ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE ABA FORUM ON THE ENTERTAINMENT AND SPORTS INDUSTRIES

VOLUME 21, NUMBER 2
SUMMER 2003

Profit Participation in the Motion Picture Industry

By Joe Sisto

Introduction: How producers and talent get paid

Producers are the overseers of motion picture productions. Their principal duties are to option a promising screenplay, approve its development, arrange for financing and determine the cost of its production. Producers hire directors, principal cast members and key production staff in accordance with collective bargaining agreements and pay their salaries and any other expenses related to a given production.

In the motion picture industry, once a film producer has secured a distribution deal with a major studio, he or she is typically paid a set producer's fee as well as a percentage of the film's profits. For its part, the talent attached to any particular production can expect to be paid a salary in accordance with the provisions of the various collective bargaining agreements that govern the relationships between signatory production companies and actors, writers and directors.[1] To reduce its

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Designing Manager Contracts for Musicians

By Kent Newsome

Identifying a manager. After a musician achieves some recognition, either regionally or nationally, people will start coming out of the woodwork telling them how wonderful they are, promising to make them a star and shoving management contracts in their face. Although retaining a manager is an integral part of assembling a musician's team, in no event should a musician execute a management contract without having the contract reviewed by a lawyer. Accordingly, the lawyer is often the first member of the team to be retained by a savvy musician on the rise.

It is not uncommon for the lawyer and the musician to consider a multitude of potential managers before selecting one. These are often trying times for the musician, as the prospective manager is simultaneously feeding the musician's ego by telling him or her how wonderful he or she is while at the same time exerting pressure on the musician to retain the manager and sign a long-term contract. It is not unusual for the prospective manager to tell the musician that there is only a

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Reality Check:

When Will Two TV Shows in the Same Genre Be Considered Substantially Similar under Copyright Law?

By Thomas A. Smart, Mark D. Godler and Kerren R. Misulovin

On Jan. 13, 2003, a federal judge denied a motion for a preliminary injunction brought by CBS, which broadcasts the hugely successful "Survivor" television reality television show, to enjoin rival ABC from airing the reality television series "I'm a Celebrity, Get Me Out of Here" ("Celebrity"). CBS brought suit for copyright infringement in November, 2002 against defendants, ABC and the producers of "Celebrity," Granada PLC and Granada Entertainment USA, after ABC announced that it would air "Celebrity," which had been a big hit in the United Kingdom, on American television during sweeps week in February, 2003.

U.S. District Judge Loretta Preska of the U.S. District Court for the Southern District of New York denied CBS' motion for a preliminary injunction after finding that CBS had failed to demonstrate that it was likely to succeed on the merits of its copyright infringement claim because of the absence of substantial similarity between the expression of the two shows. The court concluded that "Celebrity" no more infringed "Survivor" than "I Love Lucy" infringed "The Honeymooners" or

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ENTERTAINMENT AND SPORTS LAWYER

Entertainment and Sports Lawyer (ISSN: 0732-1880) is published quarterly by the Forum on the Entertainment and Sports Industries of the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois 60611-4497. Address corrections should be sent to the American Bar Association, c/o Central Records Department.

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IN THE NEWS

U.S. Supreme Court Allows Copying of Public Domain Works without Attribution

An 8-0 ruling by the U.S. Supreme Court in *Dastar Corp. v. 20th Century Fox Film Corp*, No. 02-428, permits copying of public domain material without crediting its source. Fox's claim of "reverse passing off " under the Lanham Act was denied.

U.S. Supreme Court Orders Libraries to Filter Pornography

In a 6-3 decision in *United States v. American Library Association*, No. 02-361, the U.S. Supreme Court upheld the requirement in the Children's Internet Protection Act (CIPA) that libraries must filter out pornographic material from library Internet terminals as a condition of receiving federal funds.

FCC Adopts New Media Ownership Rules

The Republican-led Federal Communications Commission approved new media ownership rules allowing TV broadcasters to own TV stations that reach a combined 45 percent of the national audience — an increase from 35 percent. The ban preventing a company from owning both a newspaper and a TV or radio station was also lifted.

Harry Potter V Sales Soar to 5 Million on Brisk U.S. Opening

Sales of *Harry Potter and the Order of the Phoenix* set sales records for a new book release at more than 5 million copies selling at an average of $18 in one day. Total Potter sales for its first day on sale totaled approximately $90 million — easily beating Ang Lee's summer blockbuster movie "The Hulk," which grossed $62 million in its opening weekend.

9th Circuit Permits Thumbnail Image Linking

The 9th Circuit Court of Appeals ruled that a search engine's display of miniature images is fair use under the Copyright Act. Photographer Leslie Kelly had sued Ariba Soft for copyright infringement when the company's software recorded thumbnails of Kelly's digital photos.

$30 Million Award to Creators of Talking Chihuahua Character

A jury awarded $30 million to two men who claimed their talking Chihuahua character was used by Taco Bell, a division of Yum Brands Inc., after negotiations to use the character broke off between the parties.

U.S. Book Title Production Tops 150,000 in 2002

R.R. Bowker, publisher of *Books-in-Print*, reported that United States new book title output increased 5.86 percent to 150,000 new titles and editions. The increase came from university presses who increased their output by 10.21 percent, whereas the largest trade publishers had a 5.6 decline in output. Also, publishers declared 131,61 books out of print, an increase of 5.7 percent over 2001.

Copyright Infringement and Camera-Equipped Cell Phones?

Book and magazine shoppers are using camera-equipped cell phones to surreptitiously photograph desired pages of publications without buying, pages such as job-search data, celebrity photos, recipes and other information. In Japan, magazine publishers are mailing 34,000 posters to bookstores targeted at patrons asking them to stop using their phones to shoot pages from books and periodicals.

Talent Show Creator Sues FOX Television

Harry Keane filed suit against FOX Television alleging copyright and trademark infringement of his work, claiming that "American Idol" was his idea. Keane sought a temporary restraining order asking that the show stop airing immediately.

Book Recalled Following Authors' Plagiarism Claims

Little Brown withdrew a book about the creation of the atomic bomb after complaints by authors that more than 30 uncredited passages without quotation marks were identical — or nearly identical — to passages in their works. The offending book, *Pandora's Keepers*, had 15,000 copies in print, and was written by Bran Vandermark, an associate professor at the U. S. Naval Academy.

Virtual Kiddie Porn:

A Real Crime? An Analysis of the PROTECT Act

By Joseph J. Beard

Editor's note: The article below is republished from our Spring 2003 issue because the endnotes were omitted. E&SL regrets the error.

"Operation Candyman," "Operation Avalanche," "Operation Cathedral" — code-names for military actions? In a way, they are. The war, however, is not between nations but, rather, nations against national and international child pornography rings. In 1998, a world-wide raid under the auspices of Interpol targeted members of the pedophile *Wonderland Club*.[1] In 2001, police in 19 countries took part in a coordinated crackdown on pedophile traffic on the Internet.[2] In March 2002, "Operation Candyman" closed down an Internet-based child pornography ring in the United States.[3] and, most recently, in "Operation Ore," British authorities arrested users of a child Internet pornography site that offered files with names like "Child Rape" and "Russian Underage."[4] These are but four examples of the continuing war being waged against child pornographers around the world.

The Internet has made possible the global distribution of child pornography on a scale unimaginable in the analog world of photographs transmitted by mail or other conventional means. The digital technology that has made the Internet a reality has also raised the possibility of digitally created virtual humans, including the spectre of virtual children in pornographic poses as well as the digital "morphing" of innocent pictures of children into pornographic portrayals.

Recently, Congress passed its latest legislative response to child pornography: S. 151, The PROTECT Act. The Act deals with pornography that involves depictions of real minors as well as depictions of virtual minors. The Act was motivated, in part, by the decision of the U.S. Supreme Court in *Ashcroft v. The Free Speech Coalition*[5] which held two provisions of 18 U.S.C. §2256 violative of the U.S. Constitution. This article will address only those provisions of the PROTECT Act that deal with depictions of computer-generated virtual minors and critique the constitutionality of the various proposed amendments to title 18 of the U.S. Code involving virtual minors.

In the Child Pornography Prevention Act (CPPA) of 1996,[6] Congress recognized the danger that digital child pornography production and distribution represented. The Act targeted four categories of child pornography:

Child pornography means sexual abuse of children.

(1) the production of a visual depiction involving the use of a minor engaged in sexually explicit conduct [18 U.S.C. § 2256(8)(A)].
(2) a visual depiction of, or what *appears to be*, a minor engaged in sexually explicit conduct. [18 U.S.C. § 2256(8)(B)].
(3) a visual depiction that has been created, adapted, or modified *to appear as* that of an identifiable minor engaged in sexually explicit conduct (the "morphing" provision) [18 U.S.C. § 2256(8)(C)].
(4) a visual depiction advertised, promoted, presented, described or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct [18 U.S.C. § 2256(8)(D)].

In 1997, the Free Speech Coalition, an adult industry trade association, challenged the constitutionality of two provisions of the CPPA, 18 U.S.C. § 2256(8)(B) and 18 U.S.C. § 2256(8)(D). The challenge ultimately reached the U.S. Supreme Court which held in *Ashcroft v. The Free Speech Coalition* that both § 2256(8)(B) and § 2256(8)(D) were overbroad and unconstitutional.[7]

Two prior decisions of the U.S. Supreme Court are necessary background to understanding the language of the CPPA and the Supreme Court's conclusion that § 2256(8)(B) and § 2256(8)(D) of the CPPA are unconstitutional: *Miller v. California*[8] and *New York v. Ferber*.[9] *Miller* held that a pornographic work would be considered obscene only if (1) the work, taken as a whole, appeals to prurient interest, (2) is patently offensive in light of community standards and (3) lacks serious literary, artistic, political or scientific value.[10] Whether images are of an adult or a child is not a *direct* consideration in assessing whether the image is obscene or not, though it is conceivable that it is an *indirect* factor.[11] *Ferber* held as constitutional a state statute criminalizing child pornography that would not be held as obscene under *Miller*.

In *Ferber*, the Supreme Court concluded that states needed "greater leeway in the regulation of pornographic depictions of children" than provided under *Miller*.[12] The Supreme Court stated that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," that the distribution of child pornography is intrinsically related to the sexual abuse of children because it produces a permanent record of the child's participation, exacerbated by their circulation and that the advertising, sales and distribution networks encourage further production involving child sexual exploitation.[13] Finally, the Supreme Court stated that the value of "permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[14] The court did comment, however, that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized."[15] This language, which might appear to be dicta at the time of the decision in *Ferber*, will later be held to be "a reason for supporting its holding" in *Ferber*.[16]

With respect to child pornography, the Supreme Court adjusted the *Miller* formulation: "a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct be done so in a patently offensive manner, and the material at issue need not be considered as a whole."[17]

Significantly, the court went on to state that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[18]

Against a backdrop of *Miller* and more particularly *Ferber*, Congress passed the Child Pornography Prevention Act, signed into law in 1996. While The Free Speech Coalition challenged § 2256(8)(B) and (D) of the CPPA, it did not challenge § 2256(8)(A) dealing with pornographic images of actual children, clearly supported by *Ferber*, and § 2256(8)(C), the morphing provision, not expressly addressed by *Ferber*, but apparently of no concern to the Free Speech Coalition.

The plaintiffs, The Free Speech Coalition, argued that the CPPA was overbroad, in that, by defining child pornography to include visual depictions of adults that appear to be minors, the CPPA effectively banned "a wide array of sexually-explicit, non-obscene material that has serious literary, artistic, political, and scientific value."[19] They also argued that the CPPA was unconstitutionally vague.[20] The district court held that the CPPA was neither overbroad[21] nor vague.[22] However, the U.S. Court of Appeals for the Ninth Circuit reversed, finding the "appears to be a minor" language in 2256(8)(B) and "convey[s] the impression" language in § 2256(8)(D) to be both unconstitutionally vague and overbroad.[23] The U.S. Supreme Court held §2256(8)(B) and (D) to be unconstitutionally overbroad and therefore found it unnecessary to address the vagueness issue.[24] The court quoted its language in *Ferber* "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. *Simulation outside of the prohibition of the statute could provide another alternative*."[25] The court went on to say "*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it…. Ferber provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well."[26]

In response to the Supreme Court's holding that §2256(8)(B) and (D) were unconstitutional, the Senate and House drafted bills in 2002 to address the issue: H.R. 4623, S. 2511 and S. 2520. These bills died with the demise of the 107th Congress. On Feb. 24, 2003, the Senate passed S.151. On March 6, 2003, the House introduced its own bill, H.R. 1161, the "Child Obscenity and Pornography Prevention Act of 2003." Subsequently, most of the provisions of H.R. 1161 were incorporated in H.R. 1104. The House then inserted the provisions of amended H.R. 1104 as a substitute in S. 151. A House-Senate Conference resolved the differences between the Senate and House bills and on April 10, 2003, the PROTECT Act was passed by the Congress and signed by the president on April 30, 2003.

What happens if future virtual images seem real?

In *Free Speech Coalition*, the government made several arguments in support of the provisions of the CPPA. It argued that virtual images could lead to actual instances of child abuse,[27] that virtual child pornography might be used to seduce children[28] and that virtual child pornography whets pedophiles' appetites.[29] Each of these arguments was rejected by the court. Mindful of the failed arguments of the government in *Free Speech Coalition*, Congress took a different tack in its Findings to S. 151. The Findings focused on the fact that, at the time *Ferber* was decided, the technology did not exist to create computer-generated virtual minors that were indistinguishable from real children and that defendants might escape successful prosecution by claiming that actual images of real minors were, in fact, computer-generated.[30] Whether the arguments by the government based on these Findings would be accepted by the Supreme Court in future litigation is problematic. Though the technology of creating virtual humans did in fact exist in embryonic form in 1982, it was not as sophisticated as today; but, as the court recognized in *Free Speech Coalition*, the *Ferber* decision did distinguish between actual and virtual child pornography.[31] Even with today's technology, one can distinguish a computer-generated virtual human from a photographic image of a real human (*e.g.*, in the 2001 film *Final Fantasy: The Spirit Within*, actors are computer-generated images that, while state-of-the-art, are still clearly not film images of real humans). But, it is likely future development will lead to virtual humans including minors that are indistinguishable from images of real persons. If that case can be made, the Findings may find a more receptive court.

While the Findings in support of the Act may provide the basis for government arguments in support of a revised statute, it is the revisions themselves that must survive constitutional scrutiny. The balance of this article will focus on the response of Congress to the criticism of the court in *Free Speech Coalition* with respect to the affirmative defense provision in §2252A(c), the language of §2256(8)(B) and §2256(8)(D) as well as, for the sake of completeness, an analysis of §2256(8)(A) and (C) though these two subsections were not addressed in *Free Speech Coalition*. This article will also address two new provisions—§2252A(a)(6) and §1466A.

§2252A(c)

The CPPA provided an affirmative defense in §2252A(c) that the alleged child pornography was produced using an adult. In *Free Speech Coalition*, the Supreme Court stated that "[t]he government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."[32] The court went on to say "Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production [i.e., computer-generated virtual minors]."[33] The Act amends §2252A(c) by expanding the defense to include alleged pornography not produced using an actual minor, i.e., a computer-generated minor.[34] This expansion of the defense addresses the Supreme Court's more narrow criticism of §2252A(c) as to its scope; but, there remains the Supreme Court's more general criticism that a criminal law that shifts the burden to the accused "raises serious constitutional difficulties."[35] It should be noted that the defense may not be asserted with respect to child pornography as described in §2256(8)(C), the "morphing" provision. This exception to the defense is not problematic. As the activity addressed in §2256(8)(C) is the morphing of innocent images of real minors into sexually explicit depictions, the minor is not virtual — only the pose is.

§2256(8)(A)

§2256(8)(A) is unchanged by the PROTECT Act. The original Senate-passed version of S.151 had proposed a revised definition of "minor" negating any requirements of proof of the actual identity of the person.[36] However, that proposal was not adopted by the conferees.

§2256(8)(B)

The Act responds to the criticism of the Supreme Court with respect to §2256(8)(B) by deleting the "is, *or appears to be of a minor*" language of the Act and substitutes in its place "is, or is *indistinguishable* from, that of a minor." "Indistinguishable" is defined as "*virtually indistinguishable.*"[37] The "virtually indistinguishable" language is adopted from the dissent of Justice Sandra Day O'Connor in *Free Speech Coalition*. In her dissent, Justice O'Connor opined that "virtually indistinguishable" would be sufficiently narrow to respond to the arguments raised by The Free Speech Coalition.[38] The Act defines "virtually indistinguishable" in subsection (11): "the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor." However, it is not clear that this modification from "appears to be" to "virtually indistinguishable" will meet the criticism in *Free Speech Coalition* in which Justice Kennedy stated that "The government…[argued]…that the speech prohibited by the CPPA is *virtually indistinguishable* from child pornography...[but]…Ferber provided no support for a statute that eliminates the distinction [between actual and virtual child pornography]." Furthermore, Justice Kennedy went on to state, "Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[39] For purposes of §2256(8)(B), the definition of "sexually explicit conduct" applicable is that contained in §2256(2)(B) which is somewhat narrower than the definition in §2256(2)(A), which applies only when a real minor is involved. Under §2256(2)(B), actual sexually explicit conduct is only actionable if it is "graphic"[40] and simulated sexually explicit conduct is actionable only if it is "lascivious." Thus, while simulated sexual intercourse is "sexually explicit conduct" under §2256(2)(A), simulated sexual intercourse under §2256(2)(B) is "sexually explicit conduct" only where the simulation is "lascivious" and "the genitals, breast, or pubic area" is exhibited. In addition, simulation of bestiality, masturbation or sadistic or masochistic abuse under §2256(2)(B) is limited to such simulation that is "lascivious." This aspect of S. 151 has been criticized by Sens. Leahy, Biden and Feingold.[41]

A section applies to actual and virtual minors.

§2256(8)(C)

As previously mentioned, §2256(8)(C) was not challenged by the Free Speech Coalition, though, in its opinion, the Supreme Court did opine that "although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*."[42] A proposed Senate revision of §2256(8)(C) was not adopted and the section remains as it was.

§2256(8)(D)

The Act deletes §2256(8)(D) as such, but it transfers the "pandering" language of subsection (8)(D) albeit in modified form to §2252A in a revised subsection, (a)(3)(B):

(3) knowingly….

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct….

It should be noted, however, that the "conveys the impression" language of the CPPA has been replaced by more narrowly circumscribed language in (3)(B). Subsection (B)(ii) makes reference to an *actual* minor whereas (B)(i) refers simply to a minor which suggests (B)(i) would be applicable not only to an actual minor but to a virtual minor as well. Assuming that observation is correct, then as to a virtual minor what had been the scope of §2256 (8)(D) has been narrowed from pornographic depictions to only those depictions that are obscene. This narrowing, however, adds nothing that wasn't already available under *Miller*. Subsection (B)(ii) applies only to an actual minor engaged in sexually explicit conduct, activity that would be proscribed by *Ferber*. And, (B)(ii) is limited to depictions of an actual minor, thus eliminating the issue of non-obscene pornographic depictions of a virtual minor. The Supreme Court criticized §2256(8)(D) because as one form of defined "child pornography" a person who received possession of a mislabeled film knowing it was mislabeled would nonetheless be guilty of a crime under the CPPA. Congress addressed that concern by removing the "pandering" language from the child pornography definition and making it a separate subsection under §2252A thus eliminating the pandering issue with respect to recipients under § 2252A(a)(2). However, the "*purported* material" language is troubling as presumably the language would apply where the material doesn't exist at all or, if it does, it is nonpornographic.[43]

§2252A(a)(6)

The Act adds a new subsection to §2252A. Subsection (a)(6) proscribes knowingly distributing, etc., a visual depiction *to a minor* where such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct, for purposes of inducing or persuading a minor to participate *in any activity that is illegal*. The "appears to be" language in §2252A(a)(6) is identical to the language in §2256(8)(B) of the CPPA, which was declared unconstitutionally overbroad in *Free Speech Coalition*. The "appears to be" language in §2252A(a)(6) would include a virtual minor. Moreover, the proposed defense that no actual minor was depicted in §2252A(c) of S. 151 is not available for a violation of §2252A(a)(6). Thus, a virtual minor depicted in sexually explicit conduct would trigger §2252A(a)(6) if (1) it was distributed, etc. to a minor and (2) for purposes of inducing or persuading the minor to participate in any illegal act. In *Free Speech Coalition*, the government had argued that the CPPA was necessary because "pedophiles may use virtual child pornography to seduce children."[44] Justice Kennedy noted that many things, including candy, can be used for immoral purposes and that simply because otherwise legal activities may be so misused does not mean they can be prohibited. [45] But, he went in to say that, "[t]he Government… may punish adults who provide unsuitable materials to children,"[46] citing *Ginsberg v. New York*.[47] *Ginsberg* involved the sale of a so called "girlie" picture magazine to a minor where the magazine was not obscene for adults.[48] Thus, §2252A(a)(6) would be consistent with *Ginsberg* in that it is restricted to distribution, etc. to minors. However, even if a court were to find the language in § 2252A(a)(6) limiting the distribution, etc. to minors was a sufficient narrowing from the language of the CPPA, there remains the troubling language "for purposes of inducing or persuading a minor to participate in any activity that is illegal." While, presumably, the illegal activity referred to in §2252A(a)(6) is particularly intended to deal with sexual abuse, read literally it applies to *any* illegal activity including illegal activities that have nothing to do with pedophiles. The purpose of §2252(A)(a)(6) is commendable but if the language chosen is overly broad, the goal of the provision will not be achieved.

If the language chosen is overly broad, the goal of the provision will not be achieved.

§1466A

The Act adds a new section, §1466A. Whatever else may be true with respect to the other proposed amendments, §1466A is an invitation to constitutional scrutiny. Of particular significance is the language of subsection (c): "It is not a required element of any offense under this section that the minor depicted actually exist." And, consistent with subsection (c), subsection (e), the affirmative defense provision, does not include a defense that a real minor was not used, a defense available under §2252A. Thus, criminal liability attaches under §1466A even where no real minor was depicted and the defendant could prove that. If the depiction is obscene, of course, it would be irrelevant that a real minor wasn't depicted — the depiction would be proscribed under the *Miller* test and *Ferber* would not implicated. But, as will be discussed, §1466A appears to apply even where the depiction does not fail the *Miller* test and the minor depicted is *virtual*, a scenario *Ferber* found to be a noncriminal alternative to nonobscene pornographic depictions of a minor. Subsection (a) deals with knowingly producing, distributing, receiving or possessing with intent to distribute proscribed visual depictions including drawings, cartoons, sculpture and paintings as well as "photographic" images. Subsection (b) deals with knowingly possessing such proscribed depictions. Subsection (a)(1) proscribes depictions of a minor engaged in sexually explicit conduct that is obscene. Likewise, subsection (b)(1) proscribes depictions of a minor engaged in sexually explicit conduct that is obscene. Both §1466A(a)(1) and §1466A(b)(1) are consistent with *Miller* and are not constitutionally objectionable. However, §1466A(a)(2) and §146A(b)(2), which are identical in language, would appear to raise constitutional concerns. Both §1466A(a)(2)(A) and §1466A(b)(2)(A) read as follows:

(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political, or scientific value;

While both subsections narrow the types of sexually explicit conduct that would be violative of the statute, it must be remembered that §1466A(c) provides that, "It is not a required element of any offense under this section that the minor depicted actually exist." Thus, §1466A(a)(2)(A) and §1466A(b)(2)(A) would be violated if a virtual, rather than a real minor, was involved and even though only one of the three tests for obscenity under *Miller* — lack of serious literary, artistic, political, or scientific value — was explicitly satisfied. Given Justice Kennedy's comments in *Free Speech Coalition*, the total absence of a defense that no real child was used where the depiction may not be obscene is unlikely to survive judicial scrutiny.[49]

The protection of our children against sexual abuse and predatory pedophiles is of extraordinary importance. The Internet that has been a boon to humanity is unfortunately an evil weapon in the hands of pedophiles and those who cater to their warped desires. And, virtual human technology that will play an increasing role in entertainment, education and other worthy endeavors also, unfortunately, serves the appetites of child molesters. Strong federal laws are needed but they, like all federal laws, must pass constitutional muster. S. 151 needs to be revised if it is to truly be effective.

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Endnotes

1. Igor Saktor, *A Child Pornography Ring Has Been Smashed Using the Online Technology on Which It Fed*, THE WEEKEND AUSTRALIAN, Dec. 5, 1998, *see also* Sean O'Neill, *Internet Child Sex Perverts Escape Justice So-Called Wonderland Club Members Operated in 46 Countries But Only a Few Took Action*, THE DAILY TELEGRAPH, Aug. 3, 2001.

2. *See* Warren Hoge, *19 Countries Join in Raids on Internet Pornography*, NEW YORK TIMES, Nov. 29, 2001; Glenda Cooper, *100 Subscribers Arrested in Web Child Porn Ring*, WASHINGTON POST, Aug. 9, 2001.

3. *See* Kelly St. John, *'Candyman' Site Billed Itself as For People Who Love Kids'*, THE SAN FRANCISCO CHRONICLE, Mar. 19, 2002; *see also Sting on Child-porn e-mail Group Nets 86*, CHICAGO TRIBUNE, Mar. 19, 2002.

4. Sarah Lyall, *Britain's Hunt for Child Pornography Users Nets Hundreds Besides Peter Townsend*, NEW YORK TIMES, Jan. 15, 2003.

5. 535 U.S. 234 (2002).

6. 18 U.S.C. § 2251 *et seq.* (2000).

7. 535 U.S. 234, 258 (2002).

8. 413 U.S. 15, 93 S. Ct. 2607 (1973).

9 458 U.S. 747, 102 S. Ct. 3348 (1982).

10. 413 U.S. at 24.

11. "Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not." 535 U.S. at 240.

12. 458 U.S. at 756.

13. *Id.* at 758-59.

14. *Id.* at 762.

15. *Id.*

16. *See The Free Speech Coalition*, 535 U.S. at 251.

17. *Ferber*, 458 U.S. at 764.

18. *Id.* at 764-65.

19. *See* Free Speech Coalition v. Reno, 1997 WL 487758, at *6 (N.D. Cal. Aug. 12, 1997)

20. *Id.*

21. *Id.*

22. *Id.*

23. Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).

24. *Free Speech Coalition*, 535 U.S. at 258.

25. *Id.* at 251 (emphasis added).

26. *Id.* The court did recognize "that pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene" but that § 2256(8)(D) prohibited "a substantial amount of speech that falls outside Ginzburg's rationale" and that consequently § 2256(8)(D) was substantially overbroad and in violation of the First Amendment, *Id.* at 257-58.

27. 535 U.S. at 250.

28. *Id.* at 251.

29. *Id.* at 253.

The Internet is an evil weapon in the hands of pedophiles and those who cater to their warped desires.

30. (7)…technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges increased significantly after the decision in Ashcroft v. Free Speech Coalition.

(9) The impact of the Free Speech Coalition decision on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition…

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful…

(13)…The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable…. H.R. CONF. REP. No. 108-66, at 28-30 (2003).

31. *Free Speech Coalition*, 535 U.S. at 251.

32. *Id.* at 255.

33. *Id.* at 256.

34. § 2252A(c)(2): "The alleged child pornography was not produced using any actual minor or minors."

35. *Free Speech Coalition*, 535 U.S. at 255.

36. Proposed § 2256(1) provided: "'minor' means any person under the age of eighteen years *and shall not be construed to require proof of the actual identity of the person*."

37. § 2256(11).

38. *Free Speech Coalition*, 535 U.S. at 264.

39. *Id.* at 254.

40. "Graphic" means that "a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that sexually explicit conduct is being depicted." § 2256(10).

41. S. REP. NO. 108-2, at 26.

42. *Free Speech Coalition*, 535 U.S. at 242.

43. *See* Comments of Sens. Leahy, Biden and Feingold on "Expansion of pandering provision." S. REP. NO. 108-2, at 23-34.

44. *Free Speech Coalition*, 535 U.S. at 251.

45. *Id.* at 251.

46. *Id.* at 251-52.

47. 390 U.S. 629 (1967).

48. *Id.* at 634.

49. Sens. Leahy, Biden and Feingold have stated "This omission may render these new sections unconstitutional." S. REP. NO. 108-2, at 18.

Designing Manager Contracts for Musicians

Continued from page 1

limited window of opportunity and that if the musician does not sign the contract immediately, untold opportunities will be wasted. Generally speaking, that is not the case.

The music industry is not going anywhere and the musician is better served by taking his or her time and ensuring to the extent possible that he or she selects the appropriate manager. Lawyers are very good at delivering bad news and it is perfectly appropriate for the lawyer to inform a prospective manager that he or she has not been chosen. This will help to preserve the relationship between the musician and the prospective manager, which may be beneficial in the future.

Signing the contract. After a manager has been selected, the next step is to enter into a written management contract. The management contract sets forth the relationship between the manager and the musician, identifies the services to be provided by the manager and sets forth the basis on which the manager will be compensated. Management contracts should almost always be negotiated by a lawyer, either with the manager directly or with the manager's lawyer. Let's review and discuss some important provisions of the typical management contract. Sample standard provisions will be highlighted in below, followed by a discussion.

Most contracts for musicians have a term of three to five years.

Term: Sample provision

(a) The term of this Agreement (the "Term") shall be for a period commencing on the date hereof and extending for two (2) years (the "Initial Period") plus such additional Contract Periods (as defined below), if any, by which the Term may be extended by Manager's exercise of the options granted to Manager below.

(b) Artist hereby grants to Manager three (3) separate options (the "Options") to extend the Term for a period of one (1) year each. Each such option period is hereinafter referred to as the "Second Contract Period," "Third Contract Period" and "Fourth Contract Period," respectively and all or any of the foregoing are referred to as the "Contract Periods." The Options shall be deemed to be exercised by Manager unless Manager gives Artist written notice to the contrary at least six (6) months prior to the date that the Initial Period or any subsequent Contract Period, as applicable, would otherwise expire.

(c) Notwithstanding anything to the contrary contained in this Agreement, Artist shall have the right to terminate the Term after the expiration of the Initial Period or any of the Contract Periods if Artist has not entered into an exclusive recording agreement with a major United States record company or a record company distributed by a major United States distributor with respect to Artist's featured performances or an offer for such an exclusive agreement has not been received by Artist and substantially negotiated during the Initial Period or the applicable Contract Period.

(d) Notwithstanding anything to the contrary contained in Section (b) above, Manager shall have the option to extend the Term for the Fourth Contract Period only in the event that Artist's Gross Compensation (as defined in Section ___ below and subject to the last two (2) sentences of this Section (d) during the Third Contract Period is equal to or greater than____________________and ____/100 Dollars ($___). All bona fide offers for Artist's services in the Entertainment Industry (as defined below) shall be included in the computation of Gross Compensation for purposes of this Section (b), notwithstanding Artist's rejection or failure to render services with respect to any particular offer. Furthermore, recording costs shall be included in Gross Compensation solely for purposes of this Section (d), it being understood that such costs are excluded from Gross Compensation for purposes of computing the Manager's Fee (as hereinafter defined) hereunder.

Term: Discussion. The term of the agreement is often the most difficult to negotiate. Because a musician is often a relative unknown in the music industry and, as a result, the musician's biggest success may be several years away, the manager is interested in locking up the musician for as long as possible. On the other hand, the musician is appropriately nervous about aligning himself or herself with a particular manager for an extended period of time, especially since after a certain age it becomes more difficult to break into the music industry.

Most management contracts have a term of three to five years. Often, the term is broken down into an initial period and one or more extension periods, at the option of the manager. One of the ways to satisfy the musician's concerns about the length of the contract is to include certain milestones that, if not met, will allow the musician to terminate the management contract. Sections (c) and (d) above contain milestones that will protect the musician to some extent in the event the manager is not able to make certain things happen by a stated time.

Occasionally, managers will ask for an extremely long term. I have seen numerous proposed contracts with a term of 20 years and I have seen a few lifetime contracts. Obviously, contracts of this nature should be avoided by the musician if at all possible and should never be executed without appropriate milestone provisions to give the musician the right to terminate if things are not progressing as planned.

Although established musicians have much greater negotiating power in connection with the term of the agreement, even new artists should be wary of signing management contracts with a term significantly longer than five years. In fact, I am trying to be diplomatic. I can't conceive a situation in which I would recommend that a client sign a 20 year or lifetime management contract.

Some states limit the allowable length of an artist management contract.

Note that, for purposes of the computation of Gross Compensation for purposes of the income milestones, certain sums are included, even though the same sums are excluded from the same computation as it relates to the manager's compensation. Although there are some valid reasons for this distinction, the musician should endeavor to exclude as many things as possible from the computation of Gross Compensation since the musician's milestone rights and monetary obligations to the manager are adversely affected by every additional sum included in these computations.

New or undiscovered acts: Sample provision

If the musician is a relative unknown and the manager is being retained to assist the musician in being discovered, the goals and likewise the milestones, might be less lofty. Here is a milestone provision I have used on numerous occasions for new artists:

(a) During the first year of the term of this Agreement, (i) Manager shall manufacture or cause to be manufactured a fully mastered demo CD (the "Demo") containing at least four songs performed by Artist and sufficient for submission to record companies and other music industry entities, (ii) Manager shall manufacture or caused to be manufactured at least 500 copies of a professional quality press kit containing photographs, biographical information and other appropriate information about Artist and (iii) Artist shall have recorded pursuant to a record contract and with a record company reasonably satisfactory to Artist at least one professional quality CD containing at least 10 songs (all by Artist, with no compilations), including professional quality cover art and graphics, which has been released for sale to the public; provided, however, that in the event Manager and Artist agree in writing to release the Demo, the release of the Demo shall constitute compliance with this item (iii).

(b) During the second year of this Agreement, (i) Artist shall have at least one (1) song that is playing or has been played regularly on at least 400 radio stations in the United States; provided, however, that such songs are not required to be played on "major" radio stations or be in "regular rotation," (ii) Artist shall be opening in reasonably satisfactory venues on a regular or semi-regular basis for recognized national recording acts and (iii) Artist shall have released a second professional quality CD containing at least 10 songs (all by Artist, with no compilations), including professional quality cover art and graphics, which has been released for sale to the public.

(c) During the third year of this Agreement, (i) Artist shall have at least two (2) songs that are playing or have been played regularly on at least 400 radio stations in the United States; provided, however, that such songs are not required to be played on "major" radio stations or be in "regular rotation," (ii) Artist shall be opening in reasonably satisfactory venues on a regular or semi-regular basis for recognized national recording acts and (iii) Artist shall have released a third professional quality CD containing at least 10 songs (all by Artist, with no compilations), including professional quality cover art and graphics, which has been released for sale to the public.

Exclusivity: Sample provision

Artist hereby engages Manager, during the Term, as Artist's exclusive personal manager, representative and advisor, throughout the world, with respect to all Artist's activities throughout the Entertainment Industry (as such term is defined in Section ___ hereof) and Manager hereby accepts such engagement. Manager agrees to exercise its best efforts in connection with the representation of Artist and to devote such time, resources and personnel as is reasonably necessary to manage, represent and advise Artist in connection with Artist's activities throughout the Entertainment Industry in a manner that is consistent with the management, representation and advice provided to successful performing artists in the Entertainment Industry. Manager represents and warrants to Artist that Manager has the knowledge, experience and resources to provide the services required to be performed by Manager hereunder in a good and competent manner.

Exclusivity: Discussion. Almost all management contracts are exclusive, meaning that the manager will be the only person retained or authorized to perform the services described. One provision that the musician should request in return for the grant of exclusive rights is a representation and warranty by the manager that he or she has the knowledge, experience or resources to provide the services required under the contract. In addition, the manager should agree to use his or her best efforts in the furtherance of the musician's career.

Often, contracts submitted by the manager contain only representations to use reasonable efforts in such regard. There is a material difference between reasonable efforts and best efforts and, given the nature of the relationship between the musician and the manager, I believe the best efforts standards, which requires more effort from the manager, is more appropriate.

Note also that the term "Entertainment Industry" is used in this provision for the first time. The definition of Entertainment Industry, which is discussed below, will be very important in that it defines those areas of the musician's life for which the manager will have responsibility. This can become especially important if the musician wants to work in related industries, such as the movie industry.

Manager's services: Sample provision

(a) Manager shall confer with, counsel and advise Artist in all matters pertaining to Artist's career in the Entertainment Industry including, without limitation (i) the selection of literary, artistic and musical material, (ii) all matters pertaining to publicity, public relations and advertising, (iii) general practices in the Entertainment Industry, such as compensation and privileges extended for similar artistic services, (iv) the selection of and negotiation with, theatrical booking and similar agencies and other third parties that seek and procure employment and engagements for artists and (v) the selection of and negotiation with, any and all potential users of Artist's talents.

(b) Artist shall immediately advise Manager of all offers of employment and of all inquiries concerning Artist's career, that are made or directed to Artist so that Manager may determine and advise Artist whether same are compatible with Artist's career. In addition, Manager shall immediately advise Artist of all offers of employment and of all inquiries concerning Artist's career, that are made or directed to Manager. All decisions with regard to Artist's career shall be made by Artist in Artist's sole but reasonable discretion.

(c) Artist hereby acknowledges that Manager is not licensed under the Labor Code of the State of California as a talent agent or as an employment agent or otherwise under the Business and Professions Code of the State of California or as a theatrical employment agency or other employment agency under the General Business Law of the State of New York or as any of the foregoing under the laws of any state and that Manager has not promised to procure employment or engagements for Artist and that Manager shall not be obligated to procure any employment or engagements for Artist hereunder. Artist shall be solely responsible for payment of all necessary commissions to booking or similar agencies.

Manager's services: Discussion. Another very important provision of the management contract is the provision describing the manager's services. Since this is what the musician will receive in return for paying the manager's commission, it is important that this provision set forth in as much detail as possible all of the services to be provided by the manager pursuant to the management contract. If the musician intends to pursue a parallel career, such as acting, the manager's role in such endeavors should be set forth.

As we will discuss below, the manager's right to receive a commission from income generated in connection with other endeavors should also be negotiated and set forth in detail. It is not unheard of for a musician to have a separate manager in connection with a music career and a movie career. If so, however, care should be taken to avoid having to pay two commissions on the same income.

It is also important to require the manager to keep the musician informed of offers, proposals and other information the manager receives that relate to the musician. It is not unusual to see a proposed management contract require the musician to notify the manager of offers received by the musician, but not vice versa. It is important that the ultimate decision-making power in connection with the musician's career rest with the musician. In order for the musician to be able to effectively make these decisions, the manager must be required to inform the artist of all offers that the manager receives, regardless of the manager's opinion of the value or benefit of such offers.

Manager's powers: Sample provision

Artist hereby irrevocably authorizes and appoints Manager as Artist's true and lawful agent and lawyer-in-fact to do the items listed below for Artist and in Artist's behalf which Artist could legally do on Artist's own behalf and which is permissible as a matter of law to authorize and empower an agent to do. Artist hereby ratifies and confirms all that Manager shall do or may cause to be done pursuant to this Section ___. This power includes the right, power and privilege, to:

(a) subject to Artist's prior approval, engage, discharge and direct for Artist and in Artist's name, public relations firms and representatives, lawyers, accountants and other persons, firms and corporations in connection with Artist's business and financial affairs;

(b) execute for Artist, in Artist's name and on behalf of Artist, any and all agreements, documents and contracts for Artist's services, provided that such engagements are to take place during the Term, as part of a series of engagements which have been approved by Artist and do not exceed a single engagement (i.e., a so-called "one-nighter"); and

(c) subject to Artist's prior approval, approve and permit the use of Artist's name (actual and professional), photograph, likeness, sound effects, caricature and the like for purposes of advertising of any and all products and services and for any other purpose whatsoever;

(d) collect and receive any Gross Compensation payable to Artist; and

(e) *audit and examine books and records of parties with whom Artist has contractual or other rights to audit and examine books and records.*

Musician wants to set aside time to go to college? Put it in writing.

Manager's powers: Discussion. This is a provision pursuant to which the musician grants the manager the power to direct the musician's career. These provisions need to be reviewed carefully to ensure that they are consistent with the musician's goals and objectives. In addition, if there are any specific requirements, such as the right to attend school, keep a day job, etc., these provisions should be specifically negotiated and set forth in detail. For example, here is a provision I have used in management contracts to ensure that the musician will be allowed to attend college:

Manager recognizes, understands and agrees that Artist may attend school at The Berklee College of Music (Berklee) full-time or part-time during the term or any renewal of this Contract. If Artist elects to attend Berklee, Manager agrees that all bookings, obligations, appearances and other obligations of Artist under this Agreement shall be coordinated and scheduled so as to not materially interfere with Artist's attendance at Berklee. Manager and Artist will work together to create a mutually agreeable calendar setting forth those dates during which Artist will be unavailable due to school commitments and any bookings, appearances or other obligations scheduled by Manager during the school year shall be subject to Artist's prior written consent, which consent shall not be unreasonably withheld.

Obviously, the more the musician is unavailable to perform, record and otherwise further his or her career, the harder it will be for the manager to make the musician successful. Managers will often strongly resist these types of restrictions, but I have found that if it is important to the musician, managers will generally agree to certain limitations on their ability to control the musician's schedule.

Manager's compensation: Sample provision

(a) In consideration of the services rendered by Manager to Artist hereunder, Artist hereby irrevocably assigns to Manager and Artist shall pay to Manager, as and when received by Artist or applied in Artist's behalf, a sum equal to ______________ percent (___ percent) of Artist's Gross Compensation (the "Manager's Fee"); provided, however, that the Manager's Fee solely with respect to Artist's live concert appearances shall be ____________ percent (___ percent) rather than ____________ percent (___ percent). Notwithstanding the foregoing, the Manager's Fee with respect to Gross Compensation that is earned by Artist after the Term in connection with agreements entered into by Artist during the Term shall be limited to Artist's Gross Compensation (including publishing income) from all phonograph record albums, cassette tapes, compact discs and other media (collectively, "Recordings") embodying Artist's performances which are commercially released after the expiration of the Term up to and including the second new in-studio album.

(b) Subject to Section (a) above, the Manager's Fee shall be paid to Manager as and when Gross Compensation is received by Artist, without any limitation of time, directly or indirectly or by any person, firm or corporation on Artist's behalf pursuant to (i) any and all contracts, engagements and commitments entered into or negotiated during the Term, (ii) any and all extensions, additions, substitutions, renewals, replacements, modifications and amendments of all such contracts, engagements and commitments referred to in (i) above, (ii) any and all copyrights and publishing rights in musical compositions written, composed, arranged or adapted in whole or in part by Artist prior to or during the Term and (iii) any and all judgments, awards, settlements, payments, damages and proceeds relating to any suits, claims, actions, proceedings or arbitration proceedings arising out of alleged breach, nonperformance or infringement by others of any of the contracts, engagements, commitments, other agreements or rights referred to in (i), (ii) or (iii) above, all of which regardless of when entered into, when performed and when effective. Any monies due to Manager resulting from subparagraph (iv) above, shall be computed after first deducting counsel fees and disbursements incurred by Artist in connection therewith.

(c) Artist agrees that Artist shall pay all Artist's expenses which may arise in connection with Artist's activities in the Entertainment Industry including, without limitation, the cost of material, equipment, facilities, transportation, lodging and living expenses, costumes, make-up, promotion, publicity, accounting and legal fees and Manager shall not have any liability whatsoever in such connection. Manager shall not be required to travel to meet with Artist at any particular place; provided, however, that when Manager travels on Artist's behalf it shall be at Artist's sole expense. Artist agrees to reimburse Manager for all reasonable expenses (collectively, "Expenses") which Manager advances or incurs on Artist's behalf hereunder including, without limitation, the cost of all long distance telephone calls, transportation undertaken by Manager at Artist's request or with Artist's consent and all reasonable lodging and living expenses connected therewith. Manager shall have the right to deduct all Expenses incurred by Manager on Artist's behalf whenever Manager receives any Gross Compensation. Notwithstanding the foregoing, Artist shall have the right to approve any single item of Expense over One Thousand Five Hundred and No/100 Dollars ($1,500.00).

(d) The interest and compensation set forth above which shall be paid to Manager shall be a continuing interest and shall not be revocable at Artist's pleasure. It is intended by Artist to create an agency coupled with an interest and the appointment and engagement of Manager and Manager's right to receive the Manager's Fee as provided for herein are the inducements for Manager to enter into this Agreement.

Manager's compensation: Discussion. These provisions set forth the compensation the manager will receive. In

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Friday, Oct. 10

8 a.m. - 9 a.m.	LAW STUDENTS	Law Students and New Lawyer Orientation to Entertainment and Sports Law: Your Questions Answered
9 a.m. – 10:30 am	PLENARY 1	Termination of Transfers Under the 1976 Copyright Act: 2003 Marks the Beginning of a Struggle
	SPORTS	Changes in the Cable Television World
10:45 a.m.-12:15 pm	PLENARY 2	Facing Digital Online, New Media Technology Issues
	SPORTS	Dealing with the Government: The Criminal Investigation of Players – What to Do When the Police Call
2 p.m. – 3:15 pm	MUSIC	State of the Music Industry: Challenges and Priorities for the Individual Players in the Music Industry in the Digital Era
	FILM	From Book to Film in an Era of Blockbusters and Tent Poles
	VISUAL ARTS	Issues in the Art Market
	SPORTS	Salary Cap Problems and Procedures: Solutions for the Advanced Negotiator
3:30 p.m. - 5 p.m.	MUSIC	View From the Top: Important Issues Facing Senior Management and Artist Representatives in the Recording Industry Today
	FILM/THEATER	Screen to Stage and Stage to Screen – Broadway Works Both Ways
	SPORTS	Legal Aspects of Protection of the Team's Intellectual Property From Ambush Marketers
	MERCHANDISING & LICENSING	The Dog May Be Howling, But His Tail is Wagging
6:30 p.m.	Networking Reception	

Saturday, Oct. 11

8 a.m. - 9 a.m.	Ethics Panel	Entertainment Law Ethics
		Nontraditional Careers for Lawyers
9:15 a.m. – 10:45 am	MUSIC	Music Industry Civil Wars
	FILM	Making Deals with Cable Networks
	SPORTS	A Review of the Year's Sports Law Cases
	LITERARY PUBLISHING	Prepublication Workshop: Spotting Libel, Privacy and Intellectual Property Issues in Book, Magazine and Newspaper Publishing
11 a.m. – 12:30 p.m.	PLENARY 3	Hidden Landmines in Entertainment Arts and Sports Law; Bankruptcy, Securities and Other Financial Issues Beneath the Surface

almost all cases, the compensation takes the form of a percentage of the gross revenues received by the artist. Typically, the manager's commission is 15-20 percent, often lower for major, established artists and occasionally higher for new artists. In most circumstances, the commission should not be higher than 25 percent.

The musician should also keep in mind that the manager's commission is determined based on gross compensation. This means that the manager's fee comes off the top, with the musician required to pay most of the musician's expenses out of the musician's remaining share. Accordingly, it is not unusual for a new artist to take home less than his or her manager after the payment of expenses.

Limitations on the manager's power to bind the musician to agreements and to spend the musician's money should also be included. A threshold amount should be set forth and any expenditure by the manager in excess of such amount should be subject to the artist's prior approval.

Set forth below is a more favorable compensation provision, which I have used on numerous occasions:

After deducting the Excluded Earnings (as such term is defined below), Artist agrees to pay Manager, promptly on receipt of same by Artist, a fee equal to ______________ percent (___ percent) percent of Artist's gross earnings during the term or any renewal of this Agreement from all shows, programs, endorsements, radio shows, television shows, motion pictures, clothing, concessions, publications, books, advertisements, transcriptions, recordings, personal appearances and any other benefits or services. After the expiration or termination of this Agreement, Manager shall continue to receive compensation as if this Agreement were in full force and effect for a period of three (3) years after the expiration or termination of this Agreement on the same terms as above for so long as Artist receives any revenues or benefits, all as fully set forth above and from any show, personal appearances, advertisements, endorsements, recordings, programs, television shows or radio shows which were scheduled, presented, auditioned for, contracted for or commenced during the term or any renewal of this Agreement. The term "Excluded Income" shall mean all royalties, bonuses or advances against future earnings from Artist's personal songwriting or music publishing interests, recording costs or other expenses advanced and recoupable by any record company, fees and royalties paid to producers approved by Manager, funds advanced by record companies for tour support and actually spent for such purpose or recoupable by the record company, reasonable cost of collection and sums actually paid to opening acts.

Regarding gross compensation: The manager might be double dipping.

Manager affiliates: Sample provision

(a) The parties hereby acknowledge that from time to time during the Term, Manager or other persons or entities (i) that are owned and/or controlled by Manager or (ii) that own and/or control Manager or (iii) that are in common ownership and/or control with Manager ("Manager's Affiliates"), may package an entertainment program in which Artist is engaged as an artist or may act as the entrepreneur or promoter of an entertainment program in which Artist is engaged as an artist or may engage Artist in connection with the recording and/or production of Recordings or as a songwriter, composer, arranger or otherwise in connection with the creation of literary or musical works. Any such activity on the part of Manager or Manager's Affiliates shall not (i) constitute a breach of this Agreement or of Manager's fiduciary obligations and duties to Artist or (ii) in any way affect Manager's right to its Manager's Fee hereunder in all instances not covered by the exceptions hereinafter set forth.

(b) Manager shall not be entitled to its Manager's Fee in connection with any monies or other considerations derived by Artist (i) from any employment or agreement whereunder Artist is employed by Manager or Manager's Affiliates in which Manager or Manager's Affiliates is acting as (A) the packager of the entertainment program in which Artist is so employed or (B) Artist's music or literary publisher or (C) Artist's record company; or (ii) from the sale, license or grant of any literary or musical rights to Manager or Manager's Affiliates.

(c) Artist understands and agrees that Manager shall not render and shall not be obligated to render the personal management services contemplated in this Agreement with respect to the aforesaid noncommissionable activities and in connection therewith, Artist shall have the right to seek and retain independent advice.

Manager affiliates: Discussion. It is not unusual for the manager to be a part of or otherwise involved with a company that promotes entertainment programs or is otherwise involved in the music industry. For example, if the manager owns a record company, any royalties paid by such record company to the artist should not be included within Gross Compensation for the purpose of determining the manager's compensation. Otherwise, the manager is, in effect, double dipping. Furthermore, given the relationship between the manager and the company, the artist should be entitled to seek advice from his or her lawyer prior to being required to perform under any contract with such company.

Accounting: Sample provision

(a) Artist and Manager shall mutually agree on the selection of a certified public accountant (the "Accountant"), which Accountant shall be engaged at [Artist's/Manager's] sole expense. The Accountant shall have the right to collect and receive, on Artist's behalf, all of Artist's Gross Compensation hereunder and deposit such Gross Compensation in one or more separate segregated bank accounts in Artist's name. The Accountant and any and all successors shall acknowledge and assume all of the obligations under this Agreement that relate to the Accountant's function. In this connection, Artist shall notify and irrevocably direct any and all third parties to pay Gross Compensation directly to the Accountant. Furthermore, Artist shall irrevocably authorize, direct and cause the Accountant to pay Manager the Manager's Fee and any reimbursement or payment of Expenses from the first monies received with respect to the preceding month's receipts and credits and due Manager hereunder, within the fifteenth (15th) day of each calendar month during the Term (except weekly during any personal appearance tour) and thereafter so long as Manager is entitled to receive Manager's Fee, together with a written accounting statement. Such accounting statements shall, among other things, set forth all gross monies received by the Accountant on Artist's behalf during the preceding month, specifying the source thereof and the deductions therefrom for Manager's Fee hereunder.

(b) In the event that the Accountant is terminated, then Manager and Artist shall mutually agree on a certified public accountant to replace the Accountant. However, it is agreed by the parties hereto that in no event shall any Accountant's services actually be terminated hereunder (i) without the prior approval of both Artist and Manager and (ii) prior to the engagement by Artist and Manager of an accountant who shall replace the Accountant to be terminated.

(c) In the event that Artist or Manager or any party on Artist's or Manager's behalf, as the case may be, shall receive any Gross Compensation hereunder, Artist or Manager, as the case may be, shall forthwith remit all such sums directly to the Accountant.

Accounting: Discussion. The accounting under a management contract is often a difficult and complex procedure, especially if the artist is successful and generates a varied and significant income. The typical practice is to retain an accountant to perform such accounting, to determine the amount of gross compensation and to determine the manager's commission. Provisions setting forth the timing and frequency of payments to the manager should also be set forth.

Representations and warranties: Sample provision

(a) Artist hereby represents and warrants to Manager that:

(i) Artist has the right to make and enter into this Agreement and to grant all of the rights herein granted to Manager and that Artist is not now under contract to any other personal manager;

(ii) Artist will, at all times during the Term, devote time to Artist's professional career in the Entertainment Industry and to do all things reasonably necessary and desirable to promote Artist's career and earnings therefrom; and

(iii) Artist shall not publicly appear or perform for anyone, directly or indirectly, except through Manager and under Manager's direction, without first consulting with Manager.

(b) Manager hereby represents and warrants to Artist that:

(i) Manager has the right to make and enter into this Agreement and to grant all of the rights herein granted to Artist; and

(ii) Manager will, at all times during the Term hereof, devote time to Artist's professional career in the Entertainment Industry and to do all things reasonably necessary and desirable to promote Artist's career and earnings therefrom.

Representations and warranties: Discussion. The manager will always want the musician to represent and warrant that the musician has the right to enter into the management contract. If the musician is encumbered by a prior management contract or some other restriction, it is important for the manager to find out up front. In addition, the manager will often want the musician to commit enough time as may be reasonably necessary to adequately pursue the musician's career.

As previously mentioned, if the musician requires a special consideration in connection with any consideration, such as the right to attend school or keep a day job, adequate language should be incorporated into these representations and warranties.

Does musician have the right to enter into the contract?

It is not unusual for proposed management contracts submitted by managers to contain extensive representations and warranties on the part of the musician, but to neglect to include any representations and warranties from the manager. Although the nature of the representations and warranties to be given will be different, as set forth above, it is certainly appropriate to obtain representations and warranties from the manager as to certain matters.

Indemnification: Sample provision

(a) Artist shall at all times defend, indemnify and hold harmless Manager and Manager's Affiliates and all officers, agents, affiliates, licensees and distributors of Manager and Manager's Affiliates (collectively, the "Other Manager Indemnities"), from and against any and all demands, claims, damages, liabilities, costs and expenses, including legal expenses and reasonable counsel fees, arising out of any alleged breach or breach by Artist of any warranty, representation or agreement made by Artist herein or pertaining to any act, error or omission allegedly committed or omitted by Artist or any person or entity allegedly acting on Artist's behalf or under Artist's direction or control. Artist will reimburse Manager, Manager's Affiliates and Other Manager Indemnities, on demand, for any payment made at any time after the date hereof in respect of any liability or claim in respect of which Manager or Manager's Affiliates are entitled to be indemnified. In the event Artist fails to so reimburse Manager, Manager's Affiliates or Other Manager Indemnities, Manager may deduct such payments from any and all Gross Compensation received by Manager hereunder. Notwithstanding anything herein contained to the contrary, Artist irrevocably consents to the jurisdiction of any court or other forum in which a claim is asserted against Manager, Manager's Affiliates or Other Manager Indemnities which arises out of or relates to any alleged breach or breach by Artist of any warranty, representation or agreement made by Artist herein or any other act, error or omission allegedly committed or omitted by Artist or any person or entity allegedly acting on Artist's behalf or under your direction or control.

(b) Manager shall at all times defend, indemnify and hold harmless Artist and Artist's Affiliates and all officers, agents, affiliates, licensees and distributors of Artist and Artist's Affiliates (collectively, the "Other Artist Indemnities"), from and against any and all demands, claims, damages, liabilities, costs and expenses, including legal expenses and reasonable counsel fees, arising out of any alleged breach or breach by Manager of any warranty, representation or agreement made by Manager herein or pertaining to any act, error or omission allegedly committed or omitted by Manager or any person or entity allegedly acting on Manager's behalf or under Manager's direction or control. Manager will reimburse Artist, Artist's Affiliates and Other Artist Indemnities, on demand, for any payment made at any time after the date hereof in respect of any liability or claim in respect of which Artist or Artist's Affiliates are entitled to be indemnified. In the event Manager fails to so reimburse Artist, Artist's Affiliates or Other Artist Indemnities, Artist may deduct such payments from any and all Gross Compensation received by Artist hereunder. Notwithstanding anything herein contained to the contrary, Manager irrevocably consents to the jurisdiction of any court or other forum in which a claim is asserted against Artist, Artist's Affiliates or Other Artist Indemnities which arises out of or relates to any alleged breach or breach by Manager of any warranty, representation or agreement made by Manager herein or any other act, error or omission allegedly committed or omitted by Manager or any person or entity allegedly acting on Manager's behalf or under your direction or control.

Indemnification: Discussion. Indemnification provisions are part of almost all management contracts and are, in effect, agreements by each party to protect the other party against any losses wrongfully caused by the party making the indemnity. It is important that the indemnification be mutual and not just from the musician to the manager. In addition, it is possible that the manager may have insurance to cover certain losses that would otherwise be covered by the musician's indemnity. If this is the case, waiver of subrogation provisions and express negligence provisions should be included in the management contract. If this is not the case, the musician may want to consider requiring the manager to carry certain insurance.

Set forth below is a waiver of subrogation and express negligence provision that I have used on various occasions:

Neither party shall have any right or claim against the other party for any property damage or other loss, whether caused in whole or in part by the negligence of the indemnifying party by way of subrogation or assignment and each party hereby waives and relinquishes any such right. IT IS THE EXPRESS INTENTION OF BOTH PARTIES THAT THE WAIVERS CONTAINED IN THIS PARAGRAPH APPLY TO ALL MATTERS DESCRIBED HEREIN, INCLUDING, WITHOUT LIMI-

TATION, ANY OF THE SAME THAT ARE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF EITHER PARTY OR ITS EMPLOYEES.

Default and remedies: Sample provisions

(a) Artist acknowledges and agrees that Manager's right to represent Artist as Artist's sole and exclusive personal manager and Artist's obligation to solely and exclusively use Manager in such capacity are unique, irreplaceable and extraordinary rights and obligations and that any breach or threatened breach by Artist thereof shall be material and shall cause Manager immediate and irreparable harm to its reputation and goodwill in the Entertainment Industry and other immediate and irreparable harm which cannot be adequately compensated for by a money judgment. Accordingly, Artist agrees that, in addition to all other forms of relief and all other remedies which may be available to Manager in the event of any such breach or threatened breach by Artist, Manager shall be entitled to specific performance, an injunction or other equitable relief against Artist to enforce Manager's exclusive rights hereunder.

(b) If at any time Artist fails, for a period in excess of three (3) consecutive months (a "Three Month Period"), to fulfill or perform any obligation assumed by Artist hereunder, then, without limiting Manager's rights, Manager shall have the right, exercisable at any time after the Three Month Period by notice to Artist, to extend the expiration date of the then current period to the Term. Such extension shall continue until Artist has fully cured such failure and the then current period of the Term shall be extended for a period of time equal to the duration of any such failure. Artist acknowledges that Manager's exercise of its rights hereunder shall not in any way affect or diminish its right to equitable relief under this Section ____.

(c) If at any time Manager fails, for a period in excess of a Three Month Period, to fulfill or perform any obligations assumed by Manager hereunder, then, without limiting Artist's rights, Artist shall have the right, exercisable at any time after the Three Month Period by notice to Manager, to terminate this Agreement, in which event this Agreement shall be of no further force or effect.

Default and remedies: Discussion. The default provisions set forth above are fairly typical of most management contracts, with one exception. I have included a default provision in favor of the musician. Most management contracts proposed by managers contain extensive default provisions in the event of a default by the musician, but neglect to include any default provisions in the event of default by the manager.

While I have been successful in many occasions in incorporating manager default provisions in management contracts, managers will occasionally vigorously resist the inclusion of such default provisions. The manager's concern is that the musician could use a technical default as a vehicle to terminate its relationship with the manager. This issue can be addressed in a couple of ways. The manager default provisions could be revised to provide that the Three Month Period would not commence until written notice was delivered by or on behalf of the musician to the manager setting forth the default in reasonable detail.

If the musician is unable to incorporate manager default provisions into the management contract, it is critical that the management contract contain milestone provisions that will give the musician the right to terminate the management contract in the event certain things don't happen by a certain time period.

Definition of entertainment industry: Sample provisions

"Entertainment Industry" shall mean, without limitation, all services and activities in such fields of endeavor as phonograph records (including but not limited to recording and production), transcriptions, musical and/or dramatic performances, signing, radio, television, motion pictures, music, personal appearances, concerts, roadshows, tours, café and cabaret performing, hotel, restaurant and private function performing, literary and theatrical engagements, radio and television commercials, commercial merchandising endorsements and tie-ins and for all and any other media of entertainment for which Artist may be or may become qualified; and the sale, lease or other disposition of musical, literary, dramatic or other artistic material which you may create, compose, write or collaborate, directly or indirectly, in whole or in part, in any and all fields; and any act, unit or package show of which Artist may be the owner or part owner, directly or indirectly.

Definition of entertainment industry: Discussion. It is within the definition of "Entertainment Industry" that any limitations on the manager's representation of the musician will be found. For example, if the musician intends to pursue an acting career without the assistance of the manager, income derived directly or indirectly through the artist's acting career should be excluded from the definition of Entertainment Industry (and from the definition of Gross Compensation).

Definition of gross compensation: Sample provisions

(a) "Gross Compensation" shall mean, without limitation, any and all forms of income, payments, consideration, compensation, sums, emoluments or any other thing of value, including salaries, advances, fees, royalties, bonuses, gifts, shares of receipts, stock and stock options, paid to you or applied for Artist's benefit directly or indirectly (i.e., any corporation, partnership or other entity in which Artist has an interest), regardless of by whom procured, as a result of Artist's activities in and throughout the Entertainment Industry; provided, however, that Gross Compensation shall not include (i) any income Artist receives from passive investments, (ii) any monies received by Artist as reimbursement for "sound and light" expenses in connection with Artist's live concert appearances, (iii) any actual bona fide recording costs paid to Artist or on Artist's behalf; (iv) all monies paid to Artist in connection with the production or exploitation of the phonograph record album entitled "______________".

Definition of gross compensation: Discussion. As previously discussed, any income that may be received by the musician for which the musician does not want to pay a commission to the manager should be excluded from the definition of gross compensation. Excluded income should include income derived from nonentertainment sources, such as salaries for day jobs, investment income, etc. In addition, if the musician intends to pursue an acting career or other simultaneous career, compensation derived from these activities should also be excluded.

Finally, if the musician is already established and has certain income producing assets within the music industry, such as prior records or an already planned tour, income derived from these activities may be excluded and should be excluded to the extent the musician is paying commissions on such sums pursuant to prior management contracts or other arrangements.

Assignment: Sample provision

(a) Manager may not assign this Agreement, in whole or in part, without Artist's prior written consent, which consent may be granted or withheld in Artist's sole and absolute discretion.

Assignment: Discussion. Given that the personal relationship between the manager and the artist is the most important aspect of the artist-manager relationship, it is important that the manager be prevented from assigning the management contract to any other party without the artist's consent. In addition, if the manager works for a company (e.g., the management contract is signed with a company and not with an individual manager), it is also a good idea to have a "key person" provision in the management contract. That provides that if the individual manager responsible for the artist dies, becomes disabled or is no longer affiliated with the company and providing the services described in the management contract, the artist has the right to terminate the management contract on written notice. Here is a "key person" provision that I have used on numerous occasions:

Manager recognizes, understands and agrees that ________________ is a material reason why Artist has elected to enter into this Agreement. In the event that ________________ dies, becomes no longer employed by Manager or otherwise ceases to be the primary individual responsible for the performance of Manager's obligations under this Agreement, Artist shall have the right, but not the obligation, to terminate this Agreement on written notice to Manager.

Conclusion

The majority of the responsibility for promoting the musician's career will fall on the shoulders of the manager. Accordingly, the manager is generally granted the most authority and will have the greatest effect, positive or negative, on the musician's success. Selecting a talented, energetic and committed manager — and negotiating a satisfactory management contract — will allow the musician to focus the majority of his or her efforts on making music while ensuring that the manager actively promotes the musician and generates significant income to the extent possible.

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Bibliography

1. Donald S. Passman, *All You Need to Know About the Music Business*, Simon & Schuster, 1991, 1994. This book is required reading for all musicians and their lawyers. If you own it, read it from cover to cover. If you don't own it, I strongly encourage you to buy it. It is an absolutely fantastic resource for musicians and lawyers desiring to learn about the music industry.

2. Naggar and Brandstetter, *The Music Business (Explained in Plain English)*, DaJe Publishing, 1995-7.

3. Krasilov and Shemel, *The Business of Music*, Billboard Publishing 1995.

Reality Check

Continued from page 1

"Bewitched" infringed "I Dream of Jeannie."[1]

After this ruling, the question remains: To what extent do creators have the freedom to develop new shows when such a limited number of new or innovative elements are available? How is it determined when the "borrowing" becomes an improper misappropriation, particularly where new "genres" like reality television combine familiar elements from other types of programs — game shows, soap operas, talk shows, documentaries and variety shows — in seemingly new ways?

As illustrated below, the key appears to be by comparing the two works' "*expression*" — a watchword of copyright protection — as exhibited in the "feel, theme, characters, plot, sequence, pace and setting,"[2] and not by simply mechanically examining how many similarities can be found between the two shows.

The two shows compared

CBS' "Survivor" involves a group of 16 "castaways" forced to live together in a remote location where they compete in grueling challenges. Initially, participants are formed into two competing teams; the winning team receives food and other rewards and immunity from being eliminated from the show and the losing team gathers for a "Tribal Council," where one person gets voted off by the team. Each episode of "Survivor" is based on this three-day cycle of reward, immunity and Tribal Council vote-off, filmed and edited over a period of nearly two months. Once the number of contestants decreases to eight, the teams are merged and the participants compete against each other. The lone surviving contestant wins a whopping million-dollar prize.

In "Celebrity," eight celebrities leave behind their pampered lifestyles and rough it in a remote outpost of the Australian Outback, where they are given tasks or trials to perform for better food. "Celebrity" is broadcast live for 15 consecutive nights and is "basically a slumber party in the jungle."

During the first week, the at-home audience votes by telephone or the Internet to choose one celebrity per night who will undertake a "Bushtucker Trial,"[3] a silly dare-like test that is often comedic and benign, in order to win extra food for the remainder of the group. During the second week, at-home viewers vote to keep their favorite contestant in the camp; the celebrity who receives the least number of votes each night must leave. The lone celebrity remaining at the end of 15 days receives a sizeable sum of money for his or her designated charity.

CBS' claim of infringement

According to CBS, "Celebrity" infringed "Survivor's" copyright because it improperly copied "Survivor's" format of stranding a group of participants in a remote and inhospitable location, requiring those participants individually and collectively to provide for themselves, subjecting the participants to challenges to win awards or luxuries and eliminating them one-by-one in a special ceremony at the end of each episode. CBS argued that, because "Survivor" was the first show to combine each of the elements that CBS defined as the show's format, CBS was entitled to stop "Celebrity" from airing. That argument failed.

As ABC's experts explained, the purportedly common elements of the two shows' formats were derived from other shows that appeared on British and American television, as well as other well-known works. For example, stranding a group of participants in a remote and inhospitable location — and having the participants collectively provide for their survival — was the subject of the 1950s classic *Lord of the Flies* and was an element of the British shows "Network 7" and "Girl Friday" and the American situation comedy "Gilligan's Island."

Requiring participants to confront and endure challenges to win awards or luxuries has been a staple of numerous television game shows, such as "Krypton Factor," "King of the Mountain," "Conquer Fort Boyard" and the children's Saturday morning show "Endurance." Finally, eliminating participants one-by-one is a concept common to virtually every TV game show and other reality shows, including "American Idol," "Boot Camp," "Temptation Island," "Weakest Link," "The Bachelor," "Big Brother" and "Greed."

Given the existence of these well-known and frequently used generic elements, can two shows that share these elements be found to be substantially similar under copyright law? As Judge Preska observed, quoting Judge Weinfeld, "even though a television game show is made up of entirely stock devices, an original selection organization and presentation of such devices can nevertheless be protected, just as it is the original combination of words or notes that lead to a protectible book or song. Copying of a television producer's selection organization and presentation of stock devices would therefore be a misappropriation."[4]

CBS argued that "Celebrity" had copied "Survivor's" "original selection organization and presentation of stock devices" and therefore misappropriated "Survivor's" protectible format. However, even though Judge Preska accepted the notion that a unique combination of stock devices might be protectible, analyzing whether an unlawful misappropriation has occurred requires an examination of the *expression* of those common elements — "the specific details of an author's rendering of ideas or the actual concrete elements that make up the total sequence of events and the relationships between the parties."[5]

Copyright law will not protect an idea.

The law of copyright: separating out protectible expression from nonprotectible ideas

The Copyright Act provides protection for "original works of authorship fixed in any tangible medium of expression."[6] "In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle or discovery."[7] "Thus copyright law will not protect an idea, like the story of a troubled high school student on his own in New York City, but does protect the expression of the idea, in this case J.D. Salinger's novel *The Catcher in the Rye*." [8]

The challenge for the court is to determine whether an allegedly infringing work has taken merely the original author's unprotectible ideas or whether it has also appropriated the original author's protected expression of those ideas. As Judge Preska noted, Judge Learned Hand provided the guiding principle to this "often impenetrable inquiry": "On any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about and at times might consist only of its title. But there is a point in this series of extractions where they are no longer protected. Since otherwise the [author], could prevent use of his 'ideas' to which apart from their expression, his property is never extended."[9]

To the extent that an author claims originality in compiling or combining otherwise unprotectible facts or ideas, "[o]thers may copy the underlying facts" or ideas.[10] The very same facts and ideas may be divorced from the context imposed by the author and restated or reshuffled by second comers without running afoul of the author's copyright, even if the author was the first to discover the facts or to propose the ideas.[11] Cognizant of the U.S. Supreme Court's admonition in *Feist Publications Inc. v. Rural Tel. Serv. Co. Inc.* that "copyright in a factual compilation is thin,"[12] by analogy, Judge Preska held that "copyright protection in a compilation of ideas must also be thin."[13]

The evidence showed that ABC and CBS combined standard, nonprotectible elements of reality shows, game shows and other television genres and used them separately to create the two programs. The major flaw in CBS' argument, according to Judge Preska, was that it "focused almost entirely on the protection of the combination of generic elements without addressing th[e] presentation or expression factor."[14] "Providing protection to a combination of elements without more — that is, without consideration of the *presentation or expression* of those elements — would stifle innovation and would stifle the creative process that spawned the two shows at issue here."[15]

To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.[16] Ownership of the copyright was assumed by Judge Preska for purposes of her preliminary injunction decision and thus was not at issue. Evidence of copying may be direct but is usually established through circumstantial evidence from which copying can be reasonably inferred. Usually, the plaintiff uses the defendant's access to the work, coupled with sufficient similarity between the two works, as circumstantial evidence to prove copying. The question of substantial similarity has been described as "one of the most difficult questions in copyright law."[17]

Courts and commentators have proposed several tests by which to determine whether two copyrighted works are substantially similar, two of which were involved in the battle between ABC and CBS. ABC fought for what is called the "dissection" or the "filtration" test. Not unexpectedly, CBS advocated the broader "total concept and feel" test.

The filtration test

ABC argued that where "a work contains both protectible and unprotectible elements," the court must "inquire only whether the protectible elements, standing alone, are substantially similar."[18] In other words, regardless of the nature of the copyrighted work, "to determine whether the similarity between plaintiff's and defendant's work is substantial, the comparison should not include unoriginal elements of plaintiff's work; rather, the comparison should take place after filtering out of the analysis elements of plaintiff's work that are not protectible."[19]

However, the problem with dissection is that one could dissect anything down to its unoriginal parts, without noticing the expressiveness of its ensemble and after doing so, almost no work could ever be classified as "original." Judge Preska acknowledged this problem, noting that "if we took this argument to its logical conclusion, we might have to decide that there can be no originality in a painting, because all colors of paint have been used somewhere in the past."[20]

The total concept and feel test

In contrast to the dissection test, the total concept and feel test looks at the two works as a whole, including both protectible and nonprotectible parts. However, when a plaintiff's work is not wholly original and incorporates nonprotectible elements from the public domain, a "'more refined analysis' is required" than mere total concept and feel.[21] "Accepting an overly broad scope for protective total concept and feel 'threatens the basic principle of copyright law: that concepts and ideas may not be copyrighted and that only a particular expression of an idea may be copyrighted."[22]

"'Concepts' are statutorily ineligible for copyright protection; for courts to advert to a work's 'total concept' as the essence of its protectible character seems ill-advised in the extreme. Further, the addition of 'feel' to the judicial inquiry, being a wholly amorphous referent, merely invites an abdication of analysis."[23] Significantly, as Judge Preska pointed out in her opinion, the few decisions in which the Second Circuit has found liability based on a "look and feel" argument all involved infringement of visual designs of a fixed artistic work.[24]

Judge Preska's hybrid test of substantial similarity: a matter of expression

Judge Preska reasoned that, in one respect, applying the dissection analysis "would result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectible elements like letters, colors and symbols."[25] In another respect, "[a]ccepting an overly broad scope for protective total concept and feel 'threatens the basic principle of copyright law: That concepts and ideas may not be copyrighted and that only a particular expression of an idea may be copyrighted."[26]

Do similarities arise from noncopyrightable elements?

Accordingly, Judge Preska seemingly applied a combination of the two approaches: On the one hand, she admonished that "when we compare products that contain both protectible and unprotectible elements, our inspection must be 'more discerning;' we must attempt to extract the unprotectible elements from our consideration and ask whether the protectible elements, standing alone, are substantially similar."[27] On the other hand, she also warned that "when assessing substantial similarity, the Court of Appeals does not permit a 'mechanical and counterintuitive,' exercise of simply extracting unprotectible elements and comparing the remainder."[28]

As a result of these two competing and equally valid perspectives, the court must examine "the similarities in such aspects as the total concept and feel, theme, characters, plot sequence, pace and setting" of the works and then determine whether the similarities arise from noncopyrightable elements, as opposed to protected elements.[29]

Judge Preska's expression test applied

In considering the question of substantial similarity between the two shows, Judge Preska found that it was "crucial to consider each program series as a whole," and in doing so held that "both shows combine well-known and frequently used generic elements of earlier works . . . but each series also includes well-known elements not present in the other."[30]

She then credited ABC's expert and her method of analysis: "Her analysis of the evolution of the serial TV reality show as a cycle in the reality TV genre which in turn evolved from combining characteristics of other earlier genres," and discredited CBS' expert, who used a more "scatter-shot" approach, "identify[ing] the shared elements of the two shows as critical and the elements not shared as unimportant."[31]

The importance of this expression or presentation factor was illustrated by the ABC expert's comparison of "I Love Lucy" and "The Honeymooners" and highlighted by Judge Preska in her decision. Judge Preska noted that both "I Love Lucy" and "The Honeymooners" are examples of early "domestic situation comedies" that shared elements: Both were populated by families or couples; both revolved around plots about gender; both had laugh tracks; and both had a three-act structure. [32]

However, these "congruent elements" were expressed differently in the two shows. "'The Honeymooners' was about a male character . . . who was always feeling inadequate in some way. His wife Alice was always in the know, always smarter than he and the plots revolved around his get-rich-quick schemes and the like." In contrast, "I Love Lucy" featured a female character, a "zany housewife . . . who wanted to get out of the house but whose husband wouldn't let her work." Her husband, Ricky, "was a band leader, the more successful one," and "both were middle class." As ABC's expert pointed out, "the programs had very different kinds of plots because of the different story elements that were added to a similar genre."[33]

Ultimately, Judge Preska concluded that the expression of "Survivor" and "Celebrity" were also sufficiently different so as not to provide a basis for a finding of unlawful copying. According to Judge Preska, the major factor contributing to this determination was "the tone of the two shows," describing "Survivor's" tone as one of "unalterable seriousness," and "Celebrity's" tone as one of "comedy."[34]

The tone of "Survivor" is "expressed by the host's unrelenting seriousness, by the contestants' cutthroat competition for food and for the million dollar prize."[35] "Celebrity's" tone is expressed in "the frequent presentations of the hosts' constantly wise-cracking" and "mocking the contestants," while the celebrities "are laughing at themselves."[36]

Characters and contestants were found very different.

The opening scenes of the two shows contribute to this difference in tone. "[I]n 'Celebrity,' the contestants had already met. There was no prohibition, no artificial stifling. They were pictured as chatting and laughing. They got off the helicopters easily and providing real . . . comedic relief . . . . There was no sign of tension of any kind."[37] "In 'Survivor,' the contestants cannot speak to each other . . . . The camera focuses on their very tense faces," and "[a]fter the plane lands, the contestants frantically ran to use the [ ] five minutes they had been given to garner enough supplies to survive without additional food for 45 days."[38]

The elimination of contestants further illustrates the difference in the tone of the two shows — "Survivor's" elimination being the "Tribal Council," "a highly ritualized [and very dramatic] sequence," and "Celebrity's" elimination, a mere "announcement" that is made in the morning, which is considered anything but a "ritual."[39]

Also helping to create a "drastically different look and feel" between the two shows, Judge Preska noted, was the difference in what professionals call "production values." "In 'Survivor,' the overall look is one of lush, artful photography and painstaking etiquette." In contrast, "Celebrity" is "closer to the home video look."[40] Moreover, although both shows were filmed in Australia, Judge Preska found that "the visual expression of the remote, inhospitable setting was different . . . . In 'Survivor,' the Australian series was filmed in the dry Outback bush area," while "Celebrity" was filmed in "the rain forest, in the jungle."[41] Also contributing to the different look and feel is "'Celebrity's' live action and audience participation."[42]

Finally, Judge Preska found the characters and contestants of the two shows to be very different. While both shows have a host and a group of real live people as the contestants, "the expression of these generic elements" is different.[43] Jeff Probst, the host of "Survivor," "appears relatively infrequently in the show," and "plays two roles: [ ] the role of judge in judging the contests and the tribal council and perhaps banishing the loser and he plays the role of group therapist and interviewer," always "unrelentingly serious."[44]

The hosts of "Celebrity," on the other hand, "are nothing, if not funny." "They appear frequently throughout the show . . . and they perform as comic entertainers almost in the broader sense," as they "tell jokes, they mock the celebrities, they wise crack, they comment sarcastically on what's going on, they perform interviews, but in a very comic, mocking style, not in any respect serious."[45]

As for the contestants on the two shows, Judge Preska first noted that "both shows use multiple, real people playing themselves and to a certain extent, this character consideration flows over into a consideration of what might be called plot in these shows."[46] The contestants on "Survivor" are "regular folks about whom the audience knows nothing . . . competing to win a million dollars."[47] The participants are initially organized into two groups who compete with each other and are voted off the show by one another. When the numbers diminish, the team structure is abandoned and it is every man for himself. This structure serves to create "fierce competition" between the teams and among the individuals — and given the competitive nature, "individuals form mutual alliances from time to time and there is suspicious musing and speculation by one contestant about what others are discussing when they are separated from the group."[48]

By contrast, the contestants on "Celebrity" are celebrities, whom the audience knows and who know about each other. There is no team structure and the celebrities do not vote each other off the show. The last remaining celebrity is crowned as king or queen of the jungle and rather than winning a million-dollar prize, the money raised goes to that winner's favorite charity. According to Judge Preska, "[t]his combination entirely changes the interactions among the contestants' so-called plot. The cut-throat competition evident in "Survivor" is entirely absent."[49] Rather than "fierce competition," the tone is "entirely light-hearted."[50] As a result, "the characters and their interactions are expressed very differently."[51]

As part of the plot, Judge Preska also considered the tests or challenges imposed on the contestants and the elimination of the various participants. Here, too, Judge Preska found that the expression of these tests was different. Whereas in "Survivor," the contestants are required to participate in physically difficult undertakings, in "Celebrity," the challenges are voluntary, "not physically difficult and are in keeping with the comedic tone."[52] Finally, although both shows involved serial elimination, Judge Preska found that this idea, too, is expressed differently.[53]

Based on a comparison of the expression of the two shows' elements — their tone, feel, characters and plot — Judge Preska concluded that "a lay observer" would not consider "Survivor" and "Celebrity" as substantially similar to one another.[54] Significantly, Judge Preska also noted that "the determination in this case does not depend on the difference between 'thin' protection and 'normal' protection," but rather is based on "the different expressions" of the two shows' "survivor concept."[55]

Out of the jungle? Programming tomorrow's television

At stake in this lawsuit was more than a single television show. It was the whole concept behind network programming. Once one show becomes a hit, it spawns three or four or more spin-offs, rivals and incarnations, all vying for viewers and trying to follow the trend of shifting audience tastes. The history of television is replete with major genre trends — situation comedies, quiz shows, medical dramas, family sagas, talk shows — comprised of programs with common traits that reflect the viewing audience's — and in a larger sense, society's — interests.

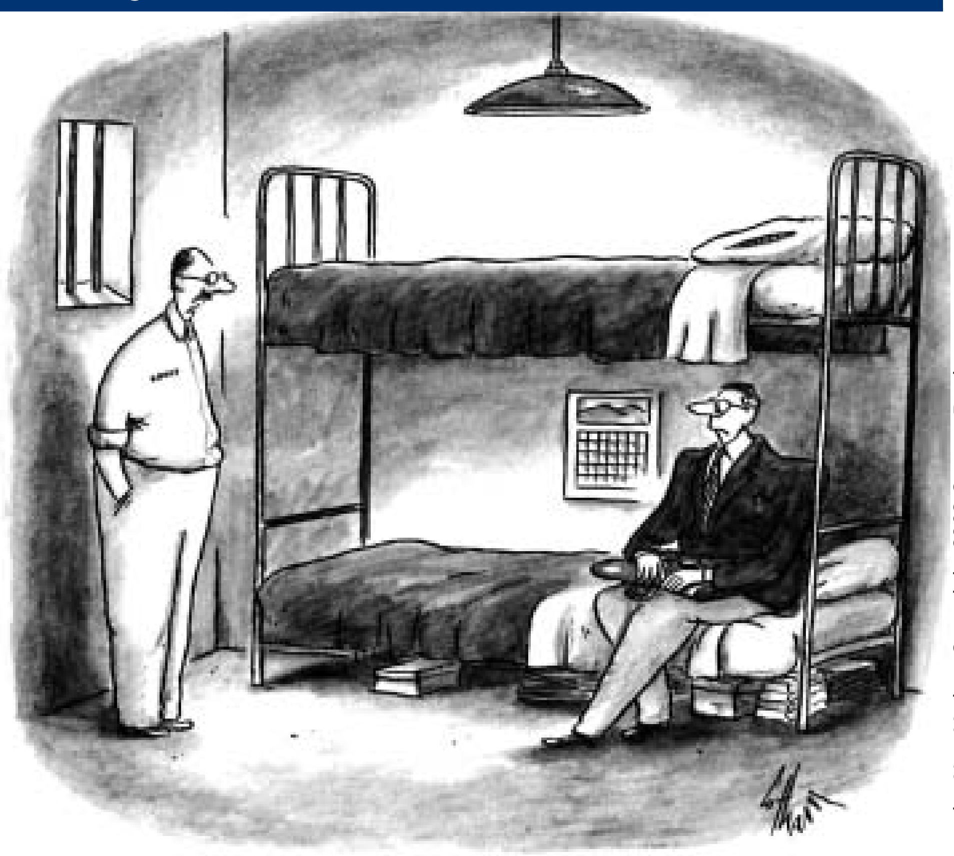
Reality programming is no different — and to some extent is simply a result of combining elements of these genres that have not been combined before and transforming them into a new genre. If the creative process that has resulted in this transformation were to constitute copyright infringement, television production would long ago have stagnated into a few generic monopolies and audience choice would have been severely limited.

After Steve Allen, there could have been no Johnny Carson, Jay Leno or David Letterman; "Wagon Train" would have precluded "Rawhide," "Gunsmoke" or "Bonanza" from ever airing; "The Donna Reed Show" would have meant no "All in the Family," "The Cosbys" or "Everyone Loves Raymond"; and because of "Dragnet," "Hill Street Blues," "NYPD Blue" and "Law and Order" might never have seen the light of day. Rather, the creators of the first of each of these genres would have had a monopoly on these formats.

The reason that television continues to thrive is that there are endless reworkings of many basic generic elements applied in novel ways, in different proportions, in different combinations and with different styles and production values. That is why "ER" and "Chicago Hope," "Laramie" and "Gunsmoke," "Kojak" and "Cannon," "Donna Reed" and "Leave it to Beaver" and as Judge Preska noted, "The Honeymooners" and "I Love Lucy," "I Dream of Genie" and "Bewitched" and Letterman and Leno, all co-exist, have been successful and do not infringe one another.

Significantly, decisions involving the copyright infringement of television programs are few and far between and of those that have been reported, none has actually found copyright infringement. *See, e.g., Noble v. Columbia Broad. Syst. Inc.*[56] (idea for a "spontaneous, unrehearsed, [television] fictitious courtroom drama, using local lawyer and judges, with participation by the studio audience as jurors" not copyrightable); *Pelt v. CBS Inc.*[57] (CBS awarded summary judgment dismissing plaintiffs' attempt to gain protection of the "format" elements of a television talk show, including the use of an opening song, a moderator, audience participation, a panel of guests, a topic for discussion, pauses for commercials and a closing statement by a moderator because they are unprotectible "generic (and unoriginal) ideas and concepts" used repeatedly on talk shows"); *Sheehan v. MTV Networks*[58] (game shows, both of which involve three players, multiple rounds of play in order to eliminate contestants, a host posing questions to contestants and use of hand-held stock devices held not substantially similar); *Novak v. Nat'l Broad. Co. Inc.*[59] (use of black and white film, an interview talk/show format and flashbacks not protectible); *Dick Clark Co. v. Alan Landsburg Productions Inc.*[60] (idea of television show based on not previously shown out-takes and film clips with "a raised set with a large screen, a live studio audience, an attractive male host and various studio guests" not protectible); *Herwitz v. Nat'l Broad. Co.*[61] (idea of a television show where contestants answer questions for the privilege of getting to choose between a prize of unknown value and a specific cash amount not protectible; plaintiff failed to establish substantial similarity between the two shows); *Richards v. Columbia Broad. Sys. Inc.*[62]

The Lighter Side



"In the novel based on my case, I'm acquitted."

(idea of a quiz show based on motion pictures with questioning of contestants, final jackpot question, conclusion and audience participation not protectible).[63]

These decisions all support the proposition that a combination of *high level concepts* cannot be protected as copyrighted expression — even if that combination is new or unique. What is protectible is the specific *concrete elements of expression* — the tone, theme, characters, plot sequence, pace and setting — the detailed sequences and events that characterize a show.

Tread the line between borrowing and stealing.

Thus, for CBS to have prevailed on its claim against ABC, "Celebrity" would have had to copy specific elements of "Survivor": the serious tone; the artful production values; the outback setting, the serious host; ordinary people competing in teams for a life-changing sum of money in high-pressured and strenuous challenges; the three-day cycle of reward; immunity and ritualized Tribal Council elimination. "Celebrity" had none of these elements and therefore Judge Preska found that a "lay observer" would not "consider the works as substantially similar to one another."[64]

Can the next show that strands a group of castaways in a remote and inhospitable location and requires them to provide for themselves, to participate in challenges to win awards or luxuries and to be eliminated one by one be far behind? Probably not — as long as the television audience wants to watch it.

Conclusion

So, to what extent, if ever, can two television shows in the same genre be considered *substantially similar* so that copyright infringement does indeed occur? Almost never — with creative writers and smart producers who can tread the line between borrowing and stealing. CBS' argument focused almost entirely on the protection of a combination of generic elements without addressing the presentation of expression of the two shows. However, "[p]roviding protection to a combination of generic elements without more — that is, without consideration of the presentation or expression of those elements — would stifle innovation and would stifle the creative process that spawned the two shows at issue here."[65]

In order for one television show — including a reality show — to be held substantially similar to a rival show, it is not enough that the two shows can be shown to follow the same format at some generic level. Rather, it is necessary also to demonstrate that there is substantial similarity in expression in the execution of the format, that is, in the feel, theme, characters, plot, sequence, pace and setting.

Basic dramatic formats — like domestic comedies featuring married couples in a suburban setting or hospital dramas featuring a diverse group of doctors, nurses and technicians in a metropolis — have been re-fitted and re-fashioned since the first broadcast glimmered onto television screens. They have never been the exclusive property of any one person or entity, nor should they be.

The same is true for the reality game show / challenge format — whether it involves stranding people in remote locations, cramped quarters or luxurious resorts. Such shows simply represent just one more variation in the cycle of creative development, available for re-fitting and re-fashioning like any format. Judge Preska's insightful scrutiny of "Survivor" and "Celebrity" and careful legal analysis of copyright law should serve as a useful map of the relatively unexplored terrain of television format protectability for years to come.

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Endnotes

1. *See generally CBS Broad. Inc. v. ABC Inc.*, No. 02 Civ. 8813 (S.D.N.Y. Jan. 13, 2003) (hereinafter "Preska Tr.").

2. *Id.* at 516 (citing *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001)).

3. In Australia, "bushtucker" is food found in the jungle.

4. Preska Tr. at 511 (citing *Barris/Fraser Enters. v. Goodson-Todman, Enters., Ltd.*, 5 U.S.P.Q.2d 1887, 1891 (S.D.N.Y. 1988)).

5.Preska Tr. at 510 (citing *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002),

6. 17 U.S.C. § 102(a) (1994).

7. 17 U.S.C. § 102(b) (1994).

8. *See* Jarrod M. Mohler, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. Cin. L. Rev. 971, 974 (Spring, 2000).

9.Preska Tr. at 509 (citing *Nichols v. Universal Picture Corp.*, 45 F.2d 119, 121 (2d Cir. 1930)).

10. *Feist Publications Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 348 (1991).

11. *Id.* at 349 (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1868 & n.12 (1990)).

12. *Id.* at 349, 359. At issue in *Feist* was the copyrightability of a compilation of names and addresses in the white pages. While plaintiff had a valid copyright in the telephone directory as a whole, the raw data [names and addresses], themselves, were considered "uncopyrightable facts."

13. Preska Tr. at 541.

14. *Id.* at 523.

15. *Id.* at 525 (emphasis added).

16. *Feist Publications Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991).

17. 4 MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT § 13.03[A] at 13-30.2 (2002).

18. Preska Tr. at 462 (citing *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996)).

19. NIMMER, *supra* note 16, § 13.03[E][2] at 13-83 to 13-84.

20. Preska Tr. at 514 (citing *Knitwaves Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1003 (2d Cir. 1995).

21. Preska Tr. at 515.

22. Preska Tr. at 516 (citing *CK Co. v. Burger King Corp.*, 1994 WL 533253, at *4 (S.D.N.Y. Sept. 30, 1994).

23. NIMMER, *supra* note 16, § 13.03[A][1][c] at13-39.

24. Preska Tr. at 571. *See Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001) (quilt design); *Yurman Design Inc. v. PAJ Inc.*, 262 F.3d 101 (2d Cir. 2001) (jewelry design); *Hamil Am. Inc. v. GFI*, 193 F.3d 92 (2d Cir. 1999) (floral pattern); *Knitwaves Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996 (2d Cir. 1995) (sweater designs). In each instance, the defendants actually copied the plaintiff's design and the similarities between the plaintiff's and defendant's works were overwhelming.

25. *Id.* (citing *Boisson*, 273 F.3d at 272).

26. *Id.* at 516 (citing *CK Co. v. Burger King Corp.*, 1994 WL 533253, at *4 (S.D.N.Y. Sept. 30, 1994).

27. Preska Tr. at 513 (citing *Knitwaves Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995). She cites to Nimmer in further support. Nimmer, *supra* note 16, § 13.03[E][2] at 13-83 to 13-84.

28. *Id.* at 513-14 (citing *Knitwaves Inc.*, 71 F.3d at 1003).

29. *Id.* at 516 ((citing *Boisson*, 273 F.3d at 273)).
30. *Id.* at 520.
31. *Id.* at 521.
32. *Id.* at 524.
33. *Id.* The television shows "I Dream of Jeannie" and "Bewitched" and "The Jay Leno Show" and "The David Letterman Show" were similarly compared as a part of Judge Preska's analysis.
34. *Id.* at 526**.**
35. *Id.*
36. *Id.*
37. *Id.* at 527.
38. *Id.* at 526.
39. *Id.* at 527-28.
40. Preska Tr. at 528.
41. *Id.* at 529-31.
42. *Id.* at 529.
43. *Id.* at 531.
44. *Id.*
45. *Id.* at 532.
46. *Id.* at 532.
47. *Id.*
48. *Id.* at 532-33.
49. *Id.* at 533.
50. *Id.*
51. *Id.* at 534.
52. *Id.* at 535.
53. *Id.* at 536.
54. *Id.* at 541.
55. *Id.* at 542.
56. 270 F.2d 938, 939 (D.C. Cir. 1959).
57. 1993 U.S. Dist. LEXIS 20464, at *7-8 (C.D. Cal. Oct. 25, 1993).
58. 1992 U.S. Dist. LEXIS 3028, at *10-11 (S.D.N.Y. March 12, 1992).
59. 752 F. Supp. 164, 172 (S.D.N.Y. 1990)
60. 1985 U.S. Dist. LEXIS 18924, at *1 (C.D. Cal. June 13, 1985).
61. 210 F. Supp. 231, 234-35 (S.D.N.Y. 1962).
62. 161 F. Supp. 516, 518-19 (D.D.C. 1958).
63. Additionally, *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002), which was heavily relied on by CBS, involved two television shows about an inner city hospital run by a predominantly black staff. There, the court did not find substantial similarity between the two shows, but merely that, given the "striking similarities" between the works, the issue of whether defendant was liable for copyright infringement as a result of having allegedly copied plaintiff's "particular sequence" of unprotectible elements was a question that could not be resolved at that stage of the proceedings.
64. Preska Tr. at 542.
65. *Id.* at 525.

Profit Participation in the Motion Picture Industry

Continued from page 1

tax burden (among other reasons), talent will usually set up a loan-out corporation which, as the term implies, will loan out the services of the actor, writer or director that it represents and collect any money owed to it in consideration of such services.

While a set fee (for producers) and pre-determined salary (for talent) is the norm, occasionally, those above-the-line will have sufficient clout to negotiate more enviable compensation packages that may include various forms of compensation contingent on the financial success of the films to which they are attached. Simply stated, contingent compensation is a right to participate in the profits of a film. Unfortunately, that is where simplicity ends.

"Profit" is an elusive word in Hollywood. If a film costs $30 million to make and another $30 million to market, then earns in excess of $100 million at the box-office, the assumption is that profit participants have hit a jackpot. Reality, however, is that once the numbers have been crunched, film studios will often claim that the profit earned by an otherwise box-office blockbuster is "less than zero."[2] Industry insiders joke that true creativity lies not with the talent, but with the accountants.[3]

After a brief history of profit participation in the motion picture industry, this article will set forth the various types of profit participation and attempt to explain how such profits are calculated. The article assumes that a producer has secured a North American distribution deal with a major Hollywood studio and that the studio is financing the cost of producing the film. Typically, the producer will negotiate, in addition to a set producer's fee, some form of profit participation. Talent, in turn, may negotiate a similar participation directly with the producer prepared to grant a participation drawn from his own cut of the profits, calculated in the same way as the producer's participation is calculated by the distributor.

The article will also attempt to show that the creative accounting methods used by film production companies have rendered the bulk of profit participations meaningless.

A brief history of profit participation in the motion picture industry

The silent picture shows of the turn of the last century launched an industry that, in a relatively short time, would become one of the largest and most profitable industries in the world.[4] The epicenter of creativity was (and remains) Southern California, while New York City became the hub of entertainment industry business and finance.[5] Although the silent film era had created its share of stars the likes of Rudolph Valentino, the advent of the *talking* picture show in the 1920s launched cults of personality and fed the industrialized world's newfound hunger for the movie star.

At the time, the vast majority of creative talent (including producers) were under contract to the major motion picture studios. Under this arrangement, referred to as the studio "star system," the studios would retain the talent's services for a term (often for many years) for a fixed weekly salary (those with savvy agents sometimes managed to secure signing bonuses). Profits earned by the films to which the talent was attached were retained exclusively by the studio.

There were, of course, a few isolated exceptions to the rule. For example, Charlie Chaplin and Bette Davis both operated their own successful production companies that allowed them to retain both creative control and a share of the profits. However, most talent abstained from such risky business ventures and remained bound to their respective studios for much of their careers. Individual studios maintained rosters of staff producers, actors, writers and directors, which allowed them to produce hundreds of films per year at relatively little cost.[6]

In 1936, comedian Groucho Marx was cast in two films: "Night at the Opera" and "Day at the Races." Rather than settle for a fixed salary, his representatives successfully negotiated contingent compensation of 15 percent of the gross profits earned by the studio (at the time, MGM). The highly profitable deal did not go unnoticed by Marx's contemporaries. Talent began to rebel against the studio star system. Bette Davis, Cecil B. DeMille, Olivia De Havilland, Jimmy Stewart, William Holden and Don Ameche, among others, refused to sign long-term contracts with the studios and demanded greater creative and financial control.

With the advent of TV in the 1950s, the movie star system collapsed.

With the advent of television in the 1950s, motion picture studios found themselves competing for audiences. As a result, they produced fewer films every year. Fewer productions and an increasingly adamant group of actors and directors eliminated the need for a roster of talent tied to each studio. Independent production companies soon mushroomed to fill the void. Talent was free to associate with a studio or independent production company on a film-by-film basis. The star system had collapsed.

Inspired by Groucho Marx, but unable to successfully tap into gross profits, talent began to negotiate net profit participation deals. Essentially, the studios would deduct certain fees and expenses from the gross profits earned by any given film and report the remainder as net profits. In spite of these deductions, the reported net profits were significant and participants were collecting considerable payments. The windfall for talent, however, was short-lived.

Eventually, studios developed accounting methods and contractual definitions designed in such a manner that, once all allowable deductions were made from the gross profits earned by a film, there was no money left to distribute to the net profit participants. The bigger names in Hollywood occasionally muscled gross profit participations into their contracts. Even today, talent considered essential to a film's success will have the bargaining power necessary to demand that their contingent compensation be based on profits earned *before* deductions are made by the studio.

Some talent, preferring not to bother with protracted negotiations and endless redrafting of contractual definitions, simply demand astronomical upfront cash payments and forego profit participation altogether. Nonetheless, the vast majority of profit participants remain subject to the studio definition of net profits, which ultimately allows for a plethora of deductions from the gross.

The right to profit participation

The right to participate in a film's financial success may be broken down into two basic elements: (1) participation in either the net or gross receipts of the film; and / or, (2) the right to a lump sum payable when the film's receipts have attained a predetermined level (also called a "deferment").[7]

The recent trend has been to refer to the revenues earned by a film as "proceeds" rather than profits. Some agreements will refer to the earnings as "receipts." Often, all three terms are used interchangeably, as though to maximize confusion. This article will refer to a film's revenues as "receipts" (i.e., money that the film studios actually receive from the exploitation of their films) and as "profits" when deductions are factored into the equation (i.e., what is left after expenses have been deducted from the receipts).

Added to the jargon are "rolling," "initial," "actual breakevens," "off-the-top deductions," "allocations," "negative cost," "deferments," "first-dollar gross," "adjusted gross" and so on. It is unwise for participants not to retain the services of an entertainment lawyer to wade through the daunting world of contractual definitions and to secure the best possible compensation package. That being said, in order to understand what both producers and talent can expect to receive as payment for services rendered, it is necessary to first determine what revenues are actually included in a film's gross receipts.

What constitutes gross receipts?

(a) Money earned from exhibitors (or theatrical gross receipts) — Generally, gross receipts (often referred to as the "pot")[8] include money received by a film's distributor (usually the major studios or so-called mini-majors) from the film's exhibitors (i.e., movie theaters). Typically, the distributors will collect about 50 percent of box-office revenues from the exhibitors. Gross receipts, therefore, will include the money received by a film's distributor from the exhibitors and not money earned at the box office.

When media, therefore, report that a film has earned $100 million from domestic box-office, reference is made to money received by the exhibitors, not the studios. The distributor-exhibitor agreement will often refer to these receipts as "film rental income" and they are generally reported correctly. The incentive for honest reporting of these receipts is that a failure to do so would expose the distributor to a possible claim for breach of fiduciary duty by the participants.[9]

(b) "Outright" licenses to sub-distributors — When films are exhibited in less-profitable territories where the distributor does not have a significant business presence (such as Africa or the Middle East), the distributor will license the film to a sub-distributor for a flat fee. The sub-distributor retains its earnings from its exhibitors in those territories. This arrangement is often referred to as an "outright license" or "outright sale." The flat fees collected by the distributors from the sub-distributors in the context of outright licenses are included in the film's gross receipts.

(c) Television, home video and nontheatrical licenses — Gross receipts are also earned from a variety of media sources other than movie theatre exhibition. For example, a distributor will license the film to television networks, as well as to individual television sta-

tions in the context of syndication, cable broadcasters, home video distributors and various nontheatrical locales such as ships and airplanes, military facilities and academic institutions. Thus, gross receipts will include any money received by the distributor from television networks and broadcasters as well as other nontheatrical locations.

Allocations are an extremely contentious issue for profit participants when dealing with the sale of television rights. A distributor will bundle a series of different movies into a so-called package and license their exploitation to a television network, cable channel or syndicator. Among the various movies so licensed are some box-office hits, some average earners and some flops. Intuitively, one would seek to allocate the receipts of such licenses to the individual movies contained in the package according to their box-office value. Thus, a smaller amount of receipts would be allocated to the flops and a greater amount to the hits. That way, producers and talent hoping to profit from the financial success of the hits would expect the distributor to add a larger portion of the receipts into their pot.

Unfortunately, standard Hollywood accounting methods are often counter-intuitive. Flops will usually receive an unjustifiably high allocation of the receipts earned from these licenses and the hits are allocated amounts nowhere near their merit. This is an artificial method of allocating receipts that ultimately ensures that hits will earn less money (in the hopes of cutting into the film's net profits) and flops earn more money (but never enough to show a profit). Distributors argue that, in accordance with the net profit definitions found in their agreements with the participants, they have a right to allocate these receipts as they see fit.

Many profit participants have argued that this sort of manipulation is evidence of a lack of contractual good faith on the part of the distributors. The profit participants, needless to say, have a more convincing argument. No North American appellate court has yet to voice an opinion on this debate.

Home video is another industry sore point deserving of slightly more elaboration. Every major Hollywood studio has an affiliated or subsidiary home video distribution company that sells VHS tapes and DVDs to wholesalers and retailers worldwide.[10] At the outset of home video technology, the major studios had not yet established their own video distribution systems. They relied on independent third-party video distributors, which paid the studios a flat royalty of 20 percent of home video sales and retained the remainder.

Today, the standard agreement between film studios and profit participants simply reflects the history of home video distribution by providing that 20 percent of the money received by the home video distributor shall be included in the studio's gross receipts. Studios will dip into the remaining 80 percent to cover the costs of producing and marketing the videos and DVDs, pay out any residuals owing and pocket the rest. In other words, once the studios had finally set up their own home video distribution arms, they (rather unfairly) continued the practice of reporting only 20 percent of sales as gross receipts and quietly pocketed the rest.

Home video sales don't earn much for the talent.

In short, as far as home video is concerned, profit participants are usually entitled to a royalty equal to 20 percent of the VHS or DVD's wholesale price. The problem with this arrangement is that any given film will often sell close to 250,000 video copies at a wholesale price of about $50 (U.S.), generating $12,500,000.[11] Only 20 percent of the generated amount (i.e., $2,500,000) will be remitted by the affiliated home video distributor to the studio. The studio, in turn, will report only $2,500,000 as gross receipts from home video sales.

Talent will be entitled to 20 percent of that reported amount. In the end, the profit participant will have received 20 percent of 20 percent of the wholesale price (i.e., 4 percent), minus allowable deductions (discussed further below). As a result, talent with greater bargaining power occasionally succeeds in negotiating either a larger royalty or a commitment by the studio to report a royalty of 20 percent of *total* sales generated.[12]

(d) Merchandising licenses — Studios will often license merchandising rights, which includes the manufacturing, distribution and sale of items such as posters, T-shirts, coffee mugs, key chains and toys, bearing the names or likenesses of film characters, movie stars or recognizable directors, film company logos and still photography, as well as on-screen product placement. All major film studios and many mini-majors have merchandise-licensing affiliates or subsidiaries of their own and only occasionally will they hire the services of an independent third-party licensing agent. Typically, 40 percent of movie merchandise is sold before a film is even released.[13]

Merchandising is particularly lucrative, generating in excess of $16 billion (U.S.) annually from entertainment-related products alone.[14] The studios intent on engaging in heavy merchandising campaigns for any given film will enter into countless cross-promotional deals with, among others, fast-food chains, soft drink companies and auto manufacturers. It is said that McDonald's Corp., as a result of its many cross-promotional deals with Disney, has become the world's largest *toy* retailer.[15]

If a studio merchandises a film in-house, it will report 100 percent of merchandising revenues as gross receipts, minus a huge and largely arbitrary 50 percent administration fee. If a studio hires an independent merchandising agent, it will also report 100 percent of the revenues, minus a much smaller administration fee, usually about 20 percent. In both instances, the studio will also deduct royalties and various other costs.

Although uncommon, it is possible to negotiate for merchandising revenues to be calculated separately, in a pot of their own and participants may earn between 5-10 percent of such revenues.

It is not uncommon, however, for distributors to exclude merchandising revenues in their contractual definition of gross receipts. Considering the value of such rights, their arbitrary exclusion and the fundamental inequality of bargaining power between distributors and participants, the latter may, in such a case, be compelled to seek legal redress.

At common law, the most likely method for participants to challenge the practice of excluding merchandising revenues from gross receipts is by suing in contract on the grounds that such a practice is unconscionable.[16] Under California contract law, a claim of bad faith (a legal requirement in all contractual relations) and abuse of right would be the basis of a plausible legal challenge.[17]

(e) Musical rights licenses and compact disc sales — Once again, the amount of revenue that will be included in the proverbial pot of gross receipts will depend on whether the studio is publishing film-based music itself or whether it does so through an independent third-party licensee. If the studio is handling the publishing, then it will normally include 50 percent of music publishing revenues as gross receipts minus an administration fee that usually hovers around the 15-20 percent mark as well as any royalties payable to composers and songwriters.

On the other hand, if the studio licenses publishing rights to a third party, it usually will not charge any administration fees, but it will deduct a distribution fee of equal value. Ultimately, the profit participant will see 100 percent of music publishing revenues reported, subject to a deduction of at least 15 percent in one form or another, as well as additional deductions for royalty payments. The remainder constitutes gross receipts.

Approximately 50 percent of revenues earned from compact disc (CD) sales for movie soundtracks will be reported by the studio as gross receipts, minus a 20-30 percent packaging fee as well as any royalties payable to composers and songwriters. If the studio hires a third-party licensee to release a soundtrack rather than do so in-house, it will typically report 100 percent of revenues received from the licensee as gross receipts, but will deduct a 10-20 percent administration fee in lieu of a packaging fee as well as any royalties owing.

For example, if a studio releases a soundtrack that sells 100,000 copies at $25 per copy (totaling $2,500,000), it will report half as gross receipts ($1,250,000), then deduct a packaging fee of around 25 percent (i.e., $312,500), for a remainder of $937,500. From the remainder, the studio will deduct any royalties owing to third-party artists and put whatever is left into the gross receipts pot.

Distributors will nearly always demand that revenues earned in a foreign currency be excluded from gross receipts.

(f) Advances from licensees — Film rights are very often licensed prior to the release of the film. Licensees will pay the film's distributor an advance on the right to exploit the finished product. Advance payments from licensees are included in the gross receipts, unless the distributor is contractually required to refund the advance in certain circumstances. The right of a licensee to recoup an advance is beyond the scope of this review.

(g) Credit for blocked funds — Distributors will nearly always demand that revenues earned in a foreign currency be excluded from gross receipts, often as a result of a foreign government's restrictions on the movement of capital. The revenues earned in such countries are referred to as "blocked funds." Distributors will sometimes agree to provide the profit participant with a credit until blocked funds are finally released.

Participation in gross receipts

There are different ways to participate in the gross receipts of a film:

First-dollar gross participation — In this scenario, the profit participant is entitled to a certain percentage of the total gross receipts earned by a film before any deductions are made by the distributor. This is the most valuable form of participation and is near impossible to negotiate unless the talent involved is either a very powerful industry player or so famous that their attachment to the project is likely to generate a box-office bonanza for the studio.

Break-even participation in adjusted gross — The "break-even" is the point at which receipts equal the amount of money that has been paid (or will be paid) by the studio. That is, the studio has disbursed, for example, $30 million and receipts have reached $30 million. "Initial break-even" refers to the moment the studio first begins to achieve a profit on a film. "Adjusted gross receipts" is the money that remains after the distributor has made a limited, pre-determined number of deductions from the initial gross receipts.

These limited deductions are referred to as "off-the-tops" and will usually include items such as taxes, trade dues, checking costs, collections, residuals and certain advertising expenses. The idea behind this form of participation is that the participant is not required to wait until the distributor has recouped all of its expenses before collecting a share of the profits. It is sometimes referred to as a "nice net" participation.[18] While this form of gross receipt participation is more common than a first-dollar gross participation, it remains very rare.

Pre-break gross participation — In this scenario, one would participate in the adjusted gross receipts after the studio begins earning a profit on the film. The studio will deduct a distribution fee from the gross at this point, albeit a much smaller one (about 15-25 percent) than one would expect to see in subsequent accounting phases.

Initial (or actual) break-even gross participation — The only difference between initial break-even participation and the simple break-even discussed above, is that the distributor is considered to have actually broken even only after it has deducted full distribution fees (about 30-40 percent) from the gross receipts.

Rolling (or moving) break-even gross participation — In this scenario, the profit participant is entitled to a cut of the adjusted gross receipts once the film breaks even. However, the distributor reserves the right to cut off the flow of profit to the participant in order to recoup any additional distribution expenses (plus a fee) that it incurs at a later date. The distributor will deduct from the gross receipts the amount of the new expenses (and fee).

The method (called "grossing up") used by distributors to calculate their fee under this arrangement is enough to boggle the mind. Suffice it to say that the rolling break-even is not a particularly valuable proposition for the profit participant because instead of collecting a distribution fee on all further gross receipts, it charges a fee on its new distribution expenses after initial break-even. Thus, break-even points continuously change (they roll) and studios will miraculously incur additional distribution expenses as long as gross receipts keep rolling in.

Participation in net profits

Most producers and talent are unable to secure gross receipt participations of any kind. Net profit participations (in the realm of 2-10 percent) are far more common, but less attractive. Essentially, the net profits of a film is the money remaining after all allowable deductions have been made from the gross receipts. The inevitable question becomes: What are the allowable deductions?

A distributor will typically seek to recoup the aggregate of the following costs and expenses from the total gross receipts before making any payments to net profit participants, in the following specific order:

(a) Distribution fees — In a nutshell, these fees include general operating and overhead costs. The problem with these costs is that they are not necessarily attributable to the specific film to which the profit participants are attached.[19] Instead, fees will vary from year to year depending on the total gross receipts earned by the distributor for all films distributed in any given year.[20] Moreover, while they are customarily referred to as "fees," they are, basically, merely another arbitrary cash grab.

The particular fee deducted in the context of a single film will typically hover around 30-40 percent of the total gross receipts earned domestically (i.e., United States and Canada), closer to 40 percent of the gross receipts earned in the United Kingdom and often in excess of 40 percent for the rest of the world. There are a few exceptions to this fee structure, but these are beyond the scope of this article.

Additional difficulties arise when the distributor contracts a sub-distributor that charges a distribution fee of its own. Thus, generally, the distributor will deduct a 30-40 percent distribution fee from all domestic gross receipts, notwithstanding that a distributor's actual operating and overhead costs will rarely exceed 15 percent of gross receipts. An unconscionability challenge (in the common law) to the imposition of such burdensome distribution fees would not be implausible. Nonetheless, such fees have become so entrenched and customary that a viable challenge seems unlikely.

(b) Distribution expenses — These expenses will only be deducted *after* the distribution fees have been deducted and will typically include, *inter alia*, laboratory release print costs, advertising expenses, an added 8-12 percent advertising overhead charge, licenses, foreign duties, taxes, checking costs,[21] collection costs,[22] guild residuals, association dues and assessments,[23] translation and subtitle costs, reissue (or re-release) costs, film reformatting costs, shipping costs, copyright registration costs, insurance premiums, litigation expenses (if any) and royalty costs.

Thus, the distributor will deduct all distribution expenses, the most significant of which will be the film print and advertising costs. Since advertising costs can consume up to 50 percent of a film's budget, distribution expenses are a sure way of whittling away at the gross receipts.

The practice of adding an 8-12 percent advertising overhead charge is particularly problematic and, as will be described below, has been successfully challenged in U.S. courts. The charge originates from a time when distributors developed large advertising campaigns in-house and justifiably deducted the charge to cover the costs of maintaining an advertising department.

Today, the vast majority of ad campaigns are contracted to independent third parties. As a result, there is no economic justification for continuing to impose the overhead charge. If a distributor spends $10 million on advertising a motion picture (a modest amount), the overhead charge adds up to $1,200,000 to that amount, which is stripped from the gross receipts(and ultimately from the net profits).

Another difficulty with calculation of distribution expenses concerns inclusion of the average cost (as opposed to the actual cost) of release prints. Distributors usually have long-standing relationships with print laboratories and use them consistently for their films. While the average cost of a release print hovers around the $2,000 mark, multiplied by, for instance, 2,500 (for the number of domestic exhibitors on a widely released film), the cost rises to $5 million. However, most distributors, as a result of the volume of business they provide these labs with, have negotiated considerable discount packages.[24] Unfortunately, the savings are seldom passed on to the participants.[25]

(c) Interest on negative cost — Next, the distributor will deduct interest on the negative cost of the film. "Negative Cost" simply refers to the actual cost of producing the picture (such as technical crew, set building, catering, equipment rentals, etc.). The standard interest rate is prime plus 2 percent. Distributors will always collect interest on the negative cost before recouping the actual negative cost because as long as the latter remains outstanding, it continues to bear interest! Thus, the distributor will deduct an interest charge of 2 percent

The net profits are what is left after all allowable deductions have been made. But what are the allowable deductions?

above the current prime lending rate on the cost of producing the film.

(d) Negative cost — The distributor will then deduct whatever it cost to actually produce the film, plus an inexplicable overhead charge of about 15 percent of the negative cost. It should be noted that the extra 15 percent overhead charge has been successfully challenged in U.S. courts. In some instances, the distributor may even deduct an interest charge on the overhead charge. Distributors will systematically attempt to categorize as many costs and expenses as possible under the rubric of negative cost. Producers beware: Many such items are actually distribution expenses that do not bear interest.

Another problem with the calculation of negative cost is that many motion pictures are shot, at least in part, on sound stages and using equipment belonging to the distributor. Thus, the distributor does not truly incur the full cost of such items, but nonetheless charges the full cost to the motion picture.

(e) Overbudget penalty — A film producer is also responsible (which both the distributor and the completion bond company will emphasize throughout the production) for ensuring that the film gets produced on time and within the allocated budget. Distributors will normally include an overbudget penalty clause to their agreement with the producer (sometimes referred to as an "overbudget add-back penalty").

If the production goes over budget due to a fault of the producer (which excludes, for instance, force majeure, raises in guild payments and any approved budget increases), the distributor will raise the negative cost of the film by the overbudget amount. Occasionally, the distributor may permit an overbudget buffer or "cushion," whereby it agrees to turn a blind eye to overbudget expenses as long as these do not exceed a pre-determined amount (usually 10 percent). Sometimes, depending on its relationship with the producer, a distributor may charge interest on the overbudget penalty.

The overbudget penalties are particularly unfair to those profit participants who do not exercise any control over the budget. Moreover, it should be irrelevant that a production has gone over budget for the purposes of calculating profitability. That is, if a film were budgeted at $30 million but goes over budget by $5 million, it will simply achieve profitability once $35 million has been earned. Why should the overbudget penalty be deducted from the gross?

(f) Deferments and gross participations — A deferment is simply a lump sum payable to a profit participant at a predetermined date (for example, two weeks after the first domestic theatrical release of the film) or when revenues (gross or net) have attained a predetermined amount. Distributors are rarely inclined to grant deferments payable on a certain date regardless of the film's box-office success.

Why should the overbudget penalty be deducted from the gross?

Instead, the bulk of deferments will be contingent on gross receipts or net profits attaining a certain dollar amount. Once the predetermined dollar amount is attained, the deferment will be payable out of the subsequent receipts as they are earned (not out of the receipts already earned to date). If the distributor has agreed to pay any deferments or any gross receipt participations, these amounts will be deducted from the gross.

Again, a producer should vehemently resist the inclusion of any such participations as a negative cost as the interest charges alone would be enormous. Often, gross participants will join in after a net participant has already signed on. The net participant should therefore attempt to negotiate a commitment on the part of the distributor that no subsequent gross participants will join in.

If the distributor refuses to commit and gross participants are allowed to join, a prior net participant may argue that the distributor is in breach of its obligation of good faith (particularly under California law) by doing something that it knew or should have known would interfere with the net profit participant's rights under their agreement.[26] Moreover, distributors have occasionally engaged in the practice of charging interest on the payments made to gross participants — a practice that has been successfully challenged in U.S. courts.

(g) Note on hard and soft floors — These notions are welcome developments for producers. Essentially, with fewer gross participants dipping into the distributor's pot, a producer can expect to collect more profit. For example, a producer may be entitled to a 25 percent net profit participation, which may be reduced by the distributor's payments to gross participants, up to a soft floor of 10 percent, which can, in turn, be reduced to a hard floor (and no lower) of 5 percent.

Whatever is left, once all of the above deductions have been made from the gross receipts, constitutes net profits. Producers collect the bulk of profit participations. The more powerful the producer, the higher up the participation scale. Producers such as George Lucas and Brian Grazer are reputed to have made contingent compensation deals in the realm of 30 percent of first dollar gross receipts. Talent will generally begin their acting and directorial careers being paid a fixed salary and a small net profit participation (meaning none at all). Greater income-generating star power will allow talent to negotiate better contingent compensation packages. Megastars the likes of Tom Hanks, Tom Cruise, Arnold Schwarzenegger and director Steven Spielberg are said to have secured spectacular profit participations in excess of $20 million against first dollar gross receipts of up to 20 percent.

Writers will typically never get anything more than 2-5 percent net profit participations and perhaps a small cash bonus if a film is a box-office smash.

Buchwald v. Paramount Pictures and other courtroom dramas

Net profit participation lawsuits are almost always settled out of court, hence the meager pickings in terms of legal precedent in the area.[27] A number of suits, however, have acquired a certain renown, perhaps infamy — the most important of which being the case of *Art Buchwald, et al. v. Paramount Pictures Corp., et al.*[28] Paramount had produced the film *Coming to America* (starring Eddie Murphy) based on a story treatment submitted by Art Buchwald. Buchwald had obtained a net profit participation as contingent compensation. The film was released in 1988 and, while it went on to earn in excess of $100 million at the box-office, Paramount claimed that it had suffered a loss.

Buchwald sued Paramount in contract arguing that Paramount's standard net profit definition was unconscionable. The Los Angeles Superior Court agreed in part and awarded Buchwald $900,000 in damages. Paramount appealed, but the suit was eventually settled for undisclosed terms. Among the items that were held to be unconscionable: charging interest on gross participations, 15 percent additional overhead charges, charging interest on overhead, interest on negative cost substantially higher than the producer's cost of borrowing.

Actor James Garner sued Universal Studios for money owing from the hit show *The Rockford Files*; Sigourney Weaver sued Twentieth Century Fox over net profit participation in the hit film *Aliens*; Jeffrey Katzenberg sued The Walt Disney Co. over net profits promised within the framework of his employment agreement with Disney (the parties are reported to have settled for well over $250 million); Alan Alda sued Twentieth Century Fox over net profits earned from *M*A*S*H*; David Duchovny sued Fox Television over the hit series *X-Files*.

More recently, New Orleans District Attorney James Garrison filed suit against Warner Brothers over net profits from the movie *JFK*. Garrison will attempt to argue in part that all major Hollywood studios collude to develop similar if not identical net profit definitions in their agreements and as a result are in breach of federal antitrust laws.

Conclusion

A promise of net profit participation is often a hollow one. Unless producers or talent have sufficient bargaining power to redefine the term, one is better off dealing for up-front cash payments or deferments.

Many of the accounting practices described in this article have been the subject of legal challenges. The most recurring bases for these challenges have been breach of contract arguments and more particularly claims of unconscionability. Challenges have also been mounted based on rules of contractual interpretation. As most motion picture industry agreements and especially distribution agreements, constitute adhesion contracts (i.e., for which the essential terms are imposed on the weaker party without the benefit of bona fide negotiations), any dispute on how to interpret an ambiguous contractual clause should be resolved in favor of the weaker party.

Film production companies must calculate the net profits earned by a film not only in order to account to net profit participants, but also, among other reasons, to report earnings to shareholders and to determine tax liabilities. It is important to note that net profits may (legally) be calculated differently depending on what the purpose of the calculation is. For example, when film production companies report their revenues to shareholders, net profits will be calculated in accordance with Generally Accepted Accounting Principles (GAAP). This method is also required when reporting earnings to securities and exchange commissions.

When reporting profits to shareholders, companies seek to report them as high as possible. When reporting to the government for tax purposes, companies seek to report as low as possible. Similarly, when reporting to net profit participants, film production companies will report as little gross income as possible and deduct as many costs and expenses as conceivable in order to minimize the payout, if any. Film companies will literally maintain two or more different sets of books that reveal two or more different accounting methods.

Often, the only means of discerning an accounting discrepancy in the reporting of net profits is to audit the film production company's books. The most salient difficulties with an audit right are twofold, namely: film companies (i) will usually reserve the right to select the auditor and (ii) will only provide the auditor with its own carefully selected books and conveniently exclude the relevant records of its affiliates and subsidiaries, as well as any underlying contracts with third-party licensees.[29]

One viable alternative to resolving many of the problems noted above is for the distribution fees and expenses (the source of most disputes with participants) to be capped at a certain percentage of gross receipts. By paying producers and talent less money up front and smaller deferments, the cost of filmmaking for the studios would shrink.

Ultimately, however, it is unlikely that the major studios will opt to modify their accounting methods in any way favorable to the net profit participant. As a result, producers and talent will continue to demand up-front cash payments, deferments or gross participations; the cost of filmmaking and star salaries will continue to soar and the studios will occasionally enjoy the pleasures of box-office blockbusters but more often bear the pains of box-office flops.

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Endnotes

1. The Screen Actors Guild (SAG); American Federation of Television and Radio Artists (AFTRA); Alliance of Canadian Cinema, Television & Radio Artists (ACTRA); Directors Guild of America (DGA); Directors Guild of Canada (DGC); Writers Guild of America (WGA); Writers Guild of Canada (WGC); and the Union des Artistes (UDA) are the principal talent unions. Below-the-line crew salaries are also governed by similar agreements. The agreements only bind production companies that adhere to them. All major studios and so-called mini-majors have done so. Countless independent production companies are not signatories to these agreements. Talent tied to nonunion productions are in far more precarious situations than their unionized counterparts because producers are not bound to respect any minimum employment standards (beyond that which may otherwise be imposed by law).

2. Hart, Joseph F. & Hacker, Philip J., "Participation History," available online at *www.filmaudit.com/abrief.html*

3. Resnik, Gail & Trost, Scott, *All You Need to Know About the Movie and T.V.*

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Business (New York: Fireside, 1996) 245.

4. See Wolf, Michael J., *The Entertainment Economy: How Mega-Media Forces are Transforming our Lives* (New York: Times Books, 1999).

5. *Hart & Hacker*, *supra* note 2.

6. Twentieth Century Fox boasted a roster of stars that included Shirley Temple, Betty Grable, Marilyn Monroe, Henry Fonda, Don Ameche and Gregory Peck. Metro-Goldwyn Mayer (MGM) had director Fritz Lang and an amazing staff of movie stars including Greta Garbo, Elizabeth Taylor, Judy Garland, Joan Crawford, Clark Gable, Spencer Tracy, Jimmy Stewart and Mickey Rooney. Warner Brothers had Bette Davis, Humphrey Bogart, James Cagney and Errol Flynn. Paramount had Mae West, Bing Crosby, Bob Hope, Gary Cooper, Burt Lancaster and Kirk Douglas.

7. Baumgarten, Paul A.; Farber, Donald C.; Fleischer, Mark, *Producing, Financing and Distributing Film: A Comprehensive Legal and Business Guide*, 2nd Ed. (New York: Proscenium Publishers Inc., 1992) 47.

8. *Resnik & Trost*, *supra* note 3 at 250.

9. *Hart & Hacker*, *supra* note 2 at 3.

10. *Ibid.*

11. *Baumgarten et al.*, *supra* note 7 at 53.

12. *Ibid.* at 54.

13. Litwak, Mark, "Movie Merchandising," in "Entertainment Law Resources for Film, TV and Multimedia Producers," available online at www.marklitwak.com/movmerc.html.

14. *Ibid.*

15. *Wolf*, *supra* note 4.

16. *Hart & Hacker*, *supra* note 2 at 3.

17. The vast majority of industry agreements provide the states of New York or California as the choices of forum and of law in the event of legal proceedings.

18. *Resnik & Trost*, *supra* note 3 at 248.

19. *Baumgarten et al.*, *supra* note 7 at 59.

20. *Ibid.*

21. Distributors will send representatives to exhibitors' movie theaters to audit the theaters' books in order to ensure that the exhibitors are not under reporting box-office revenues.

22. When an exhibitor has under-reported revenues, distributors will take action to collect unpaid receipts.

23. Such as dues owing to, among others, the Motion Picture Association of America (MPAA).

24. *Hart & Hacker*, *supra* note 2 at 4.

25. *Ibid.*

26. *Hart & Hacker*, *supra* note 2 at 5.

27. "Strategies for Litigating Net-Profits Accounting Suits," (April 1996) *Entertainment Law & Finance*, Vol. XII, No. 1.

28. Superior Court of the State of California for the County of Los Angeles, C706083.

29. Moore, Schuyler M., *The Biz: The Basic Business, Legal and Financial Aspects of the Film Industry* (Los Angeles: Silman-James Press, 2000) 139.

ENTERTAINMENT AND SPORTS LAWYER
Forum on the Entertainment and Sports Industries
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611-4497
Volume 21, Number 2, Summer 2003
ISSN: 0732-1880
Membership and Subscription Information: 800/285-2221