Any party can change their address under this agreement by notifying the other parties of the new address by a notice satisfying this paragraph.

9. Additional Provisions.

(a) If Producer is furnished with transportation and lodging to the first domestic premiere of the Picture, Writer and Writer's guest shall also be furnished with round trip air transportation (if applicable), ground transportation and location amenities and tickets in the V.I.P section for the first domestic premiere of the Picture, if out of town. If in town, Writer shall be furnished with two tickets in the V.I.P. section.

(b) If Writer receives sole written by or screenplay credit on the Picture the following shall apply: Writer shall have the first opportunity to write the first theatrical sequel, prequel or remake to the Picture, if any, for compensation to be negotiated in good faith, with the writing fee to be, unless agreed otherwise, WGA minimum for a first and final draft screenplay, not original, with no treatment; the purchase price shall be negotiated in good faith, but not less than the cash compensation payable under this agreement for the Picture plus _______ percent (_____%) of 100% of the Net Profits derived from such sequel, prequel or remake if Writer is accorded a shared Screenplay By or Written By credit on the sequel, prequel, or remake; or (ii) _____ percent (___%) of 100% of the Net Profits, if any, received by Producer in the United States in U.S. dollars from the distribution and exploitation of the sequel, prequel, or remake if Writer is accorded a sole Screenplay By or Written By credit on the sequel, prequel, or remake. All writing fees paid to the Writer for any such sequel, prequel or remake to the Picture shall be deducted from the purchase price. If Writer receives sole written by or screenplay credit on the Picture, and elects not to write the first theatrical sequel, prequel or remake to the Picture, if any, Writer shall be paid fifty percent (50%) of the Purchase Price paid to him for the Picture, on the first day of principal photography of such production, plus a sum equal to _______ percent (______%) of 100% of the Net Profits, it any, derived from such first theatrical sequel, prequel or remake.

(c) Writer hereby grants to Producer the right to use and to authorize others to use Writer's name, likeness and other elements of Writer's identity and biography for purposes of advertising, publicizing and exploiting the Picture, but any such use of Writer's name or likeness may not be used as an endorsement without Writer's prior written consent.

10. Notice and Cure: In the event either party is in material breach or alleged material breach of this Agreement, the non-breaching party shall give Producer written notice describing such alleged breach, and the breaching party shall have ten (10) business days after receipt of such

notice to cure any such alleged breach. If the breaching party cures such alleged breach within such ten (10) business day period, the breaching party shall not be deemed to be in breach of this agreement.

11. Arbitration: Any dispute between the parties shall be settled by binding expedited arbitration, using a single neutral arbitrator, in accordance with the rules of the American Arbitration Association, with hearings to take place in Chicago, IL. Any judgment rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The prevailing party may be awarded attorney's fees and other costs, damages and expenses to be determined by the Arbitrator(s) but neither party shall have the right to seek injunctive relief which would enjoin the distribution or other exploitation of the Picture in any medium or market. The arbitrator shall have the right to decide any and all issues relevant to the arbitration including, without limitation, the arbitrability of all issues.

12. Miscellaneous:

(a) This Agreement contains the entire agreement between the parties concerning the subject matter hereof and supersedes any and all prior and contemporaneous agreements, both oral and written, pertaining to that same subject matter. This Agreement cannot be changed except by a written document signed by the parties.

(b) This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, which shall be binding on and inure to the benefit of the parties' respective heirs, successors and assigns.

(c) Producer has the right to assign this Agreement, or any part of this Agreement, to one or more third parties, but Producer shall remain secondarily liable under this Agreement unless the Agreement is assigned to, and the obligations are assumed in writing by, that third party (ies).

(d) Producer shall have the right, during the Option Periods as they may be extended (and thereafter if the Option is exercised), at its expense, to enter into development, pre-production and production activities with respect to any and all productions or works intended to be based on the Writings, and any and all materials (literary or otherwise) prepared by or on behalf of Producer in connection therewith shall, as between Producer and Writer, remain the sole and exclusive property of Producer. Writer hereby grants to Producer the exclusive right during the Option Periods to create, write, produce, distribute, exhibit, reproduce, transmit and perform one or more works to make the general public aware and potential studios/distributors of the Screenplay and Picture and to incorporate into those works one or more characters from the Writings.

(e) The Option Periods and any extensions of the Option Periods shall automatically be suspended for a period of time equal to the duration of any of the following contingencies: (i) Producer's development of the Picture is prevented, hampered, or delayed by reason of any law or ordinance of any jurisdiction, governmental order, or other regulation, fire, act of God or public enemy, labor dispute, strike or threat of strike, or by reason of any other cause, thing, or occurrence not within Producer's control, either of the same or any other nature (including, but not limited to, a strike or other work action by any guild or union, and/or the death, illness, or incapacity of any director or principal cast member); (ii) Writer's material default hereunder;

and/or (iii) any third party claim in connection with the Option and/or any of the rights granted and/or Writer's representations and warranties hereunder.

(f) In the event of an alleged material breach or material breach by Producer, or in the event of a failure to give Writer credit on the Picture pursuant to the Credits paragraph above, Writer’s sole remedy shall be an arbitration for monetary damages, and in no event shall Writer be entitled to terminate or rescind this agreement or seek equitable relief, including but not limited to seeking to enjoin or restrain the distribution or exploitation of the Picture.

(g) This Agreement may be signed in counterparts, and may be signed by fax or by scanned email attachment (which fax or email attachment shall include the entire agreement).

(h) The paragraph headings contained herein are for convenience only, and they shall not affect the construction of any provision contained in this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

____

By____________________________

Title___________________________

AGREED TO AND ACCEPTED:

____

EXHIBIT "A"

SHORT FORM OPTION AGREEMENT—SCREENPLAY

KNOW ALL PERSONS BY THESE PRESENTS: for good and valuable consideration, receipt whereof is hereby acknowledged, the undersigned, ________ does hereby grant to _________ (hereinafter referred to as "Purchaser"), and its heirs, representatives, successors, licensees and assigns forever, the exclusive and irrevocable right and option to purchase and acquire from the undersigned all of his right, title and interest (including but not limited to the sole and exclusive motion picture rights [silent, sound, talking], television motion picture and other television rights, soundtrack, merchandising, literary publishing, music publishing, stage and radio rights, throughout the world in perpetuity) in and to that certain original literary work described as follows:

TITLE: "______" (WT)
WRITTEN BY: _________
PUBLISHER: Unpublished Screenplay
COPYRIGHT APPLICATION NO.: _________

including all contents thereof, all present and future adaptations and versions thereof, and the theme, title and characters thereof, and in and to the copyright thereof, and all renewals and extensions of such copyright.

The option herein granted may be exercised by Purchaser, or its heirs, representatives, successors, licensees or assigns as provided in that certain Option Agreement dated as of August ________, 2017 between Purchaser and the undersigned, which agreement is incorporated herein by reference.

IN WITNESS WHEREOF, the undersigned has executed this instrument as of _____________.

____

EXHIBIT "B"
ASSIGNMENT OF ALL RIGHTS—SCREENPLAY

1. The undersigned, **_________** ("Assignor"), for valuable consideration, receipt of which is hereby acknowledged, does hereby assign, grant, bargain, sell, transfer, convey and set over (all herein called "grant") forever, unto **________** ("Assignee"), the literary material described as follows:

All of Assignor's right, title and interest in and to a screenplay written by Assignor tentatively entitled "**___________**", including the underlying story ideas and including the results and proceeds of past and future writing services in connection therewith, together with all now or hereafter existing rights of every kind and character whatsoever therein, and the complete and unconditional and encumbered title therein for all purposes, including all titles thereof, and all elements, themes, ideas, stories, plots, incidents, music, lyrics, arrangements, choreography, dialogue, characters, character names, action, revisions, dramatizations, sequels, and other parts and components contained therein, now or hereafter in existence as well as all copies of any and all manuscripts thereof, and all versions and translations thereof, all hereinafter referred to as the "Work".

Assignee shall have full ownership of the Work, including all copyrights to the Work throughout the world, the right to alter, change or rewrite the Work, and to add to or delete from the Work, and the right to use all or only part or parts of the Work, in its sole discretion, and Assignor hereby waives all rights in connection therewith including, but not limited to, the "droit morale" of authors.

2. Without limiting the above, Assignor hereby grants to Assignee the right to produce one or more motion pictures or other productions based on the Work and to exploit, publicize and use such motion pictures or other productions in all media throughout the world in perpetuity, by all means whether or not now known, including but not limited to theatrical, television, digital transmission, and home video exploitation, and exploitation of ancillary and subsidiary rights, including live stage, novelization, merchandising, music publishing, soundtrack and all other exploitation of the Work and all motion pictures or other projects based on the Work. Without limiting the generality of the foregoing, Assignor specifically grants to Assignee, without limitation: the sole and exclusive right, throughout the universe, in perpetuity, to exhibit, record, reproduce, broadcast, televise, transmit, publish, sell, vend, distribute, advertise, exploit, publicize and use for any purpose, in any manner, and by any means, whether or not now known, invented, used of contemplated, the Work, and each and every part thereof, and any and all versions, adaptations, copies and mechanical or other reproductions of all thereof; all publication, novelization, dramatization, performing, merchandising, mechanical reproduction, radio, television and motion picture rights in the Work and each and every part thereof in such manner and to such extent as Assignee may, in its sole discretion, desire; the right to translate the Work and all such versions and adaptations into all or any languages; the right to use the name and likeness of the Assignor as the author of the Work upon which said versions and adaptations, or any of them, is based; the right to use all titles of the Work and any other title or titles, in conjunction with any such versions and adaptations and the right to use all titles of the Work in connection with literary, dramatic and other works not based upon the Work; Rental and Lending Rights as defined and agreed to in Schedule 1 of this Exhibit "B"; and the right to refrain from exercising all or any part of the rights herein granted.

3. Assignor specifically grants to Assignee, without limitation, all copyrights throughout the world including all renewals, extensions, and continuations thereof, whether common law, statutory, or otherwise, in and to the Work, and each and every part thereof, together with the exclusive right to obtain and register copyright and renewal copyright or analogous protection for the Work, whether in the name of the Assignor, Assignee, or otherwise, in Assignee's sole discretion. Assignor further assigns to Assignee all actions and causes of action whether past or future, for infringement or violation of any rights in and to the Work, and all damages, profits, penalties and other recoveries, and all other rights of every kind and character which Assignor may now or hereafter have, directly or indirectly as a result of any such infringement or violation.

4. Assignor agrees to execute, acknowledge and deliver, or to procure the execution, acknowledgement and delivery of all further documents which, in the sole judgment of Assignee, may be necessary or expedient to effectuate the purposes and intent of this Assignment. Assignor irrevocably appoints Assignee or its nominee as Assignor's attorney-in-fact, with full power of delegation, substitution and assignment, for the sole benefit of Assignee, but at Assignee's expense to procure, execute, acknowledge, register and record any and all such copyrights, renewal copyrights and documents, and to institute and prosecute such proceedings as Assignee may deem expedient to protect the rights herein granted and purported to be granted and to the effect the recovery by Assignee of the full benefit of all rights herein granted and purported to be granted. Assignee may take any of the aforesaid actions in its own name, or in the name of Assignor, and at its option, may join Assignor as party plaintiff or defendant in any suit or proceeding affecting the Work.

5. Assignor hereby represents and warrants that (a) the Work is original with Assignor and does not violate the copyright of any third party, and to the best of Assignor's knowledge does not defame, infringe upon or violate the rights of privacy or other rights of any person, firm or corporation; (b) Assignor is the sole author of the Work; (c) the Work has not been published; (d) no written or oral agreements or commitments whatsoever with respect to the Work or with respect to any right therein, have heretofore been made or entered into by or on behalf of Assignor; (e) there are no monies due third parties by reason of the execution of this Agreement and/or the exercise of the Option hereunder; and (f) there are no claims, demands or any form of litigation pending or threatened with respect to the Work. Assignor agrees to indemnify, defend, and hold Assignee, its assigns and licensees harmless from and against any costs incurred by Assignee or its assigns (including attorney's fees) arising out of any breach or alleged breach of the aforesaid representations and warranties. Assignor agrees to execute such documents and do such other acts and deeds as may be required by Assignee or its assignees or licensees to farther evidence or effectuate its rights hereunder, and in connection therewith.

6. The exercise by Assignee of any of said rights shall not be deemed a waiver or abandonment of any other of said rights. All rights herein granted and assigned shall be fully transferable, in whole or in part, without restriction, and shall inure to the benefit of the Assignee's successors, assigns, and licensees. This Assignment is executed by Assignor for himself and his heirs, executors, administrators, next of kin, personal representative, successors and assigns, and shall be binding upon said persons jointly and severally. As used herein, the term "person" includes any association, organization, partnership, business trust or corporation.

7. This Assignment shall be subject to the terms and conditions of the Option Agreement between Assignee and Assignor dated as of August ______, 2017.

IN WITNESS WHEROF, the undersigned has executed this Assignment of All Rights as of _________.

____

SCHEDULE 1 TO EXHIBIT "B"

EUROPEAN COMMUNITY ("EC") AND OTHER DIRECTIVES CONCERNING RENTAL AND LENDING RIGHTS

(a) Rental and Lending Rights: Assignor acknowledges that the compensation payable under the agreement to which this document is attached includes adequate and equitable remuneration for the "Rental and Lending Rights" (as defined below) and to the fullest extent permitted by applicable law, constitutes a complete worldwide buyout of all Rental and Lending Rights, in perpetuity. Assignor hereby irrevocably grants to Assignee throughout the world in perpetuity, the right to collect and retain for Assignee's own account all amounts payable to Assignor in respect of Rental and Lending Rights and irrevocably directs any collecting societies or other persons or entities receiving such amounts to pay them to Assignee.

(b) Definition: "Rental and Lending Rights" means all rights of Assignor to authorize, prohibit, control or receive money from the rental, lending, fixation, reproduction of other exploitation of the materials, results and proceeds of Assignor's services, or any motion picture, program or other production based thereon, by any media or means now known or hereafter devised as may be conferred upon Assignor under applicable laws, regulations or directives, in any jurisdiction throughout the world, including any so-called rental and lending rights pursuant to the European Community directives or enabling or implementing legislation, laws or regulations enacted by member nations of the European Community. The payments made by Assignee to Assignor under the agreement to which this document is attached are deemed to include sufficient remuneration for all so-called rental and lending rights pursuant to the EC directives, enabling or implementing legislation, laws and regulations enacted by the member nations of the EC.

AGREED TO as of ________

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WHAT'S THE SCORE WITH SYNCHRONIZATION RIGHTS

As the composer of a film or TV score or as a songwriter whose song is used in a movie, TV show, advertisement or video game, under the copyright law you own 100% of the copyright in your work from the moment you create the work and "fix it in a tangible medium." However, a composer or songwriter must be careful what documents he or she signs so that those rights are not signed away without fair compensation for the work.

When it comes to the use of music there are two copyrights: one in the musical composition or song and one in the sound recording which is the fixation of the sounds that make up the music. When music is used in synchronization with visual images, whether it is created especially for the particular score or whether it is a pre-existing song that the director wants to use in a scene in a TV show or film, this is referred to as the "synchronization" of music with visual images. Permission in the form of a synchronization license (sometimes referred to as a "synch license") must be procured by the makers of the audio/visual production from both the owner of the sound recording (the artist or record company) and from the owner of the song copyright (the songwriter or publishing company) Sometimes these are one and the same person or entity, sometimes they are not.

A synchronization license may take various forms. If a producer, director or music supervisor decides that a certain pre-existing song is right for a particular scene in a film, TV show, commercial or in a video game, then a synch license covering the master and the composition would be requested. Depending on the length and prominence of the use, if limited solely to use in the film the price can range from a few hundred dollars to tens of thousand of dollars, or more. If the movie company also wants the right to include the music on a soundtrack album, then additional provisions would be required for that use which would pay royalties for each record sold. Also, the song should be registered with the author's performing rights society (e.g., ASCAP, BMI, SESAC, etc.) so that revenues from performances in foreign movie theaters (U.S. movie theaters do not pay performance royalties) and from television broadcast can be collected and paid to the author.

On the other hand, a songwriter may be specifically employed to write incidental music for a film or for a TV commercial. Such an arrangement may be structured as a "work made for hire" whereby the songwriter is employed to write specific music which may ultimately be owned by the producer of the film. There is no set fee for such an arrangement - it can range from a few thousand dollars for a small budget project to hundreds of thousands for a blockbuster film score. However, in such circumstances, since the production company would own the copyright, the author may not be entitled to performance royalties from its performing rights society. This would depend on the negotiation of the contract between the parties.

Since this is a complicated area the details of which are beyond the scope of this article, I would suggest that if such an offer is made to any composer or songwriter, an experienced entertainment lawyer would be a good investment.

My advice on such matters to a prospective client is always "don't sign anything – other than an autograph – unless you have a lawyer review it first!"

Wallace Collins is an entertainment and intellectual property lawyer based in New York with more than 30 years of experience. He was a recording artist for Epic Records before attending Fordham Law School. Tel: (212) 661-3656; www.wallacecollins.com