

337

**REPORTED**

**BUSINESS PRACTICES**

**OF THE**

**MAJOR STUDIO/DISTRIBUTORS**

A Compilation (Please wait while this loads)

*By*

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#### Introduction

This monograph focuses on the reported business practices of the Hollywood-based U.S. major studio/distributors. Such practices include those that have helped these seven entities to gain and maintain their domination over the film industry, affording in turn, both financial and creative control over this important industry and its films. Such business practices are also the most critical factors in determining whether any profit participants, particularly net profit participants, who make significant contributions to the financing or production of a feature film, including producers, directors, actors, investors and others, will actually share in a portion of the revenue generated in any or all markets by the exploitation of a given motion picture. These factors are referred to herein as "distributor practices". In certain situations, however, the practice is actually something that may be occurring at the studio level, but since it is often difficult to separate the activities of the studio from its affiliated distributor, the phrase "distributor practices" will suffice for purposes of this report. The practices also run the gamut from industry level problems to rather obscure distribution agreement drafting issues.

The list does not represent an attempt to accuse any specific major studio/distributor, or other distributor of questionable or unethical conduct, creative accounting, sharp negotiating tactics or anti-competitive practices. Nor should it be interpreted as an indictment of the entire distributor segment of the industry. It also does not attempt to achieve any level of "proof" with regard to any reported business practice. There is also no attempt made here to quantify the likelihood that any given discussed practice may or may not occur within the context of an actual and specific industry relationship. Rather this report is merely an attempt to compile in one place a written list of distributor practices that have been reported from time to time in various trade publications, books

on the film industry and in discussions with large numbers of feature film producers, other profit participants and attorneys, accountants, auditors and broker/dealers (whose clients work in or relate in some way to the film finance and distribution arenas), for the primary purpose of alerting such persons to the possibility that such business practices may actually be occurring and to help them understand how such practices may impact on them. Also, some of the concepts overlap, (i.e., there is a certain level of redundancy in the list). But, it is better to be redundant than to omit an important concept. Furthermore, some of the references are not actual business practices but terms which then lead to a discussion of a specific practice.

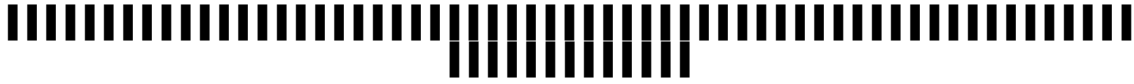
Thus, the information relating to such reported film distributor practices and provided here is offered for the purpose of making those profit participants just mentioned and others interested in the financial and creative aspects of the film business, more aware of the potential breadth of the problem and to hopefully aid in the long term correction of the abuses herein described, if in fact they are occurring. The list is specifically designed to help future independent producers and other net profit participants to be more alert to the possible occurrence of such practices, to aid such producers and others whose interests are aligned with them in negotiating film distribution and other entertainment industry agreements that are more fair to all parties and to aid such profit participants in more effectively monitoring the implementation of such agreements.

Since the consistent and persistent occurrence of such practices over a lengthy period of time tends or would tend to facilitate the concentration of decision-making authority and creative power in the hands of a few distributors and/or studio/distributor executives in the film industry, it is also hoped that this list will at least slightly inhibit the ability of such persons to continue such practices, to the extent they are occurring. Thus, it is also hoped that this monograph may contribute in a modest way toward the preservation of a more vigorous and healthy marketplace for ideas as expressed through the important communications medium--feature films.

This work is an outgrowth of another study of the author, (i.e., a dictionary of film finance and distribution terms). The larger work was published by Silman-James Press in the summer of 1992 (*Film Finance and Distribution--A Dictionary of Terms*). Thus, the concepts listed and discussed here are first defined, then the manner in which such concepts are or may be used or abused to the detriment of others is explained and finally, in many instances, a strategy for attempting to avoid the impact of such a practice is often suggested. Since the information contained herein may prove useful to a broad audience including independent producers, studio producers, producer groups, investors, financiers, joint venturers, co-financiers, actors, screenwriters, attorneys, accountants, auditors, broker/dealers, investment advisors, mergers and acquisitions specialists and other profit participants and/or their representatives, in the interest of brevity, the phrase profit participants is substituted throughout for this larger potential audience.

By the way, a monograph is initially defined by Webster's as "...a treatise on a small area of learning..." but in the alternative, as "...a written account of a single thing." The author

chooses to define the term monograph for purposes of this study as a written report on a narrow topic. In this case, the topic is feature film distributor practices. Enjoy!



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**1. Account Number**--A studio accounting number assigned to a given film production at some film studios and which is generally all that is required of someone to charge expenses for goods or services to the account of a film being produced at the studio. Reports that studio personnel commonly misuse such numbers are common in the literature of the industry. In a studio financing context, profit participants or their representatives must carefully review studio charges to make certain they are all authorized.

**2. Actual Breakeven**--The point at which revenue generated by exploitation of a motion picture equals the costs incurred in the production and/or distribution of such motion picture for the applicable entity (e.g., the film's distributor). Breakeven in a film context is a contractually defined term, and a significant number of variations have been used to signify specific points in a film's revenue stream (e.g., artificial breakeven, breakeven, cash breakeven, first breakeven, rolling breakeven, etc.). For this reason, the term is confusing and this confusion is sometime used to gain an advantage, either at the negotiation or contract interpretation stages. In addition, it is quite rare for persons or entities negotiating with a major studio/distributor to have the negotiating leverage to be able to demand a more favorable definition (see "Contract of Adhesion" and "Unconscionable Contractual Provision").

**3. Adjusted Gross**--A negotiated and defined term in a movie distribution deal, typically gross receipts minus certain specified deductions, which may be the basis of negotiated percentage participations in that fund, (i.e., adjusted gross). Such deductions from gross receipts may include prints and advertising costs, taxes, residuals, advances and other specified items from first position gross. If deductions for enough different items are demanded by the distributor and accepted by the prospective adjusted gross participant, the resulting adjusted gross participation may not have any greater value than a net profit participation. Sometimes, the cost of prints and advertising alone may diminish the value of adjusted gross participation to the point that no money will ever be paid to persons or entities with rights to receive such funds (see "First Position Gross" "Gross Receipts" and "Net Profits").

**4. Adjustment**--The reduction of film rentals owed by an exhibitor to a distributor pursuant to a license agreement, which occurs following a poorer than expected

performance at the box office. Such adjustments may be allowed by a distributor in contravention of its obligations to maximize the exploitation of a given film on behalf of net profit participants. Consequently, such adjustments may allow the distributor and exhibitor to conspire to redirect the revenue streams of one or more films so as to benefit the exhibitor and distributor, while reducing the amount of money to be directed to all other participants at later stages of such films' revenue streams (see "Selling Subject to Review" and "Settlement Transactions").

**5. Admission Price Discrimination**--An exhibitor business practice in which an exhibitor charges a different amount at the box office for theatre admissions depending on which distributor provided the movie being shown. Such price differentials have at times been contractually or otherwise imposed on the exhibitors by the major studio/distributors. Such practices over time tend to make it more difficult for independent distributors to survive (see "Anti-Competitive Practices").

**6. Advertising Costs**--The direct expenses incurred in preparing and producing advertising for motion pictures. Such costs are often overstated. They must be closely examined to make sure they are reasonable whether the advertising for a movie is handled in-house by a distributor's advertising department or by an outside advertising agency. Profit participants or their representatives should watch for "sweetheart" deals where an outside advertising agency artificially inflates the costs of its services on one producer's movie and gives the studio or distributor a more favorable rate on its in-house productions, or in another variation, actually pays some form of "kickback" to the distributor. In other instances, some studio/distributors may charge a 10% advertising fee simply for administering a movie's advertising program when the program is actually conceived, planned, created and implemented by an outside advertising agency. Determine at the distribution agreement negotiation stage whether such fees will be charged and question whether the fee is necessary and whether the percentage is fair and/or reasonable.

**7. Advertising Overhead**--A charge imposed by all of the major studio/distributors and some independents to cover the costs of operating their internal advertising and publicity departments. Generally, the charge equals 10% of the negative cost of the movie, even though any percentage is arbitrary. Net profit participants may have a reasonable basis to question this charge on the grounds that the 10% percentage has no relation to actual costs since certain pictures bear a disproportionate share of such expenses and in many instances this overhead charge will exceed the actual costs of the services actually provided for a given motion picture. In lieu of eliminating or limiting the amount of the advertising overhead charge, net profit participants may choose to seek to impose a ceiling on the amount that can be charged by the studio or distributor (see "Advertising Costs").

**8. Allocations**--The assignment to particular accounts or apportionment among films or entities of the costs associated with distribution (e.g., the costs of advertising several films may be allocated by the distributor among such films). Allocation issues also arise in the licensing of films in a package for television, whether for network or syndication

and in foreign distribution, such issues arise with respect to the allocation of a portion of film rentals to shorts and trailers. The profit participant must have access to the information upon which to make a judgment as to the fairness of such allocations. In the alternative the distribution agreement should provide for a fair or objective method of allocation (e.g., to base the allocation on the films' theatrical performances; also see "Apportioned Expense").

**9. Allowances**--A share or portion allotted or granted or a sum granted as a reimbursement for expenses. Often the film distributor will grant certain allowances to the exhibitor for advertising and exploitation of a film. Again, the profit participant must be sure that such allowances are not excessive in what amounts to a disguised attempt to cross-collateralize one movie's revenue with others the distributor is distributing or will distribute (see "Cross-Collateralization").

**10. Ancillary Rights**--The additional powers or privileges to which a film's producer or distributor or other person or entity is justly entitled to exercise with respect to the original literary property and the feature film that the producer may own, (i.e., additional to theatrical exhibition). Such rights may include the right to produce a remake, sequel, television series, stage play and/or soundtrack recording. Some distributors will seek to exclude revenue from ancillary sources from being included in their gross receipts or if revenue from ancillary sources is included in gross receipts the studio/distributor may seek to use an approach similar to that used for home video (see "Videocassette Revenue Reporting") wherein the distributor only gets a small royalty payment out of the revenues generated at the wholesale level (a royalty payment instead of a distribution fee) and quite often the distributor is an owner of the wholesale entity.

**11. Anticipated Expenses**--A concept often found in film distribution agreements which permits the distributor to deduct from gross receipts an amount adequate to cover future estimated distribution expenses. Such provisions often provide that the distributor may in good faith retain sums necessary to pay for costs reasonably anticipated to arise in connection with the picture being distributed. Some distributors often do not exercise good faith and retain far more moneys than are necessary to cover future distribution expenses. If such a provision is part of the first draft distribution agreement, seek to impose reasonable ceilings on the amounts to be set aside and then, and/or after the fact, make a judgment as to whether the distributor is exercising good faith.

**12. Anti-Competitive Practices**--A broad term referring to all sorts of activities that tend to reduce free competition in the marketplace. This term would include some business practices that are not actionable under antitrust laws (e.g., even though the MPAA rating system might not be actionable pursuant to a given federal antitrust regulation, independent producers or distributors whose films are rated in a discriminatory manner by this MPAA sponsored organization may well view this MPAA activity as anti-competitive; see "Antitrust Law Violations" below).

**13. Anti-Semitic Sword**--The false allegation of anti-Jewish prejudice directed toward someone who criticizes the business related behavior of a small group of individuals

many of whom happen to be Jewish. In their own defense, the Hollywood insiders have historically used a series of myths, smokescreens and straw-man arguments disseminated through the world's most powerful and highly-paid PR machine (aided by a partisan trade press), to cloud public discussion and understanding of important film industry reform issues. Hollywood has discovered there's more than one way to distort the marketplace of ideas, and make democracy serve its special interests and needs. With its enormous money and power Hollywood has been able to effectively confuse the issues, distract people's attention or just talk longer and louder than all the rest. One of these smokescreens is the anti-Semitic sword, the affirmative use of a false and unsupported accusation of anti-Semitism made for the specific purpose of intimidating some potential critics (in other words, creating a chilling effect on their speech), or distracting attention from the truth of the statements made by the film industry critics who have the courage to speak out. That false accusation has been directed toward a number of Hollywood outsiders over the years (including me). On the other hand, all I'm trying to do is present the truth about Hollywood. The most accurate characterization of my position is that I simply favor fair opportunities for all in the film industry (i.e., diversity at all levels), and only offer honest, well-researched criticism of the behavior of that small group of Hollywood insiders who chose to gain and maintain control over Hollywood, and many of whose members happen to be politically liberal, not very religious, Jewish males of European heritage, factual circumstances, over which I have no control (i.e., I can only accurately observe and report). In addition, I think people should not be allowed to succeed in hiding behind emotionally-charged false accusations designed to mask continued wrongdoing. So just briefly, since the accusation has already been made (and in an attempt to preempt repetition of this historical and inaccurate argument), why are my statements directed toward the Hollywood establishment not anti-Semitic? Because, as you know, anti-Semitism requires hostility directed toward Jews generally, or toward a single individual because he or she is Jewish. First, my remarks only rise to the level of honest criticism of someone's business-related behavior, and mere criticism can never be equated to hostility. Even more important, I'm not making any broad statements about Jews generally, nor am I being critical of anyone because they are Jewish. There is simply no evidence of that in my lectures, my writings or my life. Anyone who suggests otherwise is uninformed, confused or dishonest.

**14. Antitrust Law Violations**--Violations of federal and state statutes aimed at promoting free competition in the marketplace, (i.e., to prevent monopolies and restraint of trade). Any agreement or cooperative effort or intent by two or more individuals or entities that affects or restrains, or is likely to affect or restrain their competitors, is illegal under these statutes. The Hollywood control group has consistently violated U.S. antitrust laws and continues to do so today. The rampant vertical integration in this industry is clearly anti-competitive. Prohibited block booking has never gone away (it's simply been transformed into the so-called "blockbuster" or "tentpole" strategy). Arbitrary reciprocal preferences among businesses that are supposed to be competing is an illegal trade practice. Movies have never been sold to exhibitors on a movie-by-movie, theatre-by-theatre basis as required by law. Talent agency packaging is a prohibited tie-in and the revenue sharing scheme for video sales rises to the level of impermissible conscious parallelism. Most of the major studios, in fact, generally have long-operated as a shared

monopoly, which in antitrust terms is an illegal oligopoly. The two major federal antitrust laws are the Sherman Act and the Clayton Act. The Sherman Act protects the right of individuals to be free to compete and makes illegal any contract, combination or conspiracy in restraint of trade or commerce. The Sherman Act also makes illegal monopolies and attempts, combinations or conspiracies to monopolize. The Clayton Act regulates price discrimination, tying and exclusive-dealing contracts, stock acquisitions which tend to monopolize and certain interlocking directorates. The relaxation of the federal enforcement of antitrust laws in the years during and since the Reagan presidency may have resulted in numerous activities that may otherwise be actionable under the antitrust laws, if such laws were being more vigorously enforced. Movie profit participants and even exhibitors must be more aware of such activities and be willing to litigate when appropriate in order to stem any potential trend toward more anti-competitive practices (see "Political Contributions").

**15. Apportioned Expense**--Costs that are divided according to the parties' interests; proportionately. Many distribution agreements allow the distributor the discretion to apportion numerous distribution expenses relating to advertising, facilities, employees, etc. among films marketed in a package. A profit participant cannot make an informed judgment as to whether such apportionments are fair without having access to the information upon which such apportionments are based. Profit participants should try to make sure the audit rights of the producer and/or profit participants include access to such documentation, (i.e., do not allow the distributor to limit access to documents that relate to the amount of money to be received).

**16. Approved Elements**--Significant aspects of a film that have been reviewed and approved by the distributor that, in turn, has committed to distribute the film once it is produced (e.g., script, budget, director, lead actors, running time and MPAA rating). If the film as produced does not contain the elements approved in advance of production by the distributor, that distributor may be able to avoid its obligation to distribute the film. Producers and directors must not forget about those approvals as the film is produced. If the distributor does not like the film, the distributor is not likely to forget. If the film as produced significantly departs from the approved script, for example, the distributor may avoid its obligation to distribute the film. The question of what is significant provides an opportunity to disagree. Some effort ought to be made in negotiating the distribution agreement to further define what departures will be allowed and to provide for some mechanism to obtain distributor approvals on changes along the way, if any. This is a form of creative control imposed by film distributors involved in the production financing of a feature film. Producers, directors, screenwriters, actors, actresses and moviegoers should organize and work to separate the distribution function from the production financing function in the film industry (see "Creative Control").

**17. Arbitration**--The submission of a controversy, by agreement of the parties to persons chosen by the parties for resolution; an informal, non-judicial method for resolving disputes which is usually quicker and less expensive than litigation. Agreements sometimes provide for arbitration to resolve any disputes that arise between the parties. For example, motion picture lenders often require that disputes between a film's

distributor and its producer relating to whether the film has been properly completed and delivered pursuant to the terms of the distribution agreement be submitted to arbitration to insure a more rapid resolution of the dispute. In a situation where a producer signs a production-financing distribution agreement with a studio/distributor, the producer may also want to seek an arbitration clause for the same reasons, particularly since the studio will be charging interest on the production costs of the film. Major studio/distributors, however, generally refuse to submit their disputes to arbitration, since the prospect of encountering huge litigation costs often prevents potential claimants from filing lawsuits against the distributors.

**18. Artificial Pickup**--A film project originally controlled and developed by a studio/distributor but which is farmed out pursuant to a negative pickup or anticipated acquisition distribution deal to an outside (but friendly) production company, partly to avoid the higher costs of the below-the-line union crews which the studio would have to pay if the project was produced as an in-house production at the studio. This practice not only harms guild members, but also prevents some independent producers from getting their film projects picked up by the major studio/distributors since the studio has favored an insider relationship.

**19. Article Twenty**--A controversial article of the IATSE contract that allows major studios to fully finance non-union movies and television shows so long as the studios declare they have no creative control and give the union 30-days notice before production starts. Many union supporters contend Article 20 has helped to increase non-union movie production (see "Creative Control").

**20. Artificial Breakeven**--A contractually defined multiple of a film's negative cost (e.g., when gross receipts equal three times the negative cost of the motion picture) that is treated as actual break-even. This is another one of those confusing terms being defined in the distribution deal by parties of significantly unequal bargaining power (see "Contract of Adhesion" and "Unconscionable Contractual Provision")

**21. Assignment**--The distributor in a film distribution deal typically insists on the right to assign parts of the agreement to sub-distributors and other companies for purposes of meeting its distribution obligations. Some distributors may seek to avoid their distribution responsibilities in this manner. The profit participant, however, should insist on language requiring the distributor to remain liable for performance of the obligations of the agreement even if they are assigned. In many cases, the producer may also want to require the distributor to handle the first general release itself and not pass its distribution obligations on to an entity that was not a party to the distribution agreement. In addition, the producer should preserve his or her ability to assign the right to receive proceeds resulting from the exploitation of the film and to otherwise enforce provisions of the distribution agreement.

**22. Association Antitrust Policies**--The U.S. antitrust laws apply to the membership policies of trade and professional associations such as the MPAA, MPEAA, AMPTP, AFMA, AIVF and NATO. Restrictions on which companies may become a member have



particular antitrust implications, since denial of membership, with its attendant benefits, may be held to place the applicant at an economic disadvantage. Generally speaking, trade associations must allow membership to all those in the trade if excluding them would significantly limit their opportunities to compete effectively, thereby creating a restraint on competition. Two other areas of potential concern with respect to the application of the antitrust laws to professional and trade association policy, are (1) agreements among association members that have the effect of fixing or stabilizing prices for particular services and (2) boycotting or refusing to deal with companies that take action which is opposed by the association members. The major studio/distributors have engaged in all of such activities from time to time.

**23. Attendance Checking**--Activities undertaken on behalf of a producer or distributor designed to verify the actual number of paid moviegoers in attendance at a showing or showings of a film. Such activities may include the hiring of checkers to go to the theatre and count those in attendance or to purchase the first and last ticket of the day at a given theatre to then compare the ticket numbers with the exhibitor's attendance reports. There are organizations that provide such checking services for producers and distributors. However, in a rent-a-distributor situation a producer may want to hire its own checking service to conduct random checks of attendance at theatres where the producer's film is being exhibited. Since the major studio/distributors have been allowed in recent years to reacquire ownership interests in exhibition chains, the decision as to whether or not to engage in attendance checking is not necessarily being made as an arm's length transaction.

**24. Audit**--An inspection of the accounting records and procedures of a business, government unit, or other reporting entity by a trained accountant, for the purpose of verifying the accuracy and completeness of the records. It may be conducted by a member of the organization (internal audit) or by an outsider (independent audit). An IRS audit consists of the verification of the information on the return. A film distribution audit should be conducted by an accounting firm with this specialized expertise, hired by the producer and with as few restrictions imposed on the audit as possible, (i.e., a producer or profit participant should insist on broad auditing rights in any agreement which controls the participation in profits). Unfortunately, the audit rights

provision of the distribution agreement is, once again, typically being negotiated by parties of widely varying bargaining strength, thus distributors often refuse to permit broad audit rights. Broad auditing rights may be defined as a film producer's negotiated authority to audit the books and records of a distributor with few restrictions. Distributors typically want to limit audit rights by restricting when the audit may be started and conducted, limiting the purpose of the audit, restricting who may conduct the audit, requiring that copies of all reports made by the producer's accountant be delivered to the distributor at the same time as the producer, placing limits on the amount of time an audit may take, allowing only one audit each year, only permitting individual records to be audited once, limiting the period during which objections may be made, providing that all statements by the distributor are binding unless objected to in writing within a certain period of time, forever barring the producer or other profit participants from instituting

any lawsuit unless timely objection is made and only permitting review of the books of the subject picture even when the picture is marketed with other pictures as a package. Distributors will also insert language which permits them to keep records in their own unique way. Try to reduce such restrictions and limitations. It is not likely that an audit on behalf of motion picture profit participants will rise to the level of a complete audit which is so thoroughly executed that the auditor's only reservations have to do with unobtainable facts. In a complete audit, the auditor examines the system of internal control and the details of the books of account, including subsidiary records and supporting documents, while reviewing legality, mathematical accuracy, accountability and the application of accepted accounting principles. This is a technical accounting term establishing audit standards (same as unqualified audit). Producers can raise the question of a complete or unqualified audit in negotiations for audit rights although such audits are not likely to be permitted. Experienced entertainment attorneys recommend that profit participants do audit any motion picture that has any likelihood of going into profits. An audit of studio books for a domestic theatrical release may cost \$30,000 or more, but few if any of such audits, do not pay for themselves. Audits of major studios have uncovered millions of dollars in errors, most of which seem to be in the studio's favor (often referred to in the film industry as a "Profit Participation Audit").

**25. Average Negative Cost**--An industry statistic usually calculated by the MPAA for films produced by member companies and presented as a statistical median for a given year. The average negative cost for an MPAA movie has steadily climbed for many years. Studio executives and their representatives are fond of pointing to escalating advertising expenses, high labor costs and the demands of gross profit participants as the primary culprits in the escalation of negative costs while spokespersons for "A" level talent counter that if the studios would quit playing games with their books (thus making net profits virtually obsolete) there would be little need to demand gross participations. Of course, the excessive salaries paid to the studio executives themselves is also partly to blame for such high costs. Hollywood studio executives have a reputation for taking care of themselves, even if it means sacrificing the interests of their corporate shareholders.

**26. Bad Debt**--An open account balance or loan receivable that has proven uncollectible and is written off; amounts earned by a specific film and which are owed to the distributor of the film but which the distributor will not be able to collect because the debtor is insolvent. Distributors will generally deduct such amounts before making payments to the producer. Some distributors have broadly interpreted such language so as to allow them to disregard revenues for purposes of calculating profit participations. Producers and other profit participants should seek to limit distributor discretion to claim amounts are uncollectible and establish some objective criteria in the distribution agreement for which "bad debts" may be written off.

**27. Bad Faith Denial of Contract**--A relatively new tort recovery based on a defendant's bad faith conduct in asserting a stonewall ("see you in court") defense to an ordinary commercial contract. Recent cases have held that the elements of the cause of action are (1) an underlying contract, (2) which is breached

by the defendant, (3) who then denies liability by asserting that the contract does not exist, (4) in bad faith and (5) without probable cause. Film distributors often hide behind the wall of litigations costs to avoid obligations imposed by contract.

**28. Bankruptcy**--A state of insolvency of an individual or an organization; an inability to pay debts when they come due. The taking or acquiescing in the taking of any action seeking relief under, or advantage of, any applicable debtor relief, liquidation, receivership, conservatorship, bankruptcy, moratorium, rearrangement, insolvency, reorganization or similar law affecting the rights or remedies of creditors generally, as in effect from time to time. Bankruptcy is a legal process under federal law intended to not only insure fairness and equality among creditors of a bankrupt but also to help the debtor by enabling him, her or it to start anew with property he, she or it is allowed to retain as exempt from liabilities, unhampered by creditor pressure and the discouragement of pre-existing debts. Profit participants should make some effort to determine the financial stability of a distributor. A profit participant's share will generally not be forthcoming from a bankrupt distributor. Independent distributors have commonly resorted to bankruptcy to avoid payment of obligations to producers and other profit participants, while continuing to pay high salaries to the distributor executives, who then go on to start anew.

**29. Bargaining Power**--The relative ability to control or favorably influence negotiations between parties. Often in negotiations between film distributors and producers, the relative bargaining power of the parties plays a significant role in determining whether numerous negotiated issues are resolved in favor of one or the other. Distributors typically have the stronger position, partly because the law of supply and demand is in their favor, (i.e., there are more motion pictures produced each year than there are distributors who are willing to distribute). Over the years, this power imbalance has been abused by the distributors to the extent that most all feature film distribution agreements are contracts of adhesion, or contain numerous unconscionable contractual provisions. The producer, on the other hand must first assemble an attractive package and/or produce a quality picture, then seek to interest more than one distributor in its distribution. To the extent that a producer has more than one distributor interested in distributing the producer's film, the producer will theoretically increase his or her bargaining power, all other things being equal, (i.e., if the parties are negotiating on a level playing field) [see "Anti-Competitive Practices", "Antitrust Law Violations", "Contract of Adhesion" and "Unconscionable Contractual Provisions"].

**30. Barriers to Entry**--The impediments that must ordinarily be overcome in order to enter a particular kind of business or industry. For example, the barriers to entry into the film industry are extremely high since substantial amounts of capital, vertical integration, significant expertise relating to the market place, relationships with talent, exhibitors and Hollywood insiders are required. Often in the U.S. film industry, good working relationships with Hollywood insiders is arbitrarily denied, thus making it impossible for most outsiders to enter the business or succeed in the long term. The concept of barriers to entry and whether such barriers are natural or artificial plays a role in antitrust law analysis relating to competition.

**31. Below-the-Line Fringes**--Compensation paid to or for the benefit of a film's crew in addition to their salaries. When such individuals are members of a guild or union, these benefits may include vacation pay and health, welfare and pension contributions. Also, such payments may be made directly to the guild or union. Studios sometimes overstate the cost of such benefits in determining the negative cost of a movie. Thus, a producer must determine exactly what the below-the-line fringes are and how much they cost.

**32. Best Efforts Clause**--A provision in film distribution contracts which obligates the distributor to put forth its best efforts in distributing the film. In the event that a dispute arises between the producer and the distributor relating to the distributor's efforts in distributing the film, this clause would serve as a standard by which a court would determine if the distributor had met its obligations under the agreement. Of course, the studios know that the high cost of litigation will prevent most prospective claimants from filing a lawsuit, so their best efforts on a film not considered a winner may be less than anticipated. Best efforts is a higher standard than reasonable efforts, so use best efforts in such drafting situations. If other more objective standards of conduct are available, use those in place of best efforts.

**33. Biased Biopics**--Motion picture biographies slanted to favor certain groups to the exclusion of others. The studies of Professor George Custen, extended by my own, show that Hollywood's motion picture biographies, (the 443 movies about the lives of real people), exhibit unacceptable patterns of bias. Certain groups such as European royalty and entertainers have been overwhelmingly favored by the makers of Hollywood biopics. Blacks and Latinos have (as a general rule), been irresponsibly overlooked. Most of the mere 16 Blacks featured in Hollywood biopics (based on this study) have been limited to just two occupations: athletes or entertainers. The even smaller number of biopics focusing on the lives of Latinos have only portrayed two entertainers, one outlaw and a Mexican revolutionary. Hollywood producers of biopics have collectively made the shameful choice of producing more film biographies of criminals, gangsters and outlaws than for all Blacks, Latinos and Native Americans considered together. People from just two continents (Europe and North America) have been preferred in Hollywood biopics over all others. Men have been favored over women by far, and the bulk of female motion picture biographies are limited to portrayals of only two types of women: entertainers and paramours. Biopics of political liberals have been much more common than those of conservatives. A disproportionately large number of biopics presented Jewish subjects. These were generally favorable and included diverse occupations. Only 5% of Hollywood biopics featured White Southerners, and those that did usually presented gangsters, outlaws or the relatively harmless but stereotypical country-western singer. This is a clear example of regional prejudice. Also, Hollywood's biopics have consistently been historically inaccurate, and that's extremely unfortunate since it appears likely (as others have observed) that even well-educated Americans are learning much of what they think is history through film presentations.

**34. Bidding War**--A vigorous competitive auction of a property or property rights. For example, screenwriters and/or their agents occasionally succeed in instigating such competitive bidding for desirable spec scripts, but generally only when represented by a Hollywood insider agent. Independent producers also attempt to initiate such bidding contests among distributors for the distribution rights to a completed motion picture. The hoped for result is that the price paid is higher than would have been paid under other circumstances, thus bidding wars would favor the sellers as opposed to the buyers. Unfortunately, most Hollywood distributors will simply bow out of the bidding when they find out a fellow distributor is currently negotiating for a project. A recent round of such high prices paid for spec scripts halted rather suddenly fueling speculation that the major studio/distributors conspired to stop such activities or were at least guilty of conscious

parallelism.

**35. Blacklisting**--The listing of persons who are not to be hired. The concept received a great deal of publicity in the '40s and '50s when the fear of communism allegedly prompted many studios to blacklist persons who are suspected of un-American activities. Some in the industry today still maintain that a different form of blacklisting, which targets another group continues unabated. These persons fear that being openly critical of the status quo within the film industry, (i.e., the dominance of the major studio/distributors, or not going along with the "studio system" continues to result in an informal form of blacklisting today). Thus, it is not necessary for a physical list to actually exist in order for those in control positions to effectively "blacklist" certain persons considered undesirable for any arbitrary reason (i.e., a whispering campaign amongst Hollywood insiders is sufficient). Some profit participants who are film industry professionals that hope to continue to work in the film industry, suggest that one of the main reasons why most persons who feel they have legal grounds to bring a cause of action against a major studio/distributor or other distributor is this fear of being blacklisted. Further, it is suggested that one of the main reasons the lawsuits that are initiated are ultimately settled is this same fear (see "Sue Us").

**36. Blind Bidding**--The film distribution practice by which film-distribution companies (principally the major studio/distributors), through a bid request letter and without having previously screened the film for exhibitors that are invited to bid on exhibition of the film, request that interested exhibition companies submit bids to license a motion picture for showing in a given market. Blind bidding has alternatively been defined as the bidding, negotiating, offering of terms, acceptance of a bid or agreeing to terms for the purpose of entering into a license agreement prior to a trade screening of the motion picture that is the subject of the agreement. Laws that prohibit completion of exhibition contracts before exhibitors have the opportunity to view the movies on which they are bidding have been passed in a number of states. Independent distributors rarely require blind bidding and independent exhibitors consider it unethical at minimum. They ask the question, "How can any retailer in any business be expected to sell a product sight unseen? Blind bidding provides the large theatre chains with a significant competitive advantage over their smaller independent competitors. The larger chains have greater

financial resources, thus they can accept the risks inherent in blind bidding, (i.e., that they will contract to exhibit a film that would have been unacceptable if it had been viewed in advance and which results in a poor performance at the box office for the theatre). The independent exhibitors are generally out-bid anyway by their larger competitors for a "can't miss" film like a sequel to a prior blockbuster, but with respect to marginal films, the smaller independent exhibitor does not possess the financial resources to take a chance on the film's success. Thus, the blind bidding process effectively leaves the independent exhibitor with the leftovers which for many, results in financial doom. With the re-entry of the major studio/distributors into exhibition and the presumed accompanying participation in the policy decisions of the National Association of Theatre Owners, the major studio/distributors have also placed themselves in a position to oppose NATO's support for anti-blind bidding legislation at the state level and NATO may have been the only national association which might have advocated the passage of such laws on behalf of independent exhibitors. In most situations, the major studio/distributors have adapted other methods for booking and negotiating film terms with exhibitors.

**37. Block Booking**--The film distribution practice of tying together one or more motion pictures for licensing within a market, (i.e., a distributor will accept a theatre's bid on a desirable film or films contingent on the exhibitor's promise that it will also exhibit a less desirable film). This practice was addressed by the Paramount consent decrees of the late '40s and '50s, in which the major distributors were forbidden to employ the practice. The basic premise of these decrees was to prohibit block booking, (i.e., that motion pictures must be licensed picture by picture, theatre by theatre, so as to give all exhibitors equal opportunities to show a given film). Block booking would have a tendency to prevent independent producer access to certain theatres (see "Paramount Consent Decrees"). Having experienced this prohibition through the highest court in the land, the Hollywood major studio/distributors are now much more discreet about making such deals with exhibitors. It's all oral among social friends, and even though the practice continues, it is difficult for law enforcement officials to prove.

**38. Blocked Currencies**--Generally, monies earned by banks or corporations in a foreign country which cannot be removed from that country except under limited circumstances and thus, generally have to be spent within its borders. In the film industry, blocked currencies may be foreign film rentals. Distributors sometimes claim foreign film rentals are blocked and therefore cannot be remitted to the distributor, thus such funds are excluded from net profit calculations. Producers with sufficient leverage may want to negotiate a provision in the distribution deal that requires a certain portion of such funds be deposited in an account in such foreign country for the benefit of the producer (see "Foreign Receipts").

**39. Blurbs**--Short highly commendatory public notices. In feature film advertising, it is common for the publicity staff of a motion picture distributor to use a few positive words or phrases from an otherwise negative review to promote a movie, but in some cases they actually will ask movie critics to manufacture a blurb for the distributor's use in advertising a picture. Some critics reportedly will even send out a series of favorable quotes on a newly released movie hoping one will show up in the movie's ad and result in

more name recognition for the critic. As a result of such practices, distributor advertising of motion pictures represents some of the most misleading advertising confronting American consumers. It is not uncommon to go to a movie expecting to see a comedy (as advertised) only to view a tragic drama with a few comedic scenes. Similar levels of misrepresentation for other products might be considered actionable as false advertising.

**40. Boilerplate**--Language found almost universally in legal documents of a given type, often in small print. Distributors often use the term "boilerplate" to encourage producers to overlook very onerous provisions in a proposed distribution agreement. In addition, film distribution agreements are often so lengthy and complex that the distributors themselves do not know what provisions are included, some of which are often conflicting and/or ambiguous. A producer should not be intimidated or misled into accepting such language if it does not meet the needs of the specific parties and the specific transaction.

**41. Breach of Contract**--A party's failure to perform some contracted-for or agreed-upon act, or such party's failure to comply with a duty imposed by law which is owed to another or to society. In drafting a film distribution agreement vague and subjective terms or phrases must be eliminated, particularly with respect to the film's specifications or delivery requirement. Otherwise, the distributor may seek to use such vague or subjective terms or phrases as an excuse to allege breach of contract by the producer and as grounds for not performing its distributor duties pursuant to the terms of the distribution agreement, (i.e., not distributing the film), or not supporting the film as promised. Producers must keep in mind that the distributor will be the party interpreting the language of the distribution deal, and taking action or not acting. It will be the producer's burden to decide whether to sue. The distributor's know that deciding to sue is a difficult decision and they routinely take advantage of that difficulty, and conduct themselves pretty much as they please.

**42. Breakeven**--The point at which sales equal costs. In film, the specific point at which an exhibited motion picture neither makes nor loses money, (i.e., receipts cover all costs attributed to the picture by the individual or entity calculating breakeven). Above this point, a film begins to show a profit, below it, a loss. In other words, breakeven is the point in a movie's revenue stream at which the income to the exhibitor, distributor or producing entity is said to equal such entity's cost of producing and/or distributing the movie. Breakeven, thus, will be different for each of the different individuals or entities involved with a film, although the most commonly referred to "breakeven" is the distributor's breakeven. Generally, this is the point at which deferred compensation is paid on studio produced films. In many cases, the costs of distribution continue to escalate ahead of the pace at which receipts are generated. Reportedly fewer than 5% of motion pictures released in recent years and using the major studio/distributor net profits definition have earned a profit, (i.e., achieved breakeven), but that's only because of excessive studio overhead, executive salaries, talent fees for the benefit of friendly agents, inflated production costs, underreported rentals, etc.

**43. Bribery**--The giving of something of value for the purpose of influencing performance of official duty. Or in a commercial context, The breach of a duty by an

employee in accepting secret compensation from another in exchange for the exercise of some discretion conferred upon the employee by his employee. The film industry literature contains instances of studio executives being paid bribes for accepting films for distribution. The NAACP or its employees have also accepted contributions from the MPAA or related sources from time to time to keep the NAACP from staging a national boycott in protest of the continued low level participation of African Americans in Hollywood.

**44. Buchwald Case**—A breach-of-contract lawsuit filed by humorist Art Buchwald and motion picture producer Alain Bernheim against Paramount Pictures relating to the Eddie Murphy film *Coming to America*. The trial judge first ruled in January of 1990 that Paramount breached its option on Buchwald's treatment and that *Coming to America* was substantially based on the treatment. He later ruled that the net-profit formula used by Paramount was unconscionable. The judge characterized the profit-participation formula used by Paramount (which is similar to the net-profit formulas used by all of the major studio/distributors in the film business) as "...an insidious device used by the studios to perpetuate their control...and to create an economic caste system in Hollywood...". Paramount testified during the trial that the movie had grossed more than \$300 million worldwide but had not yet reached net profits. Paramount appealed but then settled, so no legal precedent was established. Some legal experts suggest that the case will not serve to encourage other plaintiffs who may want to sue the major studio/distributors since an equivalent of some \$2 million in attorneys fees and costs were incurred on the plaintiff's side during the trial phase of the litigation. These same experts further suggest that only rarely will anyone hoping to continue to do business in the industry seek a court fight with the major studio/distributors for fear of being blacklisted, whereas in Buchwald's case, he did not have that same concern since he did not ordinarily rely on the motion picture business for his livelihood. In any event, the case proves that as recent as the '90s, a major studio/distributor engaged in conduct that was considered unconscionable by the court.

**45. Buying A Gross**--A huge advertising and promotional campaign for a film that loses money in the domestic theatrical market. If too excessive, such a tactic may make it impossible for a film to ever generate net profits. Distributors, working with in-house advertising departments or friendly outside agencies, have been known to inflate the costs of advertising or shift advertising costs from one movie to another. Producers may want to work with their accountant in establishing a reasonable ceiling on such prints and ads or overall distribution expenditures, and closely monitor such expenses.

**46. Cartel**--A group of businesses or nations that agree to influence prices by regulating production and marketing of a product; a group of independent industrial corporations, usually on an international scale, which agree to restrict trade to their mutual benefit. Although prevalent outside the U.S., such groups are generally found to violate federal antitrust laws. The activities of the MPAA companies more than likely do constitute an illegal cartel outside the U.S.



**47. Cash Breakeven**--A concept that may be defined in several ways, but which in its most favorable form for a gross participant is defined as that point in a film's revenue stream at which gross receipts equal the film's negative cost, plus interest and distribution expenses excluding production and advertising overhead. A more favorable definition from the studio/distributor's point of view also takes into consideration some distribution fee, although lower than normal, (e.g., 17.5%, to reimburse the studio for its internal costs of distribution, plus some level of production overhead). The concept of cash breakeven is sometimes used by the studio/distributors to make sure they have recouped their real costs (as opposed to their real costs plus some profit factor) before the payment of a gross participation obligations is triggered. For example, if gross participations are to escalate at different levels of breakeven, cash breakeven is usually considered the first breakeven. This is another one of those variations on the definition of breakeven that is often used in film distribution deals to create more confusion and opportunities for the distributors' accountants to interpret the distribution deal in favor of the studio.

**48. Censorable Material**--Part of an audio or visual presentation in a film that may be considered objectionable in a given jurisdiction. This definition actually appears in some film distribution agreements as a producer warranty, (i.e., the producer promises not to include any "censorable material" in the film). What is censorable in various territories throughout the world varies widely. An effort should be made to find more suitable language to express this producer warranty, language that does not have such a chilling effect on the first amendment freedoms of producers. A distributor should not be allowed to refuse to distribute a film on such a vague basis.

**49. Checking and Collection Costs**--Distributor expenses incurred in monitoring the activities of exhibitors to insure that reported film attendance is accurate and in obtaining payment of amounts due. The fact that such activities are necessary speaks volumes about this industry (i.e., everybody tries to steal from everybody else). Checking and collection activities, which the producer ordinarily pays for (since the distributor deducts such costs from the film's revenue stream) would ordinarily be important in protecting the interests of the producer, but there are so many other ways for the distributor to prevent money from trickling through to the producer, that, in effect, the producer is merely paying so that the distributor can be assured of a fairly accurate accounting by exhibitors. In most instances, the producer and other net profit participants will not benefit.

**50. Closed Bidding**--A distributor practice wherein the exhibitor bids on a film about to be released are opened by the distributor privately so that the exhibitors who did not win the bid for exhibition of such picture do not know the particulars of the bids submitted by their competitors. Distributors favor the practice, but exhibitors consider it unethical, since as a result, losing exhibitors are unable to determine how to change their bids so that they might be successful in the future. Losing exhibitors also have no way of knowing whether the winning bidder made side deals with the distributor (see "Bid", "Blind Bidding", "Block Booking", "Five O'Clock Look", "Product Splitting" and "Unethical Business Practices").

**51. Co-Feature**--A film which is licensed by the distributor to an exhibitor for theatrical exhibition along with another film, as a package. Such films are typically licensed on a flat rental basis for a week's engagement, thus the distributor will not know and therefore must estimate how much of the film rentals received for the two films is to be allocated to each film in accounting for the revenues of a given film. Distributors will often seek to negotiate a provision in the distribution agreement which allows such allocations to be made in their sole discretion and without allowing the producers of the films to review the percentage allocations made to other films. Thus, if a distributor packages an independently produced feature with a studio produced film, and the studio's own distribution arm allocates 85% of the rentals for the package to the studio film, the producer of the independent film has no way of checking or contesting the allocation. It is unreasonable not to be able to confirm such allocations.

**52. Collective Bargaining Agreements**--Compacts relating to employment matters between employers and employees negotiated through bargaining agents designated by an uncoerced majority of the employees within the bargaining unit. The major studio/distributors are signatories to collective bargaining agreements between the studios and the various motion picture industry guilds. Recent complaints by studio spokespersons regarding the high costs of motion picture production lay part of the blame on union residual structures and the cost of below-the-line labor both of which are issues determined through collective bargaining. However, it is difficult to expect labor rollbacks on such items in view of the high levels of compensation paid to many studio executives, the gross participations granted to certain artists and the studio accounting practices. Also, allegations have surfaced from time to time that the major studio/distributors have succeeded in improperly influencing union and guild executives with respect to agreement provisions that turn out to be less than favorable for the union or guild membership.

**53. Combination Ad**--One print advertisement in which two or more films are advertised. If combination ads are used, the distributor has to allocate its costs for such ad among the applicable films. Again, this creates another opportunity for the distributor to use its discretion in allocating the costs for such ads among the two films. The producer's auditor should be able to review both sides of this transaction, but is seldom allowed to because the audit provision, ostensibly negotiated as part of the distribution agreement does not permit it.

**54. Combination in Restraint of Trade**--An alliance of individuals or corporations united to achieve an economic end, in this instance, interfering with free competition in business and commercial transactions, where such interference tends to restrict production, affect prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. The overall effect of the MPAA companies is a combination in restraint of trade. The ultimate economic end is to retain as much money within the Hollywood insider community as possible.

**55. Commercial Bribery**--A statutory expansion of the crime of bribery which includes breach of a duty by an employee who accepts undisclosed compensation from others in

exchange for exercising some discretion relating to the employee's work and granted to such employee by his or her employer. Reports of studio executives accepting such benefits from producers for distributing a film exist in the industry literature.

**56. Commingling of Funds**--The acts of a fiduciary or trustee who mixes funds belonging to a client or customer with his or her own funds. The practice is generally prohibited unless the fiduciary maintains an exact accounting of the client's funds and how they have been used. A distribution deal may contractually prohibit the co-mingling of the distributor's and producers funds even though no fiduciary or trust relationship is established. On the other hand, distributors have always refused to allow the contract language to characterize them as fiduciaries.

**57. Commonly Understood**--Customarily and routinely agreed upon in the business. Many motion picture industry agreements provide that certain terms not otherwise defined within the agreement are to be defined as commonly understood in the industry. Such provisions merely provide a mechanism for determining the meaning of a term that comes into question, thus in the context of arbitration or litigation the fact finder will have to entertain testimony from persons with expertise in the industry to determine whether there actually is a commonly understood meaning for such a term. Unfortunately, many terms are not commonly understood in the industry and it is likely that experts with equal authority may be produced to define such terms to favor both sides of a dispute, leaving the fact finder to have to decide between differing interpretations of the same term. In a transaction where the parties had fairly equal bargaining power the better practice would be to negotiate a definition of the term for the purposes of the agreement and include the definition in that original agreement. Unfortunately, that is generally not the case, and the producer is offered such language on a take it or leave it basis (see "Contract of Adhesion").

**58. Completion Bond**--A contractual commitment in the form of a surety that guarantees that a film will be completed and delivered pursuant to specific requirements, usually relating to on schedule, within the film's budget and with no substantial deviations from the approved script. The completion bond provides protection against overbudget costs and is supplied by a third party guarantor. It is written in the form of a surety instrument and usually authorizes the guarantor to take control over the production of the motion picture if the terms of the agreement are not met. A completion bond company acting on behalf of a studio or entertainment lender may be able to take creative control of a film from the producer and director. In negotiations with the completion guarantor and the distributor, the producer should seek to prevent the distributor from changing the producer's compensation, credit or continuing creative involvement in the event of takeover, particularly when the takeover is prompted by factors beyond the control of the producer. In other words, the producer should insist on applying reasonable conditions and limitations on the manner in which the completion guarantor asserts its takeover rights.

**59. Concentrated Ownership**--A situation in which the means of production or distribution in a given industry are controlled by only a small number of companies, (e.g., in the film industry, approximately 95% of the domestic box-office gross for feature films is earned by movies distributed by the major studio/distributors and their affiliates. That high level of concentration is exacerbated by the fact that most of the major studio/distributors are owned, controlled and/or dominated by a small group of individuals who routinely move back and forth among the studios, and most of whom share the same religious, cultural, ethnic and racial background, an unnatural development in a mature industry with a supposedly competitive marketplace (see "Antitrust Law Violations" and "Oligopoly").

**60. Conduct Provisions**--In antitrust law, elements of court rulings or consent decrees which prohibit certain specified trade practices. For example, the Paramount Consent decrees, in addition to requiring the then five major integrated motion picture companies (Paramount, Loew's, RKO, Warners and Fox) to divorce production/distribution from exhibition, also required these companies, plus three others that did not own theatres at that time (Columbia, Universal and United Artists) to abstain from fixing admission prices and making franchise agreements. The Paramount consent decrees document and form an important part of the overall history of wrongful conduct perpetrated by the Hollywood major studio/distributors.

**61. Confidence Game**--Any scheme whereby a swindler wins the confidence of his or her victim and then cheats the victim out of money by taking advantage of the confidence reposed in the swindler. The elements of the crime of the confidence game are (1) an intentional false representation to the victim as to some present fact, (2) knowing it to be false, (3) with the intent that the victim rely on the representation and (4) the representation being made to obtain the victim's confidence and thereafter his or her money and property. Much of what occurs in Hollywood takes the form of a con game employed by Hollywood insiders in their dealings with naive and vulnerable outsiders (see "Trust Me").

**62. Conflicting Dates**--A situation that occurs when a single film distributor plans to release more than one film at or about the same time, thus dividing the time, skill and efforts of the distributor's marketing staff between such films. This is of special concern to producers who contract with a distributor on a rent-a-system basis and the distributor is not careful to allow for adequate separation in release dates between one of its own films and the independent producer's film. The independent producer's concern in such instances relates to whether his or her film will receive the marketing support it would ordinarily receive but for the conflict (see "Rent-A-Distributor").

**63. Conflicts of Interest**--Situations in which regard for one duty leads to disregard of another or might be reasonably expected to do so. Conflicts of interest may be actual or

potential. On some issues the film producer and distributor's interests are the same or similar, whereas with regard to other issues, a distributor representing a producer's film, for example, will inevitably be confronted with numerous conflicts of interest which are inherent in the relationship. Some distributors, for example, will seek a representation from the producer in the distribution deal to the effect that the producer knows the distributor is not only distributing other films, but other films similar to the producer's film. It would seem that a distributor would not want to vigorously distribute two similar films that appeal to the same or similar target audiences at the same time and a producer should probably avoid such a conflict or allowing the distributor that freedom. The activities of talent agents and entertainment attorneys in Hollywood are also rife with conflict of interest situations.

**64. Conscious Parallelism**--In antitrust law analysis relating to an allegation of a conspiracy in restraint of trade, the phrase conscious parallelism refers to the same or similar business practices under circumstances which logically suggest joint agreement. The courts have never held that a showing of parallel business behavior alone conclusively establishes a conspiracy. Thus, in order to show conspiracy, a plaintiff has to demonstrate similar business behaviors that the parties were aware of to infer an agreement and additional circumstances which logically suggest joint agreement as distinguished from individual action. There seems to be a considerable amount of conscious parallelism in the motion picture industry although it is difficult to prove in a court of law. The standard manner in which video revenues are handled across the board by the major studio/distributors provides an example of conscious parallelism.

**65. Conspiracy**--A combination of two or more persons to commit a criminal or unlawful act or to commit a lawful act by criminal or unlawful means; or a combination of two or more persons by concerted action to accomplish an unlawful purpose or some purpose not in itself unlawful but by unlawful means. Motion picture exhibitors have generally failed in attempts to convince the courts that blind bidding is a conspiracy in restraint of trade in violation of the Sherman Antitrust Law partly because of the difficulty in showing a conspiracy. Hollywood insiders will often assume film industry critics are alleging a conspiracy even when they are not, simply because the Hollywood insiders know that a conspiracy is much more difficult to prove, and they have learned over the years how to avoid creating evidence of such a conspiracy.

**66. Consultation**--The seeking or giving of professional advice. Many film distribution agreements provide that the distributor is obligated to consult with the film's producer regarding various matters relating to marketing the film, distributor editing and so forth. However, there is rarely any effective way for the producer to enforce such consultation rights.

**67. Continuous Supply of Product**--An uninterrupted flow of motion pictures. The ability to provide a continuous supply of quality motion pictures is an extremely important element of the leverage or bargaining power that a producer brings to the table in negotiations with a distributor and that a distributor must possess in order to effectively negotiate with exhibitors. During times when credit and capital markets are constricted

some distributors encourage producers to utilize their distribution facilities on a rent-a-system basis partly in an effort to keep enough product flow in the distributor pipeline to maintain a strong bargaining position in relation to the exhibitors. The fact that each major studio/distributor will produce one or two hoped-for blockbusters each year is used as leverage with exhibitors to gain favorable treatment at the bargaining table.

**68. Contract Interpretation**--The way in which the language used in an agreement is understood and applied by the party implementing the terms of the contract. In the feature film industry, the distributor and its employees (attorneys and accountants) are primarily responsible for interpreting their distribution agreements with film producers. Such contracts are typically filled with mistakes, ambiguity, conflicting provisions, and excessive discretion in favor of the distributor. Distributor employees also have a reputation for interpreting the language of such contracts in favor of the distributor, and it is extremely difficult for anyone defrauded in this manner to effectively challenge such interpretation without being blacklisted in the industry (see "Blacklisting" and "Net Profit Participation").

**69. Contract of Adhesion**--A contract so heavily restrictive of one party, while so non-restrictive of another, that doubts arise as to its representation as a voluntary and uncoerced agreement. The concept implies a grave inequality of bargaining power between the parties. It often arises in the context of so-called "standard-form" printed contracts prepared by one party and submitted to the other on a "take it or leave it" basis. Courts have recognized there is often no true equality of bargaining power in such contracts and have accommodated that reality in interpreting such contracts. Although studios or distributors who offer their so-called "standard" distribution or other agreements to profit participants on a "take it or leave it" basis may be creating an opportunity for a profit participant to subsequently claim the agreement is a contract of adhesion, it is not suggested that any party rely on the uncertain future interpretation of the provisions of such a contract by a court. Most, if not all of the major studio film distribution agreements are contracts of adhesion filled with multiple unconscionable provisions. They have been specifically drafted to give these vertically-integrated, distributor-dominated major studios whatever discretion is necessary to prevent revenue generated by the exploitation of any motion picture they distribute from flowing past the distributor to net and gross profit participants, including directors, actors, actresses, screenwriters, authors and the independent producers and their "outsider" investors in independently produced films. The major studio/distributors know, however, that film industry people will rarely challenge them in court, after all, prospective litigants fear they will never eat lunch in this town again if they do sue (also called "Adhesive Contracts"; also see "Unconscionable Contractual Provision" and "Black List").

**70. Contractual Breakeven**--A point in a motion picture's revenue stream which is defined by agreement to constitute breakeven. Since there are many ways to define breakeven in film distribution agreements and certain breakeven points may never be achieved due to the effect of the so-called "rolling breakeven", it may be advantageous for all profit participants at whatever level to negotiate a contractually defined breakeven for purposes of triggering the payment of bonuses, escalations or various levels of

participation. On the other hand, the typical disparity in bargaining power will tend to work against the possibility of gaining a favorable definition for the producer.

**71. Contractually Defined Profits**--A reference to the fact that the terms "profit", "gross profit" and "net profit" and many other terms used in distribution agreements are actually subjective terms and that their meaning may vary somewhat in each film deal depending on how the term is specifically defined in the contract. In other words, there is no industry standard definition for such terms since no one individual or organization has the authority to impose such definition on two individuals or entities negotiating a contract containing those terms. Hollywood insiders are fond of pointing out that the term net profit is a defined term. But they fail to go on to reveal that the term is either offered on a take-it-or-leave-it basis (a contract of adhesion) or that the bargaining power of the parties is so uneven as to deprive the agreed upon definition of mutual consent.

**72. Contractual Overhead**--A motion picture distributor's general operating expenses that cannot be directly allocated to a specific motion picture distributed, but are deducted from gross receipts as distribution expenses for a specific film by authority of a provision in the distribution agreement which permits such deductions. Nearly all if not all major studio/distributors impose such contractually defined overhead charges on the producers of films they distribute, thus it may be fair to assume that few, if any, feature film producers have the bargaining power to eliminate such charges. Since the arbitrary percentage used for contractual overhead is based on the distributor's gross receipts, a money-making film will generate a windfall for the distributor.

**73. Controlled Availability**--The practice of manipulating and/or withholding the renting, selling or licensing of motion pictures to exhibitors such that a motion picture is made available to an exhibitor after that film's true availability. Distributors who choose to engage in such practices surely may be able to influence the exhibitor's choice of films that are exhibited. If an independent producer's film is being distributed by an independent distributor, such practices engaged in by the major studio/distributors would have a tendency to limit the available theatres for the independent producer's film. On the other hand, if the independent producer's film is being distributed by a major studio/distributor, the availability of the independently produced film may be controlled by the major studio/distributor to the benefit of the distributor's other films (see "Conflict of Interest" and "Conspiracy").

**74. Controlled Theatre**--A cinema over which a distributor has power or influence with respect to the choice of movies exhibited therein, usually due to an ownership interest held by the distributor or by virtue of such distributor's market power. The major studio/distributors have historically been able to maintain effective indirect control of production of movies through the control (and in some instances direct ownership of) first-run theatres. Harold Vogel's book "Entertainment Industry Economics" presents a very revealing chart relating to the question of domination of box-office performance by key U.S. movie theatres (the information in the chart apparently first appeared in *Variety* and was based on the work of Art Murphy). The chart shows that (at the time of its preparation) 50% of the U.S. screens generated 67% of box office gross and that 75% of

the U.S. screens generated 90% of box office gross. Thus, regardless of the quality of their movies (granted such movies will always meet certain minimum standards), the major studio/distributors merely have to control access to the right 75% of motion picture screens in the U.S. for their films to generate 90% of the box office gross. And, as can be seen from the information reported herein under "Market Share", the movies distributed by the major studio/distributors have consistently generated in excess of 90% of the box office gross throughout the last decade if not beyond. Experienced net profit participation auditors report that "controlled theatres" are generally more than fair in their settlements with their affiliated distributors, but on the other hand, they can afford to be since the distributor of a controlled theatre is also now participating in the "house nut" and "concessions" at such theatres (i.e., the distributor's corporate conglomerate gets multiple dips into the film's revenue stream).

**75. Cooperative Advertising**--Film advertising and promotion in which the costs of such are shared between the distributor and exhibitor or other entity. Such advertising expenditures are generally calculated on a weekly basis and the exhibitor's contribution toward the total cost of the ads is either a pre-determined amount set out in the contract between the distributor and exhibitor (usually decreasing from week to week) or a negotiated amount based on a mutually agreed upon ad expenditure. The distributor's contribution may be in the form of a fixed amount or based on a percentage arrangement similar to that used for film rentals. Expenditures for cooperative advertising are more advantageous from a tax standpoint since such costs can usually be deducted in the year in which they are incurred, whereas national advertising may have to be capitalized and amortized over the period in which the major portion of gross revenue from the picture is recorded. As part of the settlement transaction as between the distributor and exhibitor adjustments are sometimes made that do not ultimately favor the producer. The distributors also do not generally allow the producer's auditor to have the authority to examine exhibitor/distributor contracts and the records relating to such shared expenses (see "Settlement Transactions").

**76. Corporate Governance**--The manner in which corporations are run. In other words, the shareholder owners select the members of the board of directors. The board sets policy and makes most of the important decisions for the corporation, including hiring the officers to run the corporation on day to day basis. Many assume that since the major Hollywood studios are publicly held corporations, that it is not possible for this ownership structure to be manipulated by any so-called Hollywood insider group. This assumption proves to be false in the real world. These formerly family owned entities evolved into corporations more for purposes of obtaining outside sources of financing, while the Hollywood insiders devised various strategies and techniques for retaining control, including many of the business practices described herein.

**77. Corporate Opportunity**--A situation in which a person who has a close relationship with a corporation takes advantage of the special knowledge he or she thereby acquires for personal gain. The term refers to a legal doctrine that directors or others invested with a fiduciary duty toward a corporation may not appropriate for their own benefit and advantage a business opportunity properly belonging to the corporation. Hollywood



insiders have a long history of putting their own interests ahead of their corporate entities or the corporation's shareholders.

**78. Covenant of Good Faith and Fair Dealing**--A contractual agreement or promise to conduct one's business dealings with another in good faith and fairly, (i.e., to conduct such business dealings honestly), in fact; to observe reasonable commercial standards of fair dealing in the trade and not to deny the existence of the contract. Some states provide that the covenant of good faith and fair dealing is implied in every contract executed in that state. Breach of this covenant is commonly included as a cause of action in lawsuits against major studio/distributors, but such lawsuits are somewhat rare for the reasons already stated (i.e., fear of economic reprisal).

**79. Creative Accounting**--A derogatory term commonly used to refer to the accounting practices of studio/distributors and that may include everything from actual dishonest practices in reporting and dividing up the revenues generated by a given film at the exhibitor and distributor levels to sharp negotiating tactics used in conjunction with drafting the distribution deal. Such deals often result in agreements weighted heavily in favor of the distributor as opposed to the producer. Although mistakes and misapplication of contractual terms do occur in the industry, often what is sometimes called creative accounting is no more than the film distributor following the terms of the negotiated distribution deal which was clearly disadvantageous to the producer in the first place. Thus, in some instances what producers call creative accounting is merely a reflection of their lack of bargaining power at the negotiating table. Such instances of "creative accounting" might involve, account numbers, adhesion contracts, allocations, anticipated expenses, apportioned expenses, bad debts, combination ads, the commingling of funds, cross collateralization, the use of deal memos, direct distribution expenses, discretion, facilities allocations, front-end loads, improperly claimed expenses, kickbacks, overhead, rolling break-evens, settlement transactions, so-called standard contracts, studio accounting practices, subjective terms, the "sue-us" tactic, under-reported rentals and/or usury. Investors and/or shareholders in film distribution companies may feel they are in a better position to benefit from such practices so long as the distribution company does not get caught. On the other hand, any distributor that utilized the practices described herein, would not likely be inclined to be any more fair and honest with its own shareholders (See "Creative Contract Interpretation", "Due Diligence" and "Stock Fraud" below.)

**80. Creative Contract Interpretation**--Determining that the language of an agreement means something other than the plain meaning of the words, or taking advantage of a possible ambiguity so that the meaning favors the party implementing the contract. This is more specifically what occurs in many so-called "creative accounting" situations, after all, the studio's own accountants must interpret the language of the contracts before them, and they consistently tend to interpret such contracts in favor of the studios, sometimes grossly so. Again, they know that most members of the creative community will not openly challenge their reading of the contractual language (see "Creative Accounting").

**81. Creative Control**--The power and authority to make creative decisions with respect to a film being produced and with respect to significant creative aspects of the film, (i.e.,

the appearance and content of the final feature film product); often a major point of negotiation between a producer and director but also between producer and distributor. One example of the issue comes up in the context of a distribution agreement with respect to editing rights, (i.e., whether the distributor has the right to make editing changes, have final editing rights or produce the final cut of a movie). Such rights, to some extent, depend on the parties' relative bargaining strength and the stature, as well as the rights of the producer and/or director as between them. The producer may or may not be able or willing to give any editing rights to the distributor, but some editing changes may be required as per government regulation or in order to get a certain motion picture rating. If granted, such rights should be subject to a producer's right of approval, rather than just unlimited editing rights. Through their consistent use of the business practices described in this monograph, the major studio/distributors have gained control of the revenue streams generated by the exploitation of feature films in many markets and media worldwide. This control is routinely converted, in turn, into creative control over future motion pictures, because distribution is, in many instances, tied to production financing. In Hollywood, he who has the gold, rules (also called Artistic Control; see "Approval Rights" and "Waiver of Droit Moral").

**82. Cross-Collateralization**--An accounting practice used by and which benefits distributors whereby distributors offset their profits in one market or media against losses in another, or on one film against another. In a worldwide distribution deal the studios typically seek to cross-collateralize profits and losses among territories. With cross-collateralization the producer can only share in the profits of one territory to the extent that the profits of that territory, exceed the combined losses of all other territories worldwide. In situations where multiple films of a single producer or production company are being distributed by a single distributor, the distributor may seek authorization in the distribution agreement to cross-collateralize the financial performance of each of such films with the others. That practice does not favor the producer. In some instances, no provision is made in the distribution agreement regarding cross-collateralization (at any level) and thus the distributor may choose to use its discretion with regard to this issue. In still other instances, the producer must carefully monitor the activities of the distributor to be certain that it is not effectively cross-collateralizing the financial performance of the producer's film with the performance of the films of other producers. Licensees of film packages may also cross-collateralize the results of the exhibition of such films in foreign territories.

**83. Cultural Stories**--The accounts relating to or statements of the customary beliefs, social forms and material traits of a racial, religious or social group. Many racial, ethnic, religious, cultural, regional, political and gender groups are arbitrarily excluded from the control positions in Hollywood, and since motion pictures tend, to a large extent to mirror the values, interests, cultural perspectives and prejudices of their makers, we see relatively little diversity in Hollywood films. None of the cultural groups in a culturally diverse society should be arbitrarily denied the opportunity to tell their important cultural stories (the way they want to tell them), through this significant medium for the communication of ideas (feature film). No one should be allowed to force members of other cultures to filter their important stories through the cultural sensibilities of a small,

rather homogeneous group of film industry gate-keepers, which is exactly what is happening in Hollywood today, and that is exactly what has been occurring for the nearly 90-year history of the Hollywood-based U.S. film industry. The Hollywood control group is much too narrow in scope, and its members are prejudiced indeed.

**84. Customarily Kept by the Distributor**--A reference to the type and manner in which a film distributor maintains its books and records. Some distribution agreements will establish such a loose standard for the distributor to comply with in meeting its obligations to keep accurate books and records relating to the distribution of a film. If such language is used, and the distributor has not heretofore kept any records (or inadequate records), such language may not impose any additional obligation on the distributor.

**85. Customary**--Commonly practiced, used or observed, (i.e., the provisions which are usually found in motion picture production documentation). With respect to a film distribution agreement (and other motion picture documentation), producers must recognize that the use of such vague and subjective terms are just that "vague and subjective". Their use imposes very little on the studio/distributor and such standards of conduct can only be enforced after the fact, if at all. Such vague standards as "customary practices", "long-standing and well-established practices in the industry" or "customary terms and conditions for agreements of this nature in the motion picture industry" may often appear in so-called short form feature film production documentation or deal memos along with a statement of the intention of the parties to negotiate, draft and sign a more complete written agreement to include such terms at a later date. However, even though there may be a certain level of unanimity regarding the type of provisions that ought to be included in the same or similar feature film related agreements, the specific wording, the application of such terms or their interpretation by the courts in any given circumstance is by no means standardized. In addition, some view the use of such vague standards by the major studios as a means of continuing their dominance and control over the rest of the industry (see "Deal Memo" and "Reasonable and Customary").

**86. Day and Date**--A concept used in making a film available for exhibition and requiring that one theatre's run of a film be controlled by (i.e., identical to) another theatre's run of that film. This relationship usually exists in the negative sense, (i.e., forbidding the controlled theatre's exhibition of a film until the controlling theatre is able to exhibit that same film). However, "day and date" may be used in a positive sense, (i.e., compelling the controlled theatre to exhibit a film simultaneously with the controlling theatre's run of that same film). In situations where one theatre is controlled by the distributor of the film, such arrangements would appear to be anti-competitive (see "Controlled Theatre" and "Restraint of Trade").

**87. Deal Memo**--A shortened version of a contract (e.g., a distribution agreement utilizing a letter agreement format, which theoretically covers the main points or deal points, agreed to by the parties, such as salary, time schedule, screen credit and percentage participation in the film's profits, if any). A deal memo is often used by the major studio business and affairs departments to get the film production process

underway on a given film, with the intent that the studio's legal department will ultimately negotiate and draft a full agreement. For smaller independent producers and distributors, the deal memo may not be necessary or even desirable, since these smaller entities do not have the bureaucracy of a major studio that often slows the negotiating and drafting process, and in fact a deal memo may be dangerous since the more detailed provisions of the full contract may be much more burdensome or onerous for the producer and may even conflict with the original provisions of the deal memo.

**88. Deem**--A verb meaning to come to think of as true. Film distribution agreements often provide that certain things may be deemed to be so by the distributor and such provisions are examples of distributor discretion that should be examined for reasonableness. From the producer's point of view, a more objective method for determining the truth or circumstances involved in any matter which is considered in the film distribution relationship is likely to be more preferable and therefore should be negotiated where possible. Distribution deals often provide far too much discretion for the distributor, and that discretion has traditionally been used to the detriment of other parties dealing with distributors.

**89. De Facto Cross-Collateralization**--The unauthorized arbitrary allocation of gross receipts to a motion picture marketed as part of a package either to networks, cable, syndication markets or foreign territories. Such allocations effectively cross-collateralize the profits of one movie with the profits of other movies in the package. Distributors sometimes engage in this form of cross collateralization when the issue is not addressed in the distribution agreement (see "Cross-Collateralization", "Cross-Collateralization of Markets", "Cross-Collateralization of Slates", "Discretionary Cross-Collateralization" and "Unauthorized Cross-Collateralization").

**90. Deferments or Deferrals**--All or a portion of salaries or compensation for cast, crew or others providing property or services for the production of a movie paid (by agreement) on a delayed basis after the property and/or services have been provided and usually after the release of the film. If such deferments are to be paid out of monies generated by the exhibition of the film they are also, by definition, contingent upon the film earning enough money to pay such deferments. Considering the history of studio accounting practices, deferments for creative or below-the-line personnel do not seem to be that appealing.

**91. Delivery**--In legal terminology, a voluntary transfer of title or possession from one party to another. A term defined in a film distribution agreement usually as a schedule which lists the physical items that are to be provided by the producer to the distributor (mostly through the lab) and sets the deadlines for such items to be delivered. Delivery is usually defined as a series of objective events and does not rely on distributor approval. Some distributors will try to insert subjective approval language in the delivery mechanism (see "Breach of Contract").

**92. Denigration of our Multi-Cultural Society**--By means of its consistent patterns of bias directed toward certain populations in the U.S., the Hollywood studios have been

reducing the effectiveness of our nation's multi-cultural society. Given that ideas are some of the most important commodities of the motion picture business and that the feature film is one of the most effective, if not the most effective means of communication yet devised, it is of critical importance to a multi-cultural society that all significant cultural and other interest groups within that society have a fair opportunity to express their most important commodity (their ideas) through our most effective means of communication (the feature film). To this end, both the federal and state governments in the U.S. have an obligation to its multi-cultural citizenry to assure such fairness and equal opportunity in the marketplace of ideas (see "Idea", "Marketplace of Ideas", "Movies With a Message", "Patterns of Bias" and "Propaganda").

**93. Development Deal**--Typically, an agreement by a studio or production entity to provide early funding for a producer during the development of a motion picture project or projects. Development funds may also be provided to directors, screenwriters, actors or actresses. Major studios commonly fund the development costs of many screenplays that are never approved for production and those costs are recouped from the budgets of the movies that are produced as part of the studio's overhead charge. Unfortunately, many of these development deals are made with friends, family and girlfriends of the studio executives (see "Creative Accounting" and "Overhead").

**94. Development Hell**--A film project that enters the development process at a studio, but never gets a greenlight for production funding and is not actually placed in turnaround either. Studios have been known to take competing projects or film titles off the market in this manner (see "Turnaround Hell").

**95. Direct Distribution Expense**--All costs and expenses incurred, paid, payable or accrued, in connection with the distribution, advertising, exploitation and turning to account of the film, (i.e., the activities directly related to the distribution of a film). The largest two items relating to the release of any picture are prints and advertising/publicity costs. Other direct expenses may include, but are not limited to, such things as checking costs, freight, guild payments and some taxes. Distributors will also include items like trade-association fees and assessments, along with market research, but these should be considered indirect or at most, allocated amongst several films that benefit from such expenditures. Generally such direct expenses are specifically defined or described in some detail in a section of the distribution agreement or in an exhibit to the distribution agreement. If the distribution agreement limits distributor expense deductions to direct expenses, the profit participant auditors will be concerned with ferreting out indirect expenses that are claimed by the distributor as direct expenses. Specific categories of direct expenses that the distributor may deduct should be itemized. Other "indirect expenses" such as the distributor's general administrative overhead and similar internal costs, should be regarded as a normal cost of doing business for the distributor and not recoupable from the picture's proceeds or at least the producer should negotiate for as small a percentage of such expenses to be charged to the picture as possible. Otherwise the producer should be certain that the word "direct" is inserted in front of the general description of what kind of expenses are to be deducted as distribution expenses. Maybe

some relationship should be established between that percentage and the number of films distributed by the distributor in the course of a year.

**96. Discounts**--A reduction in price. Such reductions are often negotiated and/or awarded by exhibitors and other feature film licensees to distributors on a given picture or they are sometimes based on the volume of pictures provided by the distributor. Distributors often seek to exclude the value of such discounts in profit participation calculations, arguing that the distributor's activities are responsible for earning such credits. However, without the feature film or films made available to the distributor by the producer and other profit participants, the distributor would not be in a position to either negotiate or receive such discounts. Producers should seek to negotiate a fair provision in the distribution agreement which includes the value of such discounts in the profit participation calculations (also see "Rebate").

**97. Discretion**--The reasonable exercise of a power or right to choose between alternative courses of action or inaction. Many film distribution agreements are currently drafted so as to include numerous situations in which the distributor is allowed to exercise its discretion (e.g., in the manner and extent of the film's release and the markets selected, as well as the theatres in each such market, with respect to sales methods, policies and terms, by refraining from commencing distribution or discontinuing distribution in any country or place at any time and in allocating license payments among films marketed as a package). Distributors commonly seek too much discretion in their distribution agreements. In negotiating with distributors, independent producers should seek to eliminate unnecessary or unreasonable distributor discretion. Pay particular attention to the provisions that include the following words or phrases. These indicate someone, usually the distributor is being allowed to exercise its discretion: "discretion", "good faith", "apportion", "allocation", "best efforts", "reasonable efforts", "latitude", "reasonably", "deem", "reasonably deem", "usual", "customary", "customarily" and "industry standards". When such a word or phrase is used, determine who's discretion is involved and then consider whether it is possible to negotiate and draft language that provides a more objective standard with which to comply. Some discretion will almost always be necessary, but discretion can also be an invitation for abuse (see "Trust Me").

**98. Discretionary Cross-Collateralization**--The offsetting of motion picture profits by a distributor between markets or films in situations where the distribution agreement does not address the practice, (i.e., such cross-collateralization is left to the discretion of the distributor). Distributors will sometimes omit discussion of the cross-collateralization issue and then merely assume that they are authorized to cross-collateralize (see "Cross-Collateralization", "Cross-Collateralization of Markets", "Cross-Collateralization of Slates", "De Facto Cross-Collateralization" and "Unauthorized Cross-Collateralization").

**99. Discrimination**--The treatment of someone differently on a basis other than on merit. Studies have demonstrated that the vast majority of the top three studio executives at the major studio/distributors share a very narrow common background in terms of race, ethnicity, religion, culture, gender and political orientation, and that African-Americans, Latinos, Native Americans, Arab-Americans, Asian-Americans, Christians, Muslims,

Mormons, Whites from the American-South and political conservatives have rarely and in some cases, never broken into the ranks of such executives. Such a phenomenon could not occur in a diverse and free market society without wholesale discrimination (see "Problem Producer" and "Reciprocal Preference").

**100. Distribution Commitment**--An agreement or pledge to provide a domestic or foreign theatrical release for a film; also agreements or pledges to provide certain specified aspects of such distribution (e.g., a specified level of expenditures for prints and ads, or a release in a certain number of theatres or cities). It is difficult to get distributors to make such specific commitments, and even when they do, many distributors often do not live up to such commitments. Producers should seek to negotiate reasonable commitments with distributors and see that they are met.

**101. Distributor Credit**--Any extension of payment terms offered by the Distributor to sub-distributors and/or exhibitors or indebtedness owed to the Distributor by such entities. Distributors sometimes allow such indebtedness to be extended for unreasonable periods, in an effort to preserve important relationships with sub-distributors or exhibitors, while sacrificing the financial interests of the film producers in prompt payments.

**102. Dividend**--Distribution of corporate profits or earnings to the corporation's shareholders, prorated by class of security and paid in the form of money, stock or company products or property. The amount is decided in the discretion of the corporation's board of directors and is usually paid quarterly. Often in Hollywood, the corporation is merely viewed as a financing vehicle (or a way to use other people's money) and the top level executives, (i.e., management in a corporation) are able to control the corporation's board of directors, so they can successfully siphon off more of a corporation's revenue stream for their own compensation as opposed to allowing a larger amount of such corporate revenue to flow through to the corporate shareholders.

**103. Dominant Media Conglomerates**--The largest and most influential corporations in the communications industries including feature film production, distribution and exhibition, network television, cable television, radio, newspaper, magazines, book publishing and now the Internet. When the Reagan administration eased regulatory restraints, (i.e., adopted a policy of less government regulation--specifically a relaxation of the enforcement of the U.S. antitrust laws in the entertainment industry), the dominant media conglomerates including the major U.S. studio/distributors regained control over some of the most important theatre chains. These exhibitor circuits are not only the largest in terms of the total number of theatres and screens, but are also the most strategically located in the leading film markets. Such extensive vertical integration in the industry serves as a powerful barrier to entry to other film industry aspirants and is anti-competitive (see "Number of Screens", "Major Exhibition Chains", "Paramount Consent Decrees" and "TriStar Case").

**104. Double Add-Back**--A commonly used over-budget penalty included in agreements for studio production financing of a film which permits the studio to recoup from the film's producer or director twice the amount of the overage prior to breakeven on the film. Such contractual penalties are unreasonable and for that reason may not be enforceable, although again, few will challenge. This studio overbudget policy raises a question as to whether such overbudget costs, when added twice, bear interest and overhead charges the second time around. Distribution agreements sometimes exclude such costs as losses covered by insurance, losses caused by events of force majeure, changes initiated by or approved by the studio, third-party breaches, currency fluctuations, union increases and/or lab increases. So, a determination has to be made as to whether the increased costs are due to certain factors excluded from the calculations relating to the question "was the overbudget threshold exceeded".

**105. Double Distribution Fees**--In situations in which a film's distributor utilizes the services of a sub-distributor in certain markets or territories the film's producer and other profit participants may be subjected to distribution fees from both entities, portions of which are redundant. The producer has to try to have the primary distributor absorb the distribution fee of the sub-distributor within its own distribution fee retaining the balance as a supervision fee or have the fees of the sub-distributor passed through without markup. In the

alternative the producer may seek to negotiate a minimal override for the primary distributor on the distribution fees of sub-distributors.

**106. Double Feature**--The exhibition of two motion pictures in the same theatre (one after another) for which patrons are only charged the price of a single ticket. The distributor of such a pairing must allocate (based on a pre-determined formula or otherwise) the film rentals generated by the joint exhibition of the films. Unfortunately, distributor's often fail to allow the producer's auditor to confirm the fairness of these allocations. The distribution agreement negotiations should include some discussion of an objective standard on which to base such allocations, such as the box office performance of the movies in single exhibition, but distributors often seek to rely on their own discretion in such matters, and that discretion allows them to allocate the film rentals in favor of a studio produced film as opposed to an independently produced film (see "Co-Feature").

**107. Dues and Assessments**--The charges levied by the Motion Picture Association of America (MPAA), the Association of Motion Picture and Theatrical Producers (AMPTP) and other industry groups for their work in representing the interests of their respective segments of the motion picture industry. These dues payments are allocated to each film based on a percentage of the gross receipts generated by the film. Thus, such payments are considered a distribution expense and are paid prior to any payments to net profit participants. The MPAA distribution companies reportedly extract these dues allocations from theatrical revenues generated by MPAA distributed films whereas the percentage used is based on the anticipated revenues from television, video and theatrical distribution. Once again, it is difficult for a producer's auditor to challenge such



allocations, even though the arbitrary nature of the percentage system is inherently unfair to some films. To the extent that a producer has any leverage, he or she may want to place a ceiling on the amount of money a given film pays for association dues or assessments.

**108. Duress**--Action by a person that compels another to do what he or she would not otherwise do. Duress is a recognized defense to any act, such as a crime, contractual breach or tort, which must be voluntary in order to create liability for the person committing the act. Entertainment attorneys in Hollywood have been forced to accept less compensation for their clients in firm conflict of interest situations due to duress from their own senior partners. All creative personnel in Hollywood are under the constant threat of "you'll never eat lunch in this town again" if they do not accept certain deals proposed to them from time to time (see "Blacklisting" and "Contract of Adhesion").

**109. Economic Abuses**--Unfair, exploitative or offensive business practices. A state has a legitimate interest in eliminating economic abuses which are harmful to its citizens. Many of the business practices described in this monograph are considered economic abuses (see "Anti-Competitive Practices" and "Blind Bidding").

**110. Economic Reprisal**--A retaliatory act by a business or industry segment. For example, in response to the passage of anti-blind bidding statutes in various states, some of the major studio/distributors threatened from time to time to take their lucrative location filming to non-regulatory states (see "Anti-Blind Bidding Statutes", "Blind Bidding" and "Economic Abuses").

**111. Employment Discrimination**--Arbitrarily exhibiting a hiring preference for one group over another, or denying employment opportunities to disfavored groups. The executives of the Hollywood major studio/distributors have engaged in wholesale employment discrimination from corporate top to bottom for nearly 90 years. Not only has that discrimination destroyed the career opportunities and livelihoods of thousands of African-Americans, Latinos, women, Arab-Americans, Asian-Americans, Whites from the American South, Christians, Muslims, Mormons among others, but these Hollywood employers have also historically shown several distinct hiring preferences, including a strong preference for employing specific immigrants from just 4 or 5 European countries, as opposed to hiring equally talented persons already in the U.S. (or from other parts of the world), and even when no demonstrated need for the employment of immigrants was apparent. If you steal a car in this country, you might very well go to prison. If, on the other hand, you arbitrarily destroy someone else's career by hiring your less-deserving cultural cousin for a high-paid Hollywood studio job, our government generally looks the other way.

**112. Entire Agreement Clause**--A provision included in most contracts, including film distribution agreements which provides that the agreement constitutes the entire agreement and supersedes and cancels all prior negotiations, undertakings and agreements, both written and oral between the parties with respect to the subject matter of

the agreement. The clause may provide further that no officer, employee or representative of either party has any authority to make any representations or promises not contained in the agreement and that neither party has signed the agreement in reliance on any such representations or promises. It is common practice in the film industry however, for agents and distributors to make oral promises that are not memorialized in writing. To the extent that a producer has any leverage in the negotiations, they should try to make notes of any oral representations when negotiating with various representatives of distributors and systematically see that such representations are incorporated into the distribution agreement, otherwise, they may be worthless (see "Oral Representations").

**113. Errors and Omissions Insurance**--E&O coverage is intended to protect against claims based on certain types of occurrences in the course of a film's production and distribution, such as the failure to obtain requisite releases. The producer usually pays for such coverage, at least initially, but if the coverage is expanded to include possible distributor error, the distributor should pay for some or all of the coverage for the distribution period. Unfortunately, distributors will often seek to deduct the entire premium from revenues due the producer. Also, when errors and omissions insurance is provided, there is no longer any need for the distributor to withhold sums of money from distribution proceeds to cover such claims, unless there is a possibility that such claims may exceed the limits of the insurance coverage. The producer should also discuss the E&O requirements as set out in the distribution deal with his or her insurance agent or carrier to make sure the distributor is not obligating the producer to provide coverage that is not available in the current marketplace.

**114. Ethnic Diversity**-- The existence together of a variety of groups of people with differing racial, national, tribal, religious, linguistic or cultural backgrounds. The Hollywood film community has effectively prevented the existence of ethnic diversity at the top in Hollywood for 100 years. Recently, the United States joined with its NATO allies in Central Europe to spend billions of dollars and put American lives at risk in fighting for a principle, that is: no nation-state shall be defined primarily by the ethnicity of its people. This same important principle should be applied here in our own country so that no industry, certainly not an important communications industry such as feature film, can be allowed to arbitrarily preclude participation at its highest executive levels based on considerations of ethnicity

**115. Exclusions**--A term used and defined in some distribution agreements to be the amounts of all adjustments, credits, allowances (other than advertising allowances), rebates and refunds, given or made to sub-distributors, exhibitors and licensees, that are excluded from accountable or adjusted gross, when that concept is used. Also monies in the nature of security deposits, or advance or periodic payments are not included in accountable gross until they have actually been earned (such as by the exhibition of the film) or forfeited. In other words, some distribution deals will allow the distributor to not count and therefore not be obligated to include in its net calculations, certain items that otherwise might be included in gross receipts. Such exclusions must be carefully reviewed for reasonableness (see "Adjusted Gross").

**116. Exploitation Film**--A feature motion picture that contains obligatory or gratuitous sex, violence, horror, catastrophic events or a combination of any or all of such themes and that has little socially redeeming value. The exploitation film blatantly advertises and uses these themes to attract gullible, immature, non-sophisticated audiences, who also can be easily attracted by misleading advertising. Such films typically enter and exit the theatrical market more quickly than other feature films (see "Misleading Advertising").

**117. Extortion**--The illegal taking of money by anyone who employs threats, or other illegal use of fear or coercion in order to obtain the money, and whose conduct falls short of the threat to personal safety required for robbery (e.g., the use or the threat to use violence in order to collect interest or the debt itself). Representatives of the major studio/distributors are resorting to extortion when they suggest or imply that a profit participant might be "blacklisted" if such profit participant did not forego a lawsuit or settle a lawsuit for less money than is owed. The same kind of coercion is often used in Hollywood to get creative personnel to accept unfavorable compensation packages (see "Racketeering").

**118. Facilities Allocations**--The apportionment of studio or distributor operating expenses among the studio's various components for the purpose of charging such expenses against a given film's costs. The major studio/distributors are notorious for inflating such costs. In studio or distributor financed films, the producer should consider negotiating to exclude such indirect costs from the permissible distribution expense deductions or to place a limit on the percentage of such allocations or in the alternative, carefully review such allocations to make certain they are reasonable. Once again, most producers do not have the leverage to negotiate reasonable language in the first place, and has even less power to remedy such inflated costs after the fact.

**119. Feature Film Limited Partnership**--A film financing vehicle through which passive investors (the limited partners) typically provide some or all of the production monies for producing one or more motion pictures. Like corporate stock, interests in limited partnerships are securities, thus the federal and state securities laws, including the anti-fraud provisions apply to the sale and offer of limited partnership interests (see "Stock Fraud" below). In recent years, the film limited partnership has often been portrayed in a negative light by many broker/dealers, financial commentators, investment advisors and certainly film industry professionals who have expertise in other forms of film finance, ostensibly because investors have not fared well, with their investments in such film financing vehicles. In some specific instances, it is entirely possible that greedy general partners or others help to create a situation in which excessive up front fees or expenses are deducted from the offering proceeds, (i.e., the monies raised through such limited partnership offerings, thus not leaving enough of such funds to actually produce the movie promised or envisioned). It is also possible that such excessive up front payments to key people do not leave enough profit participation incentive to provide adequate motivation for the producer to negotiate a distribution deal that treats such passive investors fairly, (i.e., the producer has a conflict of interest with such investors). It might just as accurately be pointed out, however, that the industry and distributor practices cited elsewhere in this monograph probably play an even more significant role

(in most feature film limited partnership situations) in actually determining whether such investors recoup or see a reasonable profit on their investment. If, in fact, any feature film distributor engages in very many of the practices described herein, it is not likely that any profit participant including limited partnership investors are going to see any share of such profits. For these reasons, feature films are considered exceptionally high-risk investments in the investment community.

**120. Fiduciary**--A person or entity having a legal duty, created by his, her or its undertaking, to act primarily for the benefit of another in matters connected with an undertaking, (i.e., a person in a position of trust and confidence). A fiduciary relationship is only created as a general rule by the express terms of a written agreement, and over the years, feature film distributors have refused to allow their relationship to producers and other net profit participants to be characterized as a fiduciary relationship, although by virtue of the activities undertaken by the distributor on behalf of the producer the distributor has, in fact, created a legal duty to act for the benefit of such producer (see "Contract of Adhesion" and "Unconscionable Contractual Provisions").

**121. Film Rentals**--The money owed and/or paid by an exhibitor to a distributor under a film's lease agreement, (i.e., the monies paid by the exhibitor and/or earned and due to be paid to the distributor as rental fees for the right to license a film for public showing). Authorities do not seem to agree on this issue of "owed" versus "paid" thus most film distribution agreements do not even use the term "rentals" but instead use and contractually define the broader concept of "gross receipts". Film rentals are generally computed weekly on a consecutive seven-day basis (Wednesday through Tuesday or Friday through Thursday, depending on the day on which the film first opens in the market). Film rentals as between the distributor and exhibitor are negotiable and may be determined by several different methods, including a 90:10 basis, sliding scale, fixed percentage, minimums (floors) that relate specifically to the gross box-office receipts and a flat-fee basis that is a predetermined, unchanging amount. In many distributor/exhibitor contracts, the film rentals earned will change from week to week, with the distributor's relative share generally decreasing and the exhibitor's share increasing from the first through subsequent weeks. This scheme makes it essential for the exhibitor to successfully obtain the rights to exhibit anticipated blockbusters that are expected to stay in the theatres for longer periods of time. This, in turn, gives the distributors leverage when negotiating with the exhibitors on less important films (see "Block Booking"). One or two hoped-for blockbusters ("tentpole" projects) thus becomes an important part of each major studio/distributors annual marketing strategy. In addition, the exhibitor and distributor will often negotiate a settlement amount for film rentals that is actually less than the contractual amount owed by the exhibitor (see "Settlement Transaction"). The term film rentals also refers to the accumulated film rentals for a given film from all theatres in a market or all markets (also called "Distributor Film Rentals").

**122. Film Schools**--Colleges and universities that offer a degree program in film. Some of the better known film schools include New York University, the University of Southern California and the University of California at Los Angeles. Recent reports indicate film-study programs across the U.S. graduate some 26,000 students each year,

but that only 5% to 10% of those graduates actually end up making a living in their chosen field. The dominant entities in the film industry (the major studio/distributors) benefit from this huge imbalance in the law of supply and demand (i.e., the film schools are turning out many more actors, actresses, directors, producers, filmmakers, screenwriters, etc.) than could possibly be accommodated by the industry), and along with the film schools themselves have failed to effectively discourage the many thousands of immature and uninformed 18 and 19 year olds from choosing a career path that is, in most cases, doomed to failure (see "Law of Supply and Demand").

**123. Final Cut**--The last fine-tuning of a motion picture immediately following acceptance of the fine cut version, wherein the sound is mixed and the picture conformed and made ready for the lab to run off the answer print. The final cut is the finished version of the work print to which the negative is conformed in order to strike the release prints that are to be exhibited in theatres. Who has the ultimate authority to approve this version of a film is a significant negotiating point between producers and directors and also between producers and distributors. Many film distribution agreements provide that the distributor has sole discretion to edit the film as it sees fit. Producers generally want to limit the rights of distributors to edit the film without the producer's approval to certain situations (i.e., to meet censorship and MPAA rating requirements). However, in most instances, as with other important issues, only a small group of Hollywood insider producers and directors have the leverage to negotiate favorable terms on this issue (see "Discretion", "Editing Rights" and "Marketplace of Ideas").

**124. Final Judgment**--The last decision that settles the rights of the parties to a lawsuit. Many distribution agreements require the producer to reimburse the distributor for legal fees if the producer files a lawsuit against the distributor but fails to obtain a final judgment against the distributor. Of course, most lawsuits never get to a final judgment. They are settled beforehand, and substantial legal fees are likely to have been incurred. Such unconscionable provisions merely represent another way in which distributors discourage producers from protecting their rights through lawsuits.

**125. Final Marketing Outlet**--The retail level of a business. In the feature film theatrical business exhibition is the final marketing outlet. The major studio/distributors exercise an anti-competitive control and/or dominance over all phases of the film industry from development through exhibition and beyond theatrical exhibition to other media.. Historically (from 1940 to 1948, most of the years during which the Paramount case was being litigated) the major studio/distributors of that period produced about 62% of the films and distributed approximately 71% of the domestic films released. The major studio/distributors gained effective indirect control of feature film production through their control of first run theatres. By monopolizing the final marketing outlet they successfully curtailed entry by independent producers. The Paramount consent decrees were partly intended to weaken the market dominance of the major studio/distributors. But, in the last ten years of so (a period which has witnessed relaxed U.S. Justice Department enforcement of antitrust laws in the entertainment industry) the feature films distributed by the current group of major studio/distributors and their subsidiaries or affiliates generate about 95% of the domestic box office gross in any given year. This

level of domination warrants another inquiry by the U.S. Justice Department without political intervention (see "Barriers to Entry", "Major Exhibition Chains", "Number of Screens", "Paramount Consent Decrees" and "TriStar Case").

**126. First Position Gross**--A share of the gross receipts or total revenues from a given source or stage in a movie's revenue stream, such as film rentals or home video, which is accounted for before distribution fees, distribution expenses, negative costs or other gross participations are deducted. First position is generally considered to be the most sought-after participation in a movie deal, but it is seldom awarded by movie studio/distributors, except to a handful of the most-recognized talent in the industry (and generally represented by Hollywood insider talent agents). To the extent that anyone other than the distributor is participating in a distributor's gross receipts in a first position, chances for that film generating net profits for other profit participants are substantially diminished.

**127. First-Run Zoning**--Arbitrary, fixed rankings of exhibitors for film releases. In other words, not all theatre owners have the same opportunity to show movies at their theatres on the first run of certain motion pictures. The major studio/distributors have resorted to what in effect is "tier releasing", (i.e., the categorization of exhibitors based on the arbitrary judgment of the distributors and the releasing of the distributors' films only to the "more desirable" theatres first while denying the less desirable theatres an opportunity to exhibit such films until later in the film's release schedule, if at all). First-run zoning was one of the conduct restrictions of the Paramount consent decrees (see "Admission Price Discrimination", "Blind Bidding", "Block Booking", "Conduct Restrictions", "Five O'Clock Look", "Paramount Consent Decrees" and "TriStar Case").

**128. Five O'Clock Look**--An unethical business practice allegedly engaged in by some distributors who wait until the exhibitor bids for the first-run of an about-to-be-released film are in, then the distributor calls an exhibitor to whom the distributor would like to award the movie and reports the highest bid received for the film to that point from the favored exhibitor's competitors. The distributor then allows that exhibitor to come in late with a higher bid and awards the first-run of the movie to the late (and highest) bidder. Such a practice obviously favors the financially stronger theatre chains, and those with favorable relationships with the Hollywood insiders (see "Blind Bidding", "Closed Bidding", "Conduct Restrictions", "Predatory Practices", "Reciprocal Preferences", "Selling Subject to Review" and "Unethical Business Practices").

**129. Floor**--A lower limit. In the context of a distributor/exhibitor agreement, the minimum percentage of box office gross the distributor is entitled to receive regardless of the exhibitor's operating expenses, (i.e., a minimum weekly percentage of a film's gross box office receipts which the film's lease agreement guarantees the distributor will receive as film rental regardless of the theatre's house allowance). Floors may be subject to adjustment, (i.e., reduced over the course of the film's engagement, and may range from 70% to 25%). Distributors, on the other hand, generally refuse to allow producers to benefit from similar floors in the producers' agreements with distributors.

**130. Foreign Receipts**--Monies earned by exploitation of a film outside the U.S. and received by the distributor. Generally, distributors will exclude foreign receipts from their net profit calculations until such funds have been remitted to the U.S. This typically delays the point in time when the producer and other net profit participants will benefit from such receipts. In some instances, the foreign receipts will be under the total control of the distributor, but still on deposit in a bank in a foreign country, thus the producer and other net profit participants are being unfairly denied access their funds. To the extent that the producer can, it is important for the producer and other profit participants to clarify at what point foreign receipts are to be included as part of the distributor's gross receipts, that is, when profit participants will receive the benefit of the collection of foreign receipts that could be remitted to the U.S. (see "Blocked Funds").

**131. Foreign Tax Credits**--Dollar for dollar deductions from an individual or entity's U.S. income tax for the payment of foreign taxes levied by countries as a remittance or gross receipts tax. Foreign taxes generally represent the largest part of the distribution expense item "taxes". Distributors often pay such taxes, then deduct such payments from their gross receipts as a distribution expense (meaning that the producer and other net profit participants have actually paid the taxes) while the distributors still claim the foreign tax credit against their U.S. tax liability. A distribution agreement negotiated between more evenly balanced parties would provide that either the distributor should not deduct the payment from gross receipts or the foreign tax credit should be passed on to the producer group ("Creative Accounting", "Fraud" and "Unethical Business Practices").

**132. Formula Deal**--A film licensing agreement between a distributor and a circuit of theatres in which the license fee of a given feature is determined, for the theatres covered by the agreement, by a specified percentage of that feature's national box office gross. This in effect cross-collateralizes the financial performance of the film among the various theatres at which it is exhibited. The results of film formula deals have been found to be an unreasonable restraint of trade. If the major studio/distributors also own certain exhibitors (as some do) it is difficult to prevent them from effectively utilizing formula deals as between their internally controlled distributor and exhibitor (see "Antitrust Law Violations", "Cross-Collateralization", "Major Exhibition Chains", "Paramount Consent Decrees", "TriStar Case" and "Vertical Integration").

**133. Franchise Agreements**--A film licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement. Such agreements typically protect the exhibitor by prohibiting the exhibition of that distributor's films within the geographical market of the exhibitor and protect the distributor by committing the exhibitor to book the distributor's films. In recent court hearings relating to the requests of certain distributors to be relieved of the Paramount consent decree conduct provisions in dealings with exhibitors, the U.S. Justice Department has taken the rather bizarre position that franchise agreements are not necessarily anti-competitive in the current marketplace (see "Antitrust Law Violations", "Conduct Restrictions", "Paramount Consent Decrees" and "TriStar Case").

**134. Fraud**--Intentional deception resulting in injury to another. Elements of fraud are (1) a false and material misrepresentation made by one who either knows it is false or is ignorant of its truth, (2) the maker's intent that the representation be relied on by another and in a manner reasonably contemplated, (3) the recipient's ignorance of the falsity of the representation, (4) the recipient's rightful or justified reliance, and (5) proximate injury to the recipient. Fraud usually consists of a misrepresentation, concealment or non-disclosure of a material fact, or at least misleading conduct, devices or contrivance. If in fact, a given distributor engages in a significant amount of the conduct described in this monograph, it is likely that such distributor has intentionally deceived and caused an injury to all of the profit participants involved in the deal, thus, such distributor may well have committed some form of actionable fraud (see "Racketeering").

**135. Free Enterprise System**--An economy structured around unfettered choice, (i.e., businesses are free to choose what products they will make, consumers are free to choose what they will buy and prices are generally left to fluctuate with supply and demand in an openly competitive market). Free enterprise has traditionally been one of the basic underlying economic principles of the U.S. economy. Unfortunately, some businesses, like those described herein, if not limited by aggressive law enforcement, will use predatory practices, unfair business practices, anti-competitive practices, unethical practices and the many other business practices described in this monograph to gain a competitive edge over some competitors, often to the detriment of the many small businesses in the industry and the consuming public. Entertainment industry leaders often use the phrases "free enterprise" and "free market" to describe the Hollywood-based U.S. film industry, however, such claims are false and misleading (see "Anti-Competitive Practices", "Antitrust Law Violations", "Greed", "Combination in Restraint of Trade", "Law of Supply and Demand", "Marketplace of Ideas", "Predatory Practices", "Unethical Business Practices" and "Unfair Competition").

**136. Free Marketplace of Ideas**--The basic underlying concept of our U.S. democracy (i.e., if our citizens are exposed to all of the ideas concerning important issues, they will be in a better position to make the right decisions relating to those issues). The U.S. film industry and its motion pictures enjoy constitutional free speech protection (see the U.S. Supreme Court case *Burstyn v. Wilson*, 1952) precisely because as the Supreme Court stated, the motion picture is a significant medium for the communication of ideas. Our democracy and this concept of free speech are based on the principle that a vigorous and free marketplace of ideas will eventually result in the emergence of the most worthy of those ideas as they relate to all kinds of important issues that confront and confound our society. In order for the citizens of our democracy to make informed judgments on debatable questions, they must be exposed to a fair representation of the ideas on all sides of such issues. Unfortunately, the Hollywood-based U.S. film industry, (which, by the way, dominates this communications medium in the U.S. and around the world) is neither a free market, nor a level playing field, nor is it even based on merit. It severely limits freedom of speech in this country by arbitrarily restricting who gets to express their ideas through this important communications medium. Thus, not all ideas that could be promoted through film have had an equal opportunity to be expressed. Therefore, our



democracy's overall free marketplace of ideas is flawed because a single important communications medium is significantly biased.

**137. Free Speech**--The Hollywood-based major studios successfully argued before the U.S. Supreme Court in the 1952 case of *Burstyn v. Wilson* that feature films ought to be protected by the First Amendment's right of free speech. These same studios have used this free speech privilege for many years to prevent critics from influencing film content. At the same time, these same studios have utilized a wide variety of unfair, unethical, unconscionable, anti-competitive, predatory and illegal business practices to severely and arbitrarily limit who has the opportunity to express themselves through this important medium for the communication of ideas. Thus, the Hollywood studios, controlled by a small group of people severely lacking in racial, religious, ethnic or cultural diversity, have been able to hide behind their free speech protection, while indirectly denying the same protection to others.

**138. Frequency of Payments**--How often compensation is disbursed. Frequency of payments can be an important issue as between producers and distributors when the distributor or its studio affiliate provides production-money financing for a motion picture project, and is thus charging interest on the negative cost of the film, particularly since the distributors typically deduct their distribution fees and distribution expenses from gross receipts, then deduct interest payments from the revenue stream before the negative costs start to be recouped. Gross profit participations are also characterized as a production cost, thus incurring additional interest even though the money was not expended until the film generated revenues (see "Gross Participants" and "Interest").

**139. Generally Accepted Accounting Principles (GAAP)**--Conventions, rules and procedures that define accepted accounting practice. Financial statements included in a securities registration statement must be prepared in accordance with GAAP, as well as the SEC's own accounting standards. Major studio/distributors generally do not restrict themselves to the use of generally accepted accounting principles (see "Contractually Defined Terms" and "Creative Accounting").

**140. Glamour Industry**--A business that is considered to be fascinating and exciting to the public. The film industry is such a business and this factor is often cited as an underlying reason for investor interest in the industry, at least for individual investors, (i.e., some of these investors are partially motivated to invest in movies because of the so-called "cocktail chatter" value of such investments). Distributors have traditionally taken advantage of this appeal and engaged in the numerous business practices described in this monograph, more often than not resulting in no returns to investors. The same appeal also attracts all sorts of other people to the industry, including those with good ideas for scripts, but in many cases, the industry has devised ways to extract those ideas and to use them without properly compensating the originator (see "Theft of Ideas").

**141. Good Faith**--Being faithful to one's duty or obligation, (i.e., a total absence of any intention to seek an unfair advantage or to defraud another party); an honest and sincere intention to fulfill one's obligations. Film distribution agreements often use this rather vague standard which can only be applied after the fact, knowing that most parties involved in disputes with distributors will never sue because such litigation is too expensive, time consuming and may bring an end to the litigant's film industry career.

**142. Graylisting**--A form of discrimination based on age, (i.e., age bias). Screenwriters, actors and others have complained from time to time about the youth-driven agents and executives who run the U.S. television and film companies saying such persons have an obsession with youth and that it has become a factor in deciding whether a scriptwriter can write or an actor can act (see "Blacklist" and "Discrimination").

**143. Greed**--Inordinate or reprehensible acquisitiveness. Although no scientifically conducted study is cited to support the statement, it would appear that there is adequate informal evidence to support a conclusion that greed is a motivation that occurs frequently in the film business. When a motion picture like "Coming to America" grosses more than \$300 million worldwide but does not reach net profits it may be fair to assume that "greed" was involved in the negotiation or implementation of that distribution deal somewhere along the line. When the number one box office hit of all time for Warner Bros. ("Batman") achieves \$253.4 million in distributor gross receipts as of September, 1990 but based on the distributor accounting still showed a deficit of \$35.8 million it may be fair to conclude that someone taking off-the-top was being greedy in that deal. In that specific situation, the movie's star Jack Nicholson reportedly received \$50 million. Now for the poor and working people of this country, that may appear obscene. It would not be unreasonable for them to boycott every movie Jack Nicholson makes in the future because his \$50 million is enough for a life time and it came out of somebody's else's share. In the meantime the movie-goers have to pay for all of this greed. The motion picture "Rain Man" reportedly grossed more than \$400 million, but according to an MGM/Pathé accounting statement for the period from November 1990 to February 1991 it was still more than \$27 million away from breaking even (see "Breakeven", "Buchwald Case", "Creative Accounting", "Gross Receipts", "Leverage" and "Market Power").

**144. Gross Floor**--A negotiated minimum level of backend participation in a movie's revenue stream regardless of the number or amount of distributor or other deductions from gross rentals. This device permits a producer or other person relying on a percentage participation in net profits to receive at least this minimum, (i.e., gross floor regardless of how many gross points are awarded to others or distributor deductions are otherwise made from gross receipts). It may be necessary to include such a gross floor to preserve some profit participation for the producer and others participating in the producer's share. In light of the reported figure that only about 5% of movies using the major studio/distributor net profits formula ever reach breakeven, (i.e., generate net profits), it would seem to be quite essential for every producer to insist on at least some small percentage of a gross floor until distribution deals begin resulting in more films that generate net profits. Unfortunately, as a matter of practice, distributors refuse to grant

such reasonable requests for a minimal participation in the economic upside of the film created by the producer group (see "Floor", "Gross Participants" and "Gross Receipts").

**145. Gross Participants**--Persons or entities who have negotiated or are awarded a percentage participation in a movie's gross rentals or other defined level of a movie's revenue stream at some stage of gross and prior to net receipts or net profits. Without a gross floor being negotiated by a net profit participant, too many (or even one) gross participant(s) may eliminate the possibility of a movie's revenue stream ever generating net receipts or net profits. In addition, distributors can even cheat gross profit participants by means of the settlement agreement and by defining gross receipts to be something less than actual gross (see "Gross Floor" and "Settlement").

**146. Gross Receipts**--A contractually defined term in motion picture distribution agreements, generally referring to all monies actually received by the distributor (or its subsidiaries or affiliates) from the exploitation of any rights granted pursuant to the distribution agreement, from all sources, stated in U. S. dollars, and not subject to forfeiture or return, including non-returnable advances and guarantees. The major areas from which gross receipts are derived include home video, theatrical revenue or "film rental", non-theatrical, pay television, network television, television syndication and ancillary rights. The studio/distributors will generally take the position that advances should not be included in gross receipts until earned, in other words, the distributor will want to deduct an amount equal to any advance that has been paid to the producer from monies received by the distributor and will not want to consider such amounts as part of gross receipts for any calculations based on gross receipts. Distributors will also sometimes gross receipts to be something less than actual gross (see "Adjusted Gross" and "Contractually Defined Term").

**147. Hard to Audit Expenses**--Costs that are difficult to verify. Many of the film distributor distribution expenses deducted from the distributor's gross receipts in order to arrive at net profits are difficult, if not impossible to verify or judge as to reasonableness, particularly since the language of the audit provision generally limits the auditor's access to certain information. For this reason alone, it might better serve the overall film community for the entire system relating to the deduction of distribution expenses to be abandoned in favor of negotiated across-the-board gross participations for all participants (see "Direct Distribution Expenses").

**148. Hidden Agendas**--Plans of things to be done or intentions that are not apparent or divulged. Filmmakers make movies for many reasons. Making money, becoming famous, earning the respect of professional peers, providing entertainment and communicating important ideas would seem to be high on anyone's list of the typical reasons why movies are made, although the order of importance certainly may differ amongst individuals. The feature film, as a communications medium, with its large screen, color technology, special effects, lighting techniques, exquisite photography, incredible sound, excellent talent on and off the screen, is also, without question, one of the most effective forms of

communicating ideas that the world has yet devised. It would indeed be naive for anyone to assume that the communication of ideas is not an important motive for any serious filmmaker or filmmaking concern. Yet the top executives of the major studio/distributors and spokespersons for the MPAA are quite fond of saying "It's all about money". If it were all about money, there would be no patterns of bias in Hollywood films. A feature film affords a unique opportunity for those who control or dominate the process of decision-making as to which movies or ideas are included in motion pictures, to insert such ideas or select and actively promote the movies which best express the views held by those decision-makers (see "Patterns of Bias").

**149. Holdback Periods**—If the distributor is given a broad grant of rights in the distribution agreement, the distributor will want to make its own internal decisions regarding appropriate sequential distribution in various media in the territory. The producer, on the other hand, may want to seek a holdback schedule in order to ensure that the picture has an opportunity for maximum revenues in each medium of exploitation. This is another issue on which distributor negotiating leverage generally allows the distributor to offer its terms on a take-it-or-leave-it basis. Examples of holdback periods might include: videocassette rights: 9-12

months after initial theatrical release; cable and pay tv: 3 months after start of videocassette distribution; free television: 2 years after initial theatrical release.

**150. Hollywood Insiders**—Studies have demonstrated that the people who still determine which movies the vast majority of American audiences see on the screen (that is, the real Hollywood movie "makers") are the three top studio executives at the so-called major studio/distributors (that is, the top executives at Paramount, Universal, Disney, Sony [including Columbia/TriStar], Warner Bros., 20th Century Fox and MGM). Despite what you may be told about influence on a small number of important films from other sources, like certain powerful actors, agents and directors, these top studio executives are the people who directly control the important level of Hollywood decision-making relating to which films are produced and released by the major studio/distributors, and they have exercised that control for the nearly 90-year history of the Hollywood-based U.S. film industry. These studies demonstrate further that the most honest, accurate and fair description of the relevant characteristics and backgrounds of the members of this Hollywood control group is that a clear majority of its members are politically liberal, not very religious, Jewish males of European heritage. There is no suggestion being made in such studies that the members of this narrowly-defined Hollywood control group behave the way they do because they are Jewish, nor that their behavior is typical of the much broader so-called Jewish community. Thus, such studies are only talking about the well-documented behavior of a small group of unrepresentative individuals. But, once again, since movies tend to mirror the values, interests, cultural perspectives and prejudices of their makers (and motion pictures are a significant medium for the communication of ideas) it is essential in a democracy that we know as much about the backgrounds of these individuals as possible (see "Insider's Game" and "Proclivity for Wrongful Conduct").

**151. Home Video Royalty**--A share of the proceeds from the sale or rental of motion picture videocassettes paid by the video wholesaler to the distributor. In contrast to feature film sub-distribution in other media, film distributors handling the distribution of motion pictures on videocassettes accept mere royalties from the wholesalers instead of the balance of the wholesale proceeds minus a modest sub-distribution fee. Royalty payments are traditionally much smaller than other forms of percentage participations. Before this rapidly diminishing revenue stream generated by home video reaches the producer, the distributor will also typically deduct its negotiated distribution fee. This system was designed by the major studio/distributors who, in many instances, own significant and/or controlling interests in the video wholesalers, thus these major studio/distributors get to participate twice in the videocassette revenue stream and are able to minimize the dollars that ultimately flow past the distributors to the producer and other net and gross profit participants (also called "Royalty on Home Video"; see "Conflicts of Interest", "Fiduciary", "Twenty Percent Rule", "Unethical Business Practices" and "Videocassette Revenue Reporting").

**152. Homogenous Films**--Motion pictures that are the same or similar. During the early years of the motion picture industry, the major studio/distributors produced a large volume of films that were very similar, (i.e., they were designed to and did appeal to the same mass audience), thus exhibitors had little need to pre-screen each motion picture offered. With today's more fractionalized audiences and film's of widely varying quality which appeal to separate but more narrow audiences there is a greater need for exhibitors to pre-screen the product they are asked to exhibit, although Hollywood films still fall within fairly narrow ranges in terms of genre and how certain people or occupations are portrayed (see "Blind Bidding" and "Patterns of Bias").

**153. Horizontal Price Fixing**--Price fixing engaged in by those in competition with each other at the same level in an industry. For example, if distributors conspired to fix prices at a certain level that would be an example of horizontal price fixing. On the other hand, if an exhibitor and a distributor conspired to fix prices, that would be an example of vertical price fixing. It is quite common, for example, that whenever a distributor agrees to pay an exceptional advance for an independently produced film following a screening at a film festival like Sundance, the following year, distributors all tend to keep the advances low and often bow out of discussions while another distributor is seeking to negotiate with the filmmaker. Distributors will also often ask producers what other distributors have seen the movie, or expressed interest. The close knit group

of distributors compete at some levels but do not want producers to actually benefit from a true bidding war (see "Antitrust Law Violations", "Price Fixing" and "Vertical Price Fixing").

**154. House Nut**--A negotiated dollar amount as between a film's distributor and its exhibitor which represents the estimated expenses during the course of a week for the film exhibitor, (i.e., the amount it supposedly costs an exhibitor to operate a theatre for a week). In a typical exhibitor/distributor agreement the distributor would split the balance of the box-office gross (in accordance with the agreed upon percentages between them)

after the house nut has been deducted by the exhibitor, (i.e., the exhibitor deducts the amount of the "house nut" before the distributor/exhibitor split of the balance). This negotiated figure may range from \$5,000 a week to \$35,000 a week depending on the theatre. Because of such arrangements, the exhibitors and distributors are generally being compensated better than most producers, particularly independent producers (see "Contractual Theatre Overhead", "Weekly House Allowance" and "Weekly House Expense"; see "Controlled Theatre").

**155. Idea**--A formulated thought or opinion; a mental image or formulation of something seen or known or imagined; a pure abstraction, or something assumed or vaguely sensed. In theory and in filmmaking, the idea is more narrow in scope than a concept, thus the concept is considered the initial step in creating a movie. Many persons both in and out of the film business recognize that ideas are the film industry's most important article of commerce and that the motion picture is one of the most powerful methods for communicating ideas that human beings have yet to devise. Unfortunately, neither existing law or practices afford much protection to outsiders who seek to get their ideas made into movies (see "Marketplace of Ideas" and "Theft of Ideas").

**156. Illegal Combination**--Two or more persons or entities who join together to commit an illegal act (e.g., the joining together of two competing companies in an industry to alter the competitive balance in their favor is an illegal combination in restraint of trade). Several film production companies on a studio lot working together and with the studio to create so much confusion regarding the source of submitted material serving as the basis for a screenplay that goes through multiple revisions and involves a number of different screenwriters, and that is ultimately produced and/or distributed by some of the entities involved, would rise to the level of an illegal combination (see "Combination in Restraint of Trade" and "Theft of Ideas").

**157. Illegal Trade Practice**--A custom in a business that is against the law (e.g., the fixing as between competitors of film licensing terms, runs, clearances and minimum admission prices). When representatives of distributors talk to each other about acquiring an available film, and one agrees to bow out of the bidding as a courtesy to the other (a favor among friends that is expected to be returned some day in the future), that would be considered an illegal trade practice (see "Antitrust Law Violations", "Price Fixing" and "Reciprocal Preferences").

**158. Illegitimate Power**--The possession of control or influence over others gained through methods not authorized by law. Control of the Hollywood-based U.S. film industry has been obtained illegitimately. It was gained and is maintained through the systematic and arbitrary exclusion from power of most Hollywood outsiders by the consistent patterns of behavior of the Hollywood insider group.

**159. Illusory Promise**--A promise so indefinite that it cannot be enforced or which, by virtue of provisions or conditions contained in the promise itself, is one whose fulfillment is optional or entirely discretionary on the part of the promisor. Since such a promise does not constitute a legally binding obligation, it is not sufficient as consideration for a

reciprocal promise and thus cannot create a valid contract. The major studio/distributor distribution agreements are filled with illusory promises (see "Contract of Adhesion" and "Unconscionable Provisions").

**160. Improper Financial Management**--Directing the fiscal aspects of a business in an inappropriate manner. Some film industry financial analysts say that a commonly held notion about the film industry is false, (i.e., that the primary reason for most of the recent film production company bankruptcies is the failure of their motion pictures to perform at the box office). Instead such analysts point to improper financial management (e.g., increasing debt during good times, rather than decreasing debt) as one of several reasons for such failures. Other reasons cited include the failure to use sophisticated computerized financial modeling on a continuous basis and the abandonment of successful actions (while substituting new, untried ideas, without first piloting them with limited financial commitments). On the other hand, improper financial management may be irrelevant in an industry that is so dominated by a few major players who have long-standing reputations for engaging in numerous questionable business practices (see "Anti-Competitive Practices", "Barriers to Entry", "Conscious Parallelism", "Creative Accounting" and "Reciprocal Preferences").

**161. Improperly Claimed Expenses**--A distributor accounting practice in which the distributor wrongfully or unfairly allocates certain of its incidental expenses or costs to a film, or completely fabricates distribution expenses that are allocated to a film. This is one of those so-called "creative" accounting practices often complained about by producers and investors (see "Creative Accounting", "Direct Distribution Expenses", "Overreported Travel", "Studio Accounting Practices" and "Unethical Business Practices").

**162. Incestuous Share Dealing**--The buying and selling of the corporate stock of one company by another company and vice versa for the purpose of creating tax or other financial advantages. Hollywood is notorious for its vertical and horizontal integration, overlapping boards of directors and other forms of incestuous dealings between the Hollywood insiders (see "Reciprocal Preferences").

**163. Independent Audit Rights**--The authority to conduct an examination of the books and records separate from an authorized entity (e.g., in a film distribution agreement, the distributor will undertake the responsibility for paying directly to third party participants any portion of the production company's share of gross or net proceeds as assigned by the production company, provided that no such third party has an audit right other than that granted to the production company). On the other hand, the audit rights granted to the production company are typically fairly weak because the bargaining power of the distributor is typically much greater than the production company at the time of those negotiations (see "Audit Rights").

**164. Independent Checking Company**--A business that can be hired by a producer or distributor to verify the number of paid ticket purchasing moviegoers in attendance at showings of a given movie and which is not the checking service normally used by the

major studio/distributors (see "Attendance Checking", "Checker", "Checking and Collection Costs", "Puffed Numbers", "Skimming" and "Ticket Switching").

**165. Independent Feature Project (IFP)**--A non-profit membership organization dedicated to promoting quality American independent feature filmmaking and supporting the efforts of individual filmmakers through educational programs, publications, services and awards. Members include producers, directors, writers, crafts people, distributors and movie industry executives. The IFP gets much of its financial support from the major studio/distributors and their affiliates, thus the organization has purposefully avoided becoming an advocacy group. It thereby only provides limited services to its independent film community members. For this reason, most of the really important issues relating to film finance, creative control, patterns of bias in Hollywood films and employment discrimination at the major studios are all avoided by the organization. Even if it modified its charter and status as a not-for-profit educational organization, it would probably have difficulty obtaining a consensus relating to a single important advocacy issue from its diverse membership and corporate sponsors. The use of monetary contributions to organizations for the purpose of quieting dissent is a common practice in the film industry (see "Bribery", "Conflicts of Interest" and "NAACP").

**166. Industry Assessments**--The prorated dues, fees or other costs required of member companies to support the activities of industry trade groups such as the MPAA, MPEAA, AFMA, etc. Such costs are typically included in the definition of distribution expenses in a distribution agreement. A portion of industry assessments paid on behalf of independently produced films to the MPAA are used to pay for MPAA PAC contributions and lobbying in support of issues not necessarily in the best interests of independent production companies. In addition, since these MPAA assessments are usually based on a percentage of a film's gross receipts, the MPAA sometimes receives a windfall (i.e., monies that could have been passed on to gross and net profit participants on that film, if another method for calculating the assessment was used (see "Distribution Expenses" and "Dues and Assessments").

**167. Inferior Bargaining Position**--Economic and other circumstances that result in less leverage for one party when negotiating a transaction. With few exceptions, independent feature film producers in the current industry environment have little or no real negotiating power when it comes to determining the terms of the distribution deal. In the first place the basic economic law of supply and demand is working against the independent producers, (i.e., there are too many films being produced each year). More films are being produced than there are available distributors who are willing and able to distribute and even though many of the films being produced, arguably do not deserve to be released, there are still too few distributors that are both capable and willing to distribute the worthy films. Thus, even though the available distributors may be willing to negotiate on certain aspects of the distribution deal, as to any given issue, distributors pretty much have the power to say "take it or leave it". Of course, many independent producers foolishly believe that by producing a "great" film all of their problems associated with their inherent "inferior bargaining position" will go away. Unfortunately, by concentrating most if not all of their time, energy and skill on the creative side of the



film business equation as opposed to the business side of the business, many independent producers end up winning the "film" but losing the "deal" (see "Creative Accounting", "Contract of Adhesion", "Law of Supply and Demand" and "Leverage").

**168. Initial Actual Breakeven**--Another contractually defined breakeven point in the revenue stream of a motion picture, which commonly means that point at which net proceeds are reached. There are so many different forms of breakeven that the net result is that distributors have a great deal of leeway in interpreting the meaning of the term, and the burden is on the net profit participants to challenge the distributor's interpretation. As has already been pointed out, however, such challenges whether involving an audit of the distributor's records that are made available or litigation are expensive and time consuming, not to mention to the risk that such action may result in alienating the claimant from the industry (see "Actual Breakeven", "Artificial Breakeven", "Blacklisting", "Breakeven", "Cash Breakeven" and "Rolling Breakeven").

**169. Insider Cash Infusion**--A broad strategy implemented by Hollywood insiders designed to bring more and more cash into the system controlled by the Hollywood insider group, and primarily for the benefit of the members of that group (including studio executives, agents, entertainment attorneys and talent). Many of the business practices cited herein can be better understood as part of this broad strategy.

**170. Insider's Game**--A competitive industry viewed as a contest between rival factions and run by a restricted inner circle of people, admission into which may be limited by arbitrary considerations. These so-called "insiders" in the film industry are also sometimes referred to as being "members of the club". Although different people may use varying criteria for defining who or how many people are actually "members of the club", in a general sense these "club members" are the top level owner/executives of the major studio/distributors and the top actors, actresses, producers and directors in the industry along with their agents and attorneys. Admission into this Hollywood insider's group is somewhat arbitrary and such discrimination is partly responsible for the failures of many outsiders to achieve success in this field, as well as for the patterns of bias seen in many Hollywood films (see "Discrimination", "Hollywood Insiders", "Level Playing Field", "Member of the Club", "Patterns of Bias" and "Reciprocal Preferences").

**171. Interest**--Consideration or compensation paid for the use of money loaned; the cost of using money, expressed as a rate per period of time, usually one year, in which case it is called an annual rate of interest. In studio financing of a film's production cost, interest is typically deducted after the distributor deducts its fees and expenses and before recoupment of the negative cost. The interest issue creates problems for independent producers and other net profit participants at several levels: (a) **Interest Plus Profit Participation**--Distribution agreements involving at least partial studio or distributor financing of the negative cost of a film often allow the distributor to charge interest on its unrecouped negative cost in addition to permitting the studio or affiliated distributor to retain a substantial if not overwhelming interest in any profit participation. If a distributor is being paid a fair rate of interest on its borrowed funds, it should not also be permitted to participate in a motion picture's net profits or other defined level of the film's revenue

stream beyond the deduction of its distribution fee and direct expenses. Banks loaning production funds would not be allowed to double dip in this manner; (b) **Interest Rates That Are Excessive**--The interest rate charged by the studio is often not in proportion to the actual cost of funds. Studios have been known to charge interest rates of 20% to 30%. If anything, since the studio affiliated distribution company is also able to obtain compensation in the form of its distribution fees, the affiliated studio acting as a financier should charge less than the market rate for interest on the borrowed funds, but the studios do not do so because nobody has the power to prevent them from charging more; (c) **Interest on Advances**--The studio/distributors sometimes take the position that advances should not be included in gross receipts until earned, in other words, the distributor will want to deduct an amount equal to any advance that has been paid to the producer from monies received by the distributor and will not want to consider such amounts as part of gross receipts for any profit participation calculations which start with a gross receipts figure. At the same time, the studio/distributor may seek to charge interest on such advances. To the extent that any bargaining power exists, the producer and other profit participants may want to take the position that if advances are excluded from gross receipts, no interest should be charged on such amounts; (d) **Interest on Monies Not Spent**--Interest is sometimes charged on monies not yet spent by the distributor, (e.g., in preparing an earnings statement for a film, the distributor may accrue the print and advertising costs incurred but not yet paid so that an interim participation statement will not show a profit. This accrual of expenses also reduces gross receipts which could be used to reduce negative costs and thereby also reduce interest charges. In other words, the studio may seek to calculate interest on negative costs from the point at which such expenses are incurred (as an accounting entry), whereas the producer may prefer to have such interest calculated as of the time such expenses are actually paid by the studio; (e) **When Interest Charges Stop**--Studios also sometimes seek to continue charging interest on the negative costs of a film until the end of the accounting period in which payments reducing the negative cost and/or interest are received by the studio. It would be in the interest of the producers and other net profit participants for interest charges to stop when such payments are actually received by the studio, not waiting until the end of the accounting period, however many months that might involve; (f) **Interest on Negative Cost Balances**--In calculating this interest on the studio's unrecovered negative costs, all direct distribution costs and fees are typically first deducted from gross receipts as expenses of distribution, thus significantly decreasing the amount of gross receipts, if any, which may apply toward recoupment of the studio's contribution toward production costs. Thus, at many early stages of earnings statements, no recoupment of negative costs is achieved and the interest charges simply continue to accrue. In contrast, with a bank financed motion picture production, the bank will recoup its loaned amount (including the negative cost, plus interest and fees) before the distributor deducts its distribution fee and expenses. If a studio wants to act like a bank and charge interest on borrowed funds, then it ought to also allow a priority position for the recoupment of negative costs so as not to unfairly extend the repayment of the loaned amount thus increasing the total interest charges. In such situations, the studio/bank is guilty of self-dealing; (g) **Interest on Overhead**--In many instances, even some or all of the indirect distribution costs, the normal costs of doing business as a distributor which are not specifically tied to a particular film being distributed (overhead), are also deducted from gross receipts as

distribution expenses and again, are not available for reducing the size of the negative cost balance (recoupment of the negative cost). Other items of overhead may be inappropriately characterized as production costs, thus interest may also be charged by a studio or distributor on some of these indirect distribution expenses; (h) **Simple vs Exact Interest**--Studio/distributors also may use a form of simple interest, based on a 360 day year, instead of exact interest (based on a 365 day year) and that practice, particularly when dealing with substantial amounts of money in the form of negative costs, will result in the payment of a greater amount of interest to the studio/distributor for that final partial interest bearing term and (i) **Interest on Gross Participations**--A variation on the practice of charging interest on monies not actually spent in which the distributor for a major studio/distributor financed motion picture categorizes gross participations as production costs (as opposed to distribution expenses or another special accounting category) and thus charges interest and overhead on such monies that were never expended by the distributor, but only deducted from the revenue stream of the film (see "Contract of Adhesion", "Creative Accounting", "Greed", "Overhead" and "Usury").

**172. Interlocking Directorates**--Corporate boards of directors whose members serve as directors on more than one corporate board. The film industry and other so-called entertainment industry entities are so intertwined (vertically and horizontally) that it is virtually impossible for these companies to avoid interlocking directorates with the accompanying insider information and potential self-dealing. From an antitrust point of view, the MPAA companies engage in so much similar conduct and exchange so much information regarding products and pricing, that competition among the MPAA companies is minimal.

**173. International Film Importers and Distributors of America (IFIDA)**--An assembly of independent producers and distributors which was listed in the MPAA publication about the history of the MPAA Ratings Board, as one of the three industry organization partners in the creation of the movie rating system. The rating system replaced its predecessor the Production Code Administration in November of 1968. Unfortunately, after numerous inquiries, this author has been unable to find anyone at the MPAA, MPEAA or NATO who knows anything about this organization. It is also not listed in the Los Angeles or area telephone listings. Thus, it appears that the organization not only no longer exists, but that few people even remember it, in which case its current status should be noted in the above referenced MPAA publication because otherwise it is misleading for the MPAA to suggest that any association of independent producers is currently supporting the MPAA Ratings Board (see "Industry Groups", "MPAA" and "Production Code Administration").

**174. Internationally Competitive**--Able to vie for business throughout the world. On the one hand it appears reasonable for the major studio/distributors to use their political influence to persuade the U.S. government to relax its enforcement of the antitrust laws in the entertainment industry in an effort to free these entities from restrictions that impair their ability to compete in a global marketplace. On the other hand, if such relaxed enforcement increases the competitive stranglehold of the major studio/distributors on the domestic industry and makes it even more difficult for the many thousands of

independent, small business persons to enter the field and/or survive (whether they be production companies, distributors, exhibitors or otherwise), then there needs to be a better balancing of interests in this industry. Also, certain domestic film industry organizations have traditionally worked together in the foreign distribution of films anyway, thus there is no need to permit vertical integration in the domestic marketplace in order to create more strength for U.S. companies in the foreign marketplace (see "Antitrust Law Violations", "Paramount Consent Decrees" and "TriStar Case").

**175. It's All About Money**--The common suggestion by Hollywood insiders that the motives of most people in the film industry are primarily focused on making money. This is another dishonest and responsibility shifting tactic used by Hollywood insiders to detract attention from their other motives for producing and releasing some of the movies shown to audiences that are inappropriate, offensive and/or harmful to the general health and welfare of our citizens. Hollywood insiders claim that they are primarily motivated by making money, but if that were the case, there would be no patterns of bias in their films (see "Patterns of Bias").

**176. It's Only Money**--A rationalization that some distributors use when excusing the business practices described herein. They're expressing the view that the film business is merely a game, that many of the disputes that occur only relate to money and that's not important. The truth is that in most instances, the money being squabbled over represents several years of people's lives, expertise and efforts as well as their dreams and that many of the film industry professionals whose rights are trampled because "it's only money" end up with a drinking problem or some other dysfunction due to the dilemma in which they find themselves, (i.e., they don't feel they can publicly complain or sue the distributor and still be able to get another job in this town). In addition, the money siphoned off a film's revenue stream, may have been the same money that would have given the filmmaker the opportunity to make another film. With the money goes the power to make future films.

**177. Japanese Money**--Some years ago, many billions of dollars were invested in the American film industry by Japanese owned concerns. A great deal of speculation occurred relating to the questions of how such investments might impact the domestic film industry and how such investments might turn out for the investors. Considering the distributor and/or industry practices described herein it would have been quite predictable that the investment of Japanese monies in the domestic film industry would have no significant impact whatsoever on the domestic industry and equally predictable that the Japanese investors would not fare any more favorably than other groups that have invested in the American entertainment industry in the past. The Japanese money phase was just another in a series of outside financing options engaged in every several years by the Hollywood studios. A series of public limited partnerships preceded the Japanese infusion of cash. A flow of Euro dollars followed.

**178. Kickbacks**--The practice of a seller of goods or services paying the purchasing agent of those goods or services a portion of the purchase price in order to induce the agent to enter into the transaction. In most commercial transactions, kickbacks are illegal

and prohibited by criminal commercial bribery statutes. The principal of the purchasing agent may also have a cause of action against the agent to recover the amount of the bribery. Also, for tax purposes, amounts paid as kickbacks or bribes generally are not deductible. Kickback schemes have been reported in the industry literature from time to time. Producers have to watch for indications of such arrangements in all of the distributor's relationships with the providers of services when the distributor pays for and deducts the cost as distribution expenses (e.g., outside advertising agencies, film labs, trailer production firms, exhibitors in co-operative advertising arrangements, distributor employees and facilities, distributor editing, censorship approvals, checking services, screening expenses, industry assessments, residuals and banking costs).

**179. Larceny**--The taking of another's property unlawfully with the intention of depriving the owner of its use. Several of the schemes used by Hollywood scam artists and designed to deprive the owners of screenplays of their rights to use such scripts as the basis for a movie, by unlawfully taking and using such scripts as their own should fairly be considered larceny (same as "Theft"; see "Racketeering" and "RICO").

**180. Latitude**--Freedom of action or choice. Most of the film distribution agreements offered in the current marketplace give the distributor an excessive amount of latitude with respect to matters relating to the distribution of the film and in the distributor's handling of monies resulting from the exploitation of such film. Such latitude has been commonly abused (see "Creative Accounting", "Contract of Adhesion", "Contractually Defined Terms" and "Discretion").

**181. Law of Supply and Demand**--A basic economic principle providing that to the extent the supply of goods or services is greater than the demand for such goods and services, all other things being equal, the market price for such goods and services will be lower than if the demand was greater than the supply. In the film industry, this law is always at work. For example, there are clearly more talented actors, actresses and directors available for work on motion pictures than there are motion pictures produced in a given year, thus without the support of their respective unions, and the involvement of talent agents, the compensation for the working actors, actresses and directors would likely be significantly less than it is. In addition, since there are more motion pictures produced each year than there are capable distributors willing to distribute such films, the distributors are in the stronger bargaining position with respect to the terms of the distribution agreements. In the U.S., the exhibitors have also built so many theatre screens that the distributors tend to have the advantage in negotiating the terms of their exhibition agreements. Also, as mentioned elsewhere in this book, some distributors are entering or re-entering the exhibition arena, thus eliminating any question of arm's length negotiation, disparity of bargaining power or the impact of the law of supply and demand as between the distributor and exhibitor in such situations. This presentation of the concept is, of course, an over-simplification, but the law of supply and demand does underlie and influence most of the negotiations between the parties named in this paragraph and many others in the film industry. It would also appear, however, that based on the compilation of reported industry and distributor practices contained herein, certain distributors may have leveraged this basic economic advantage into an abusive

dominance which could under certain circumstances be criminal. As indicated above, the disparity in bargaining power between distributors and others in the industry is partly based on this law of supply and demand, however, industry interest groups, such as unions, guilds, professional or trade associations, or even film schools, seem to be either unaware of the critical need to take steps to reduce this great disparity and unaware of the impact such legitimate action might have on the economic fortunes of the smaller numbers remaining in the field, or in the alternative, they are unwilling to take such actions. It is important to note that the antitrust laws do apply to the activities of such groups and that any measures taken to reduce the numbers of available suppliers of specified services in given field must comply with such laws (see "Antitrust Law Violations", "Inferior Bargaining Position" and "Predatory Practices").

**182. Level Playing Field**--An expression which when used with respect to a particular industry, such as the film industry, refers to whether the rules of the game are the same for all of the players, or whether the environment ("field") in which the business is conducted provides a fair opportunity for all to participate on an equal basis. One of the primary reasons for most of the failures of the independent production and distribution companies historically relates to this issue of the lack of a "level playing field" in the film industry (see "Anti-Competitive Practices", "Antitrust Law Violations", "Blind Bidding", "Contract of Adhesion", "Creative Accounting", "Financial Management", "Leverage", "Reciprocal Preferences" and "Unethical Business Practices").

**183. Leverage**--In the context of film industry negotiations, the power to control or influence others. The concept is extremely important in determining the outcome of negotiations as between film distributors and producers. Without sufficient leverage, neither a film producer, nor others, are likely to be able to negotiate many of the contractual provisions described in this monograph in a manner that is fair or favorable to the non-distributor. Even with substantial leverage, the distributor's have developed so many ways to "keep the money" that it is virtually impossible to negotiate a fair distribution deal, unless the distributor wants a particular party to benefit from the deal. Even then, it's not so much what's on paper that counts, but how the deal is implemented. Distributors have commonly ignored their agreements (see "Contract of Adhesion", "Law of Supply and Demand", "Level Playing Field" and "Power").

**184. Liability Limitation**--If a distributor assumes the burden of protecting a film's copyright against infringement, it may also incur some potential liability if it fails to act conscientiously in the protection of such copyright. Thus, the distributor may seek a provision in the distribution agreement that limits its liability for its own conduct in attempting to protect the film's copyright. Unfortunately, the distributor will seek to impose such a limited liability provision even in instances of the distributor's willful misconduct or gross negligence and possibly even negligent conduct. Such limits may not provide enough incentive for the distributor to act conscientiously to protect the copyrights associated with the film.

**185. Licensing Process**--The activities engaged in, the procedures used and the negotiations involved while a feature film distributor is contracting with exhibitor's and

sub-distributors for the exploitation of a film. Typically, the final print of a film is not available for screening at the beginning of this process (as between the distributor and exhibitor) thus, the exhibitors often have to make their offers based on very sketchy information provided by a distributor. Such information usually only includes the names of the principals involved in the film and a brief synopsis of the plot. Some exhibitors complain that such a small amount of disclosure relating to a film does not allow them to adequately assess a film's potential profitability or its suitability for their particular patrons. Since some of the major studio/distributors now have regained ownership interests in theatre chains, this licensing process is not even an arm's length transaction between unrelated parties.

**186. Lie, Cheat and Steal Syndrome**--The signs and symptoms of a pattern of business practices and behavior which seem to occur regularly in the film industry and can be characterized by a lack of basic honesty or ethics, at least partly motivated by greed. A similar pattern of behavior described over a 50 year period by a Supreme Court Justice, a judicial administrator and a litigating attorney in describing those in charge of the Hollywood-based U.S. film industry as having a "proclivity for wrongful conduct".

**187. Limits on Dividends**--In bank lending, barriers imposed by the lending bank on a corporation's ability to pay dividends to its shareholders. However, such a limit or barrier on dividends in a loan agreement may help a company avoid an IRS tax imposed on the unreasonable accumulation of retained earnings. Hollywood's major studio executives are able to use the first concept as an excuse for not paying more dividends to shareholders and the second concept for not paying more taxes, all the while siphoning off excessive executive and star salaries, which benefit their agent friends (see "Dividend").

**188. Litigation Budget**--The monies required to initiate, maintain and pursue a lawsuit. Such budgets may include filing fees and other court costs, investigatory expenses and attorney fees. In addition to auditing funds, an independent producer may need to set aside some funds to cover litigation costs in the event a dispute arises with respect to a film's distribution. The Hollywood major studios are quite adept at stringing out litigation for long periods of time, thereby costing claimants a significant amount of money to pursue their claim, while the claimants' Hollywood careers are generally put on hold, or slowed to some extent. The studio executives know that this kind of economic pressure prevents many people with bonafide claims from ever pursuing them, thus contributing to the attitude in Hollywood that "there are no rules", or expressed in another way, the Hollywood studio executives have long known that they can do whatever they cannot be prevented from doing (see "Audit" and "Sue Us").

**189. Litigation Disclaimer**--This clause, among the producer warranties in the distribution agreement, is a general disclaimer by the producer that there is any litigation pending which could impair distribution of the picture. The distributors generally refuse to provide a similar disclaimer for the benefit of the producer.

**190. Lobbying**--Activities engaged in by persons (lobbyists) in an attempt to persuade legislators (and in some cases government regulators) to pass or vigorously enforce laws or regulations that are favorable to their interests or the interests of their clients, or to defeat, amend or not vigorously enforce those laws or regulations that are unfavorable. The activities of lobbyists are generally regulated by statute, and contrary to what is often suggested in the press, there is nothing wrong with lobbying per se. Lobbyists merely represent the interests of organized interest groups and most significant interests are represented by lobbyists. If a significant interest is not represented by lobbyists, it should be. In the motion picture industry some segments of the industry (e.g., major motion picture producers and distributors) are well represented by their trade associations which vigorously lobby on behalf of the interests of their member companies while other segments of the same industry (e.g., independent producers) are not organized at the industry level in a manner which will permit the effective advocacy of their interests with respect to important issues. Thus, certain laws, government regulations and/or the enforcement of such laws and regulations are not likely to be favorable to the interests of the unrepresented group. That in fact may be the case with respect to questions relating to the enforcement of the federal antitrust laws, (specifically vertical integration), blind bidding, block booking, the motion picture rating system, the membership policies of certain industry associations, controlled theatres, etc. Some in the industry consider it foolish for independent producers to try to function in an industry without an effective advocacy group representing their interests at the industry level and that the circumstances for the independent producer will continue to deteriorate without such representation. Some producers are so confused about such matters that they think it is appropriate to have a producer's guild (see "Antitrust Law Violations", "Contract of Adhesion", "Creative Accounting", "Major Exhibition Chains", "Marketplace of Ideas", "Market Share", "Number of Screens" and "Political Influence").

**191. Long Form Agreement**--Contracts which are fully negotiated and contain all of the terms and provisions intended by the parties thereto. Long form film distribution agreements, for example, relating to the licensing of feature films, are negotiated by and between the film's producer and a distributor (or their legal representatives) and usually include long lists of delivery items, detailed lists of what will be considered distribution expenses, extensive producer warranties, the laboratory access letter and an instrument of transfer. Sometimes, negotiators will opt for a letter agreement, deal memo or short form agreement in order to save time, although such a tactic involves certain risks if a dispute on a question not covered by the shorter form of agreement arises before the long form agreement is signed. The resulting long form agreement also often contains conflicting provisions and its terms are often ignored (see "Deal Memo").

**192. Mafia**--Originally, a Sicilian secret criminal society, but a term which is sometimes currently used to describe a secret organization composed chiefly of criminal elements engaged in controlling racketeering, peddling of narcotics, gambling, prostitution and other typically illicit activities throughout the world. Although, members of the Mafia allegedly first appeared in the U.S. along with the influx of immigrants from European countries, including Italy in the late 1800's or early 1900's the so-called Chicago Mafia was apparently formed during World War I when an old world Sicilian racketeer named



Jim Colosimo organized a network of Italian/Sicilian criminals to protect his houses of prostitution and other illegal businesses. Another individual, Johnny Torrio has been identified as being a member of that group and he supposedly recruited Al Capone into the Chicago mob in 1919. Torrio then reportedly contracted with Capone to murder Colosimo in 1920, after which Torrio became the head of the Chicago Mafia. Torrio continued to utilize the services of Capone to eliminate rival Irish and Sicilian gangs and during the prohibition years, Torrio began to admit criminals from other ethnic backgrounds into what had theretofore been a traditional Italian/Sicilian crime group. The ambitious Capone tried to have Torrio executed, but even though Torrio survived he stepped aside to let Capone assume leadership of the Mafia. By 1931, the Mafia had become "Americanized" in the sense that the last old world first-generation leaders of the American-Sicilian underworld were killed in September of that year. Subsequently a national crime syndicate was created to stop the infighting among Mafia families which was interfering with the mob's primary goal of making money. With increased stability, mob financiers were free to continue and expand both their illegal and legal ventures, raise the required financing from participating crime families, launder funds through "friendly" banks and businesses, buy political protection and oversee the distribution of profits from such activities. Some writer/researchers have alleged that significant Mafia connections and influence have long existed in the capital intensive motion picture industry, but as with antitrust law violations, such allegations have been difficult to prove (source: Dan E. Moldea's book *Dark Victory*; see "Antitrust Law Violations", "Extortion", "Mob Controlled Distribution Company", "Money Laundering", "Movies With a Message", "Organized Crime", "Political Influence", "Racketeering", "RICO", "Theft" and "White Collar Crime").

**193. Major Exhibition Chains**--The largest theatre owners who control the most theatres and screens in the best locations. Ownership interests have changed often in the last several years, and even more significantly, several of the major studio/distributors have reacquired ownership interests in such theatre chains, thereby extending the distributor's vertical integration into an area once prohibited pursuant to the Paramount consent decrees. This occurred after the film industry's friend President Ronald Reagan's administration eased regulatory restraints (e.g., MCA, the parent of Universal has a substantial ownership interest in Cineplex Odeon, Columbia has an ownership affiliation with the Loews theatre chain and Paramount and Warner have ownership interests in Cinemerica. Paramount also operates Famous Players, one of the largest Canadian exhibition circuits (see "Number of Screens", "Paramount Consent Decrees", "TriStar Case" and "Vertical Integration").

**194. Management**--The combined areas of policy and administration for a business. Also the people who make the decisions and provide the supervision necessary to implement the business owners' objectives. In some instances when a major studio/distributor has been acquired by a corporate conglomerate in recent years the studio's management team has pretty much stayed in place. Part of the reason for that is that traditional Hollywood management tends to support each other (i.e., engage in reciprocal preferences) in situations where the interests of outsiders are involved. If a Hollywood outsider buys a studio, the outsider either has to follow the recommendations

of Hollywood insiders and staff the studio with other Hollywood insiders, or run the risk of having the rest of the Hollywood insiders team up against the management team of the studio (see "Dividend" and "Financial Management").

**195. Marketplace of Ideas**--The worldwide environment in which formulated thoughts or opinions may be expressed. Because of the presumed (or well-established) importance of the motion picture as a vehicle for the expression of ideas, the obvious power of this form of communication and the fact that movies are often exhibited worldwide, it is vitally important that all significant human interests whether based on race, culture, religion, economic systems, forms of government, national identities or other factors be concerned about the use and abuse of the motion picture medium as a means for advocating such interests. In other words, all of these interest groups should be concerned as to whether their views are consistently portrayed in a positive or negative fashion through feature films. Thus, to the extent that an industry such as the motion picture business is dominated by a particular interest group that consistently espouses a slanted view on numerous issues that are presented in films, and to the extent that such an interest group utilizes the practices described in this monograph to perpetuate its dominance of the industry, the other interest groups, including government, should be outraged and they should take action which is both designed to "level the playing field" and to broaden the points of view expressed in the motion picture medium (see "Hidden Agendas").

**196. Market Power**--The ability to control or dominate a specific level of an industry (e.g., wholesale or retail). Generally, in the application of the antitrust laws to the film business market power may be presumed from the fact that the product involved, (i.e., motion pictures is copyrighted). However, in recent years, the U.S. Justice Department has taken the position that if a market is not otherwise susceptible to market power wielded by a single firm or a coordinated group of companies even significant increases in barriers to entry in that market are unlikely to adversely affect competition in the marketplace. The Justice Department however does not understand the high level of cooperation routinely engaged in by MPAA companies and how extreme the barriers to entry are for non-MPAA companies. Justice Department policy is also influenced by presidential politics and Presidents are influenced by the huge amounts of political contributions made by the political action committees associated with MPAA companies, their top executives and their spouses (see "Antitrust Law Violations", "Barriers to Entry", "Merger Guidelines", "Paramount Consent Decrees", "Political Influence", "TriStar Case" and "Vertical Merger").

**197. Market Share**--The percentage of industry sales of a particular company, product or segment of an industry (e.g., for the period from 1984 through 1990 independently distributed feature films only generated a yearly average of approximately 8.1% of the domestic theatrical box office gross and that percentage has been reduced in more recent years). That means the MPAA and affiliated company distributed films (some of which were produced by independent producers) generated an average of 90% to 95% of the domestic box office gross. One of the more puzzling of motion picture industry phenomena is the rather common occurrence at the annual Academy Awards for

independently produced films to win a disproportionate share of the more important awards (e.g., best picture, best director, best actor, best actress, best screenplay, etc.), particularly since many of those same award-winning films are not as commercially successful as many of the films produced by the major studio/distributors. Some industry observers would quickly dismiss that anomaly as the result of differences between movies that are targeted for the large mass audience (commercial product) and those that are designed to be small films tailored for a limited but more discriminating audience (not commercial). Another factor in how well these two categories of films are received at the box office may have nothing to do with whether such pictures are quality award winners or merely commercial, but have more to do with which distributors have the market power to get their films shown at theatres, to spend the money to advertise and promote their pictures (advertising which is often grossly misleading to consumers) and the leverage to collect film rentals from exhibitors. Besides, the more artistic award-winning independently produced films, after receiving all of the free publicity and promotion associated with the Academy Awards, are suddenly now more "commercial" and those distributed by the major/studio distributors before the awards can be re-released (or continued in release) to take advantage of their new profit-making potential (see "Blind Bidding", "Cartel", "Controlled Theatre", "Major Exhibition Chains", "Market Power", "Oligopoly", "Political Influence" and "Settlement").

**198. Merely Entertainment**—A common and dishonest position taken by film industry leaders when the industry is criticized for promoting ideas or messages that have a negative impact on society. This argument is used to shift responsibility for the motion picture industry's continued pollution of our cultural environment. As noted elsewhere, all movies communicate ideas, and the history of human civilization proves that ideas have always been and always will be powerful motivators of human conduct, therefore it is inevitable that ideas being communicated through a powerful communications medium such as feature film will influence some human conduct, particularly that of the less sophisticated, less educated and impressionable youth of our country.

**199. Merger Guidelines**--A six-part analytical framework set forth by the U.S. Justice Department in 1984 for use as a guide in analyzing the competitive effects of a proposed vertical merger in the motion picture business which is based on the U.S. Justice Department's analysis of Clayton Act cases. The guidelines are summarized below: (1) Does the contemplated merger significantly foreclose other competitors (e.g., exhibitors) from access to motion pictures or access on competitive terms? (2) Does the proposed merger significantly foreclose other competitors (e.g., distributors) from access to theatres or a substantial portion of theatres? (3) If actual competitors are not likely to be foreclosed from access to motion pictures on competitive terms, does the proposed action nonetheless effectively force actual or potential competitors to enter or continue in the distribution or exhibition business on a vertically integrated basis? (4) If vertical integration is effectively required in order to enter or continue in the business, how difficult is it to achieve vertical integration? (5) If vertical integration is required, and if there are significant barriers to such integration, is the market otherwise conducive to (i.e., will it allow) non-competitive performance? and (6) Does the proposed vertical merger have offsetting positive benefits for the economy by creating efficiencies? The

truth is that film industry lawyers have been able to outwit Justice Department lawyers for years (see "Antitrust Law Violations", "Barriers to Entry", "Internationally Competitive", "Market Share", "Paramount Consent Decrees", "Political Influence", "TriStar Case" and "Vertical Integration").

**200. Minimum Rating**--A commitment made by a feature film producer to a distributor and/or financiers that the film being produced will receive an MPAA rating not worse than a specific rating, (e.g., an "R" rating). Such commitments are often required in film distribution agreements and if the producer fails to deliver the agreed upon rating, the distributor may be relieved of its obligation to pay monies or release the picture. Such situations which involve an MPAA member distributor and an independent producer may raise the question relating to the inherent conflict of interest involved in rating films through the facilities of an MPAA sponsored organization. Such ratings being imposed by a distributor clearly deprives the producer and director of creative freedom. The creative community must work toward eliminating their dependency on

distributors for financing. Production should be separated from distribution and distribution should be separated from exhibition. That creates a true free market and encourages creativity, which in turn, benefits society.

**201. Misleading Advertising**--Paid announcements generally designed to call the public's attention to an upcoming feature film but that deliberately deceive the prospective moviegoers into believing that the film is primarily about some theme or subject that is not necessarily the case. For example, it is common for Hollywood distributors to mislead the public into believing that a film is a comedy when it is overwhelmingly tragic, or deals with serious issues that are in no way humorous. Other movies have been promoted as action films when they are actually romance movies and vice versa. Hollywood movies often are promoted for their artistic elements with no mention that a liberal political theme dominates the picture. A political liberal slant consistently appears in Hollywood movies. The huge advertising, publicity and promotion budgets expended on behalf of major studio films and the often misleading nature of such advertising conflicts with the often made claim that Hollywood produces the films that audiences want to see. The truth is that Hollywood produces the films it wants to produce and then spends millions convincing the public to see those films, sometimes even lying to the public about the nature of the film.

**202. Mob-Controlled Distribution Company**--A film distribution company controlled by organized crime. Occasionally, reports will surface that a particular distribution company was formed by organized crime interests solely for the purpose of distributing one or more feature films, manipulating the books and then at some point going into bankruptcy, leaving all profit participants high and dry. It is interesting to note that in any given year more than 50% of U.S. feature film distributors only distribute one film and approximately 15 to 30 feature film distribution companies cease distributing films for one reason or the other. Even the possibility that this may occur makes it imperative that producers investigate the distributors with whom they do business. As can be seen in this list, the major studios engage in numerous unfair, unethical, unconscionable, anti-

competitive, predatory and illegal business practices, thus may also be considered a form of organized crime (see "Mafia", "Money Laundering", "Racketeering", "RICO" and "White Collar Crime").

**203. Model Agreement**--A sample contract which may be drafted by an industry organization for educational purposes. Unlike the unions and guilds, professional and trade association are not allowed to bargain collectively on behalf of their members, but there is no reason that seminars and other educational programs cannot be properly conducted (in compliance with the antitrust laws that apply to such association activities) so as to meet the needs of association members with respect to the study and understanding of certain key industry agreements which significantly effect their livelihood. For example, the AFMA reportedly has model distribution agreements with terms and provisions from which its members may choose when drafting their own distribution agreements for the distribution of feature films. It has also long been recognized in the film industry that the terms and provisions of the film distribution agreements used by the major studio/distributors are remarkably similar (more precisely contracts of adhesion filled with unconscionable provisions) regardless of whether their association (the MPAA) was actively involved in that phenomenon or not. Since many of the terms and provisions of the feature film distribution agreements being used today are not favorable to the independent feature film producers, there may be some value for such producers to organize their own association and include the development of a model distribution agreement, the terms of which are more favorable to independent producers, among the projects which such association undertakes (see "Conscious Parallelism", "Contract of Adhesion", "Lobbying" and "Standard Contract").

**204. Money Laundering**--The funneling of money obtained by illegal means through an apparently or previously legitimate operation. For example, consider this reported scenario in the film industry. A drug dealer agrees to pay the production costs of a feature film in exchange for the rights to distribute that film in a single foreign territory where that drug dealer controls a number of theatres. It is then possible for the drug dealer to inflate the attendance figures and send what appears to be legitimate but inflated distributor's share of the box office gross back into the U.S. as laundered money. Question: In any given year in which a thousand feature films are produced in the U.S., with the source of the production financing for many of such films unknown or difficult to determine, do such practices occur? Answer: Probably yes.

**205. Monopoly**--Control of the production and distribution of a product or service by one firm or a group of firms acting in concert; a market condition where all or nearly all of an article of trade or commerce within a community or district is brought within the single control of one person or company, thereby excluding competition or free traffic in that article. Monopolization is prohibited by the federal U.S. statute called the Sherman Act. Conviction can lead to criminal penalties and divestiture. The offense of monopoly has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident. The MPAA companies have been smart enough over the years to make sure that

the seven major studios continue to exist in apparent competition, even though most of the individuals moving back and forth among these companies in the top management positions share a common religious/cultural background making it obvious that outsiders are being discriminated against and victimized by the reciprocal preferences and other anti-competitive activities of the Hollywood insiders (see "Antitrust Law Violations" and "Oligopoly").

**206. Motion Picture Association of America (MPAA)**--A movie industry association organized to promote the international dissemination of American films and to upgrade imported films. The organization was founded in 1922 as the trade association for the American film industry but has evolved into an advocate for major producers and distributors as opposed to the independent producers and distributors. Its members include Columbia Pictures (now Sony Pictures), the Walt Disney Company, MGM/Pathé (formerly MGM/UA), Orion, Paramount, Twentieth Century Fox, MCA/Universal and Warner Bros. These are the so-called "majors" studio/distributors in the film industry. One of the MPAA's functions is the assigning of audience ratings. The MPAA also maintains a strong lobbying arm which constantly monitors both the federal and state legislative branches for proposed bills or provisions in bills that are considered unfavorable to the interests of the MPAA companies. The MPAA also monitors and works to eliminate certain alleged exhibitor practices (e.g., product splitting, piracy and the illegal use of motion pictures). MPAA company activities involving vertical integration, block booking, tying arrangements, dominance of market share, association membership policies, nepotism, discrimination and anti-competitive practices should raise questions regarding how these companies came to dominate the industry (see "Antitrust Law Violations", "Contract of Adhesion", "Creative Accounting", "Lobbying" and "Ratings").

**207. Movies With a Message**--Motion pictures in which a moral, social or other statement predominates over the entertainment value of the movie. All movies have one or more messages and financiers, producers, screenwriters, directors, actors and others in the industry have long recognized and used the medium as one of the most effective means yet devised by humanity for the communication of all sorts of ideas. However, if the message is too strong or seems out of place, it may be resented by and distracting to the audience which generally goes to the movies primarily to be entertained. The Oliver Stone movie "JFK" could be considered an example of a strong "message movie". Some might even suggest that the real message coming out of that motion picture was not designed to convince the movie-going audiences that a conspiracy was involved in the assassination of a U.S. President (which many people already believed anyway), but instead to divert attention from one suspect group (the mob) and direct it toward others (the CIA and the highest levels of the U.S. government), while simultaneously suggesting that the same conspiracy was also involved in the killings of Bobby Kennedy and Martin Luther King. If allegations that elements of the mob were really the moving force behind the killings of the Kennedy brothers and that the mob has connections with the motion picture industry are true, this might help to explain why the motion picture took that particular editorial slant (see "Final Cut", "Hidden Agenda", "Mafia", "Marketplace of Ideas", "Pattern of Bias" and "Unfavorable Portrayal").

**208. MPAA Rating and Certificate**--The certificate for a film's designated rating issued by the MPAA's Code and Rating Administration. The rating of a movie may significantly affect the number of people who may see a given movie. Since the MPAA rating is provided by a board of MPAA employees, there is an unethical built-in conflict of interest in the rating of films produced by non-MPAA member production companies. This conflict of interest should not be tolerated by independent producers. Also, a movie's distribution agreement may provide for a specified MPAA rating, and if that rating is not obtained, the obligation on the part of the distributor to distribute the film may have been eliminated. Thus, the producer must be careful not to commit to producing a movie that cannot achieve the rating called for in the distribution agreement. A professional association of independent feature film producers and the existing AFMA, which represents independent distributors should start an alternative and improved movie rating system or become partners with the MPAA in sponsoring the movie rating system. Better yet, the public and government should insist that exhibitors institute a new ratings board totally independent of all such organizations and supported by producer fees.

**209. Narrow Control**--The domination of an industry by a not very diverse group of people. It is inappropriate in our multi-cultural society for any readily identifiable interest group (whether the group identity is based on ethnicity, culture, religion, race, class, region of origin, sex or sexual preference, or otherwise) to be allowed to dominate or control any important communications medium, including film. After all, movies tend to mirror the values, interests, cultural perspectives and prejudices of their makers, thus the fact that those people who have the power in Hollywood to determine which movies will be produced and/or released by the major studio/distributors tend to share a not very diverse backgrounds results in some of the patterns of bias noted in such films (see "Patterns of Bias").

**210. NC-17**--The copyrighted MPAA rating established in September of 1990 to replace the X-rating (which was not copyrighted by the MPAA and was therefore available for use by anyone) and indicating that no children under the age of 17 should be admitted. The NC-17 rating does solve the problem of unauthorized use of the "X" rating by pornographers, but some states or local communities will still not admit persons under twenty-one to such films and some newspapers will still not carry advertising for an NC-17 rated film. This rating change also does not address the concerns of parents and independent producers relating to providing more content information with a rating so that parents can know in advance whether a movie contains violence, graphic sex and foul language. Nor does this rating change deal with the inherent conflicts of interest in having an MPAA sponsored organization rating the films produced by non-MPAA member production companies (see "MPAA Rating" and "Certificate" above).

**211. Negative Costs**--The total of all of the various costs, charges, and expenses incurred in the acquisition and production of a motion picture, in all its aspects prior to release, (i.e., to produce the final negative). These include such items as facilities (sound stage, film lab, editing room, etc.) and raw material (set construction, raw-film stock, etc.). Typically segregated as pre-production, above-the-line production-period costs and below-the-line costs and post-production-period costs. Negative costs are also

distinguished from distribution, sub-distribution and exhibition costs. When a studio/distributor finances the production costs of a film, there may be a tendency for the distributor to characterize some of what are actually distribution costs as production costs, with the result that interest being incurred by the production cost side is inflated. The term "negative cost" for a studio/distributor not only may include the out-of-pocket production expenses but also a non-allocated overhead percentage charge which may range from 10% to 15%. In order to increase the creative freedom of film producers, feature film distributors should not be allowed to finance such negative costs (see "Distribution Expenses", "Interest", "Overhead", "Production Costs" and "Rising Production Costs").

**212. Negative Portrayals**—The projection of screen images for motion pictures in a disagreeable and unrepresentative manner. At least a half-dozen groups in our diverse society have been consistently portrayed in Hollywood films in a negative or stereotypical manner. Those groups include Arabs and Arab-Americans, Muslims, Christians, Latinos, Asians and Asian-Americans, Italian Americans and Whites from the American South. Several other population groups have in recent years made some small gains toward more balanced or diverse portrayals in Hollywood films, but still are probably not where they ought to be in that regard and those groups include women and African-Americans, along with gays and lesbians. The consistent portrayal of any population in our diverse society in a negative or stereotypical manner, through a powerful communications mass medium like feature film, will inevitably influence the attitudes, thinking and beliefs of millions of moviegoers, particularly the more unsophisticated younger members of those audiences.

**213. Negotiated Contractual Definitions**--A phrase which refers to terms used in certain motion picture industry agreements, such as film distribution contracts, whose meanings have been specifically bargained for or settled on after some discussion between the parties to the contract. Some spokespersons for the major studio/distributors are fond of explaining that most if not all of the alleged "creative accounting" practices are really the result of disappointed net profit participants who did not understand the effect of the contractually defined terms in their agreement. It is more accurate to observe that most of these terms, whose defined meanings in film industry contracts sometimes vary considerably from the meanings of the same terms as used in the agreements of other industries, are not negotiated at all, and if they are negotiated, the negotiations are between parties with such a disparity in bargaining power that there is an absence of any meaningful choice on the part of the weaker party. Thus, the Hollywood apologists' claims to the contrary represent nothing more than another Hollywood sham (see "Contract of Adhesion", "Contractually Defined Terms", "Creative Accounting", "Inferior Bargaining Position" and "Unconscionable Contract").

**214. Negotiated Deal**--As between exhibitors and distributors, an agreement which is negotiated as opposed to one which was accepted on bid. In the event that a distributor rejects all bid offers submitted by exhibitors for the right to license a film for exhibition



within a market, the branch office of the distributor will in turn either re-bid the picture suggesting different terms or send out a notice to all exhibitors by which it offers to negotiate openly in an effort to award the film to the theatre that offers the most attractive negotiated terms. Since distributors know what their contingent compensation obligations are to creative personnel associated with each film, they can easily manipulate these negotiations with exhibitors from film to film (some of which are produced by independent producers) so as to minimize the revenue streams for films burdened with such contingent compensation deals. Such negotiations between film distributors and exhibitors can have the same negative results on prospective net and gross profit participants as the settlement transactions between the same distributors and exhibitors (see "Blind Bidding", "Five O'Clock Look" and "Settlement Transactions").

**215. Nepotism**--Favoritism shown to a relative or in the broadest sense, on the basis of some other relationship (e.g., hiring an employee because of his or her relationship to the employer instead of on merits). Hollywood has a long history of nepotism and it continues today (see "Discrimination", "Insider's Game" and "Reciprocal Preferences").

**216. Net Profit Participation**--A form of percentage participation in a motion picture's revenue stream that has been characterized by some as "the customary form of participation" although it has not always been so, nor is it likely to continue to be, since more and more prospective net profit participants within the industry understand how unlikely it is for a film to generate net profits. Any reading of a typical major studio feature film distribution deal reveals so much discretion in the hands of the distributor that such entity's accountants can pretty much do what they want with respect to granting net profits and it is extremely difficult to mount an effective challenge to such contract interpretation and accounting practices (see "Contract Interpretation").

**217. Offset Rights**--The authority to adjust accounting records to compensate for a credit or loss incurred by a second party. In the producer/distributor agreement the distributor may seek offset rights to adjust the accounts between the two parties. Also, if a distributor/exhibitor agreement provides for offset rights the exhibitor is able to deduct co-op advertising or other expenses owed to the exhibitor by the distributor from distributor rentals which would have otherwise been paid to the distributor. Such deductions reduce the revenue stream from which gross and net profit participations are paid, thus a reasonable limit on the discretion of such party to offset should be included in the offset rights provision to prevent the offsetting party from abusing its discretion to make such deductions, particularly if the amounts being offset have nothing to do with the film whose revenues are being offset. Lending banks will typically require that the distributor's offset rights as to the producer be waived so as to better insure more rapid payment to the bank. If gross and net profit participants had leverage they would want the same.

**218. Off-the-Bottom Expenses**--Another contractually defined term sometimes used in feature film distribution agreements to describe another category of distributor expense

deductions that are taken by the distributor after payment of gross participations, if any, but before net profits. For example, in a distribution arrangement where production costs are provided by a limited partnership or a third party financier (other than a bank/lender) the distributor may want to first deduct from gross receipts its distribution fee, then any off-the-top expenses, then gross participations, if any, then off-the-bottom expenses and remit all of the balance to the producer's group which is responsible for providing the partnership or financier with recoupment of the negative costs plus whatever return they contracted for and responsible for dividing up the balance of the net profits as between deferrals, net profit participations and the producer's share. On the other hand, if a bank or lender were involved in a negative pickup situation, the negative costs plus interest and fees would be paid to the bank or lender first out of the distributor's gross receipts, then the distributor might take its distribution fees, off-the-top expenses, pay gross participations, if any, take off-the-bottom costs and remit the balance to the producer's group as net profits. In the studio financed production-financing/distribution arrangement, the distributor typically takes its distribution fees first, then off-the-top expenses, pays gross participants, if any, takes off-the-bottom costs, deducts interest payments, then recoups the negative costs and finally, if anything is left, remits the balance to the producer group as net profits. Pursuant to these arrangements, studio and bank lenders are getting preferential treatment over third-party financiers.

**219. Off-the-Top Expenses**--Contractually defined feature film distribution costs that represent the first group of expenses deducted by the distributor from the distributor's gross receipts. Off-the-top expenses typically may include licenses and taxes, checking and collection costs, any expenses associated with converting foreign currency into U.S. dollars, residual payments, trade dues, assessments and local advertising. The major studio/distributors rather uniformly deduct their distribution fees first, (i.e., they base the percentage calculation on the largest pool of money received by the distributor, 100% of the distributor's gross receipts), then they deduct off-the-top expenses, if any, before paying any contractual gross participations out of this remaining fund which may be labeled "accountable gross" or "adjusted gross". Some independent distributors may deduct certain distribution expenses off-the-top before computing their distribution fee. Note that a lower distribution fee percentage is most likely to result in higher distribution fees if the fee calculation is applied to the larger pool of money, (i.e., before the off-the-top expenses are deducted). Other distributors may want to deduct all distribution expenses off-the-top and then divide up the balance between participants pursuant to pre-agreed percentages. There is no reason other than an abuse of power that the distributor's money, which is expended last, should be paid out first (i.e., prior to recoupment of third-party financiers of the film's production cost).

**220. Oligopoly**--An industry in which a few large sellers of substantially identical products dominate the market; a market situation in which a small number of selling firms control the market supply of a particular good or service and are therefore able to control the market price. An oligopolistic industry is more concentrated than a competitive one but is less concentrated than a monopoly. The Hollywood-based movie business is an oligopolistic industry dominated by a small group of companies closely allied with one another and controlled by a small group of individuals, most of whom

share a similar religious/cultural background (see "Antitrust Law Violations", "Cartel", "Hollywood Insiders", "Market Share" and "Monopoly").

**221. Ongoing Costs**--Expenses that continue to accrue. For example, in the context of a film distribution deal any of the distributor expenses that are based on some percentage of a defined portion of the film's revenue stream would be considered ongoing costs, so long as there was no ceiling on such expenses. Thus, residuals, taxes, trade association dues, gross profit participations and even interest up to a point all might be considered ongoing costs. This concept helps to explain why after a motion picture achieves net profits for one accounting period, it may not be in net profits as of the next accounting statement, (i.e., these ongoing costs may have increased substantially during the next accounting period). Such costs have also been inflated from time to time (see "Gross Receipts" and "Net Profits"].

**222. Oral Representations**--Spoken statements as opposed to written. A common problem in the negotiation of all contracts. In film distribution situations, statements regarding the manner in which the distributor intends to distribute a given film are often made orally in various conversations between a film producer and representatives of the distributor. The problem occurs when such statements are not included in the written memorialization of the parties' negotiations, (i.e., the written distribution agreement). The problem is made worse because most film distribution agreements contain a so-called "entire agreement" clause (see "Contract of Adhesion", "Entire Agreement Clause" and "Good Faith").

**223. Ordinary Course of Business**--According to the common practices and customs of commercial transactions; the usual and necessary activity that is normal and incidental to a business. Occasional isolated or casual transactions are not frequent or continuous enough to constitute the ordinary course of business. A phrase which is commonly seen in feature film distribution agreements when the parties have failed to negotiate more specific language. The phrase "ordinary course of business" is a very vague standard of conduct for business practices. It is not a precise standard that can be applied in advance. It is merely a standard that can be applied after the fact, in arbitration or litigation, by bringing in various persons with expertise in the industry to explain what is usual and customary with respect to such practices. Thus, the distributor using this language in its distribution agreement has a lot of leeway pursuant to such language to do whatever it desires, on a given issue, knowing that it may take a complaint from the other party and either an arbitration proceeding or a trial and court judgment to firm up the standard of conduct. The distributor knows that the producer is not likely to sue anyway and if the producer sues, the distributor will most likely settle out of court for a smaller amount than what was contractually due (see "Contract of Adhesion", "Inferior Bargaining Position", "Market Power" and "Sue Us").

**224. Outstandings**--Among film distributors and exhibitors, the money for advertising expenses or film rentals that the distributor owes the exhibitor or the exhibitor owes the distributor. If the distributor and exhibitor disagree as to the correct amount due on a given film or several films from the same distributor, such amounts may remain unsettled

for a period of time and may have to be settled on the basis of a compromise figure relating to more than one film. This practice can have an adverse impact on a movie's other profit participants and gives the distributor the ability to manipulate such compromises to its advantage (see "Creative Accounting" and "Settlement").

**225. Over-Budget Penalty**--A form of financial punishment or forfeiture imposed by a studio when a producer of a studio financed film goes over budget. While the terms forfeiture and penalty are often used interchangeably, the generic term "penalty" includes forfeiture and the term "forfeiture" in a more narrow sense relates to a loss of real or personal property, while a penalty most often relates to the loss of money. In either case, the major studio/distributors will try to avoid the use of these particular words in describing their over-budget policy relating to the production of a motion picture, since contract law may not allow unreasonable penalties to be enforced in commercial transactions and the studios' over-budget penalties are unreasonable penalties (see "Double Add-Back").

**226. Overhead or Overhead Costs**--Generally, the costs of operating a business that are not directly associated with the production or sale of goods or services; also called indirect costs and expenses or production overhead; (i.e., a charge typically levied by a motion picture studio, generally within the range of 10% to 25% of the movie's production costs or budget, which is designed to cover the studio's overhead). Such overhead costs are attributed to accountants, lawyers, studio executive salaries and their expenses, rental of sound stages or other studio facilities such as dressing facilities, vehicles, telephones, office space and equipment, secretaries salaries, story-abandonment costs and general administrative costs relating to the production area or other costs of doing business which are all absorbed by the production. The actual accounting entry for such costs is referred to as the overhead surcharge. Since it is expressed as a flat percentage, it has no relation to actual costs. Interest is usually charged on the overhead surcharge and the overhead surcharge amount is generally deducted prior to the calculation of net profit participations, thus adding significantly to the amount that must be recouped by the studio before a motion picture can realize net profits. Studios have also been known to charge an overhead fee on other expenses which are in themselves overhead.

**227. Overreaching**--In commercial law, taking an unfair advantage over another through fraudulent practices or abuse of superior bargaining power; synonymous with fraud. Contracts that are the product

of overreaching in an unequal bargaining context may be unenforceable today under modern concepts of fraud or the unconscionability doctrine. Most of the distribution agreements offered by the major studios overreach, but most victims of studio overreaching are afraid to complain (see "Unconscionable Contracts").

**228. Over-Reported Travel**--Another of the alleged wrongful studio accounting practices sometimes complained about by producers in which the studio inflates the travel expenses associated with the production of a film being produced in conjunction with the

studio. The studios commonly inflate their expenses and under-report their revenues (also see "Kickbacks").

**229. Packaging**—The tying together (as a group) of a screenwriter, director and/or several actors and actresses all represented by the same talent agency and offering the group attached to a specific film project. The primary purpose of agency packaging is to maximize agency fees. Packaging is an anti-competitive business practice of the talent agencies, but the major studios act in complicity with the agencies in not objecting to such illegal practices. The only two studio heads who actively opposed such practices did not last long in their positions due to pressure from the powerful agencies. Thus, once again, the individuals who head the studios and talent agencies are engaged in a game of reciprocal preferences and special concessions for the benefit of each other, and to the detriment of the talent arbitrarily excluded from such package deals and moviegoers (since a smaller talent pool is available for packaged films).

**230. Package Sales**--Distributor's sometimes will seek to make outright sales of a picture in certain territories as part of package of several films for a lump sum price. Films may also be licensed as part of a package for television (network or syndication). Package sales create opportunities for the distributor to fraudulently allocate a larger portion of the fee for the package to its own films as opposed to independently produced films also included in the package (also see "Outright Sales" and "Sub-Distributor").

**231. Paramount Consent Decrees**--The popular name for the final judgments handed down by the U.S. District Court for the Southern District of New York, with respect to each studio/distributor or motion picture related defendant (Loew's, Paramount, Columbia Pictures, United Artists, Universal, American Theatres, Warner Bros., 20th Century Fox and RKO) in the U.S. v. Paramount Pictures case (in the late '40s and early '50s). A separate judgment was issued for each of the nine defendants, and although similar, the judgments were not identical. Generally, the decrees prohibited certain business practices engaged in by the studios (e.g., block booking, unreasonable clearances), and with respect to some of the defendants, but not all. The decrees mandated that the defendants divest themselves of all motion-picture theatre holdings and prohibited the acquisition of theatres in the future. The decrees sought to put an end to so-called vertical integration, through which the motion-picture companies produced, distributed, and exhibited their film products to the public. The intention was to afford competitive theatres an equal opportunity to license motion pictures for commercial presentation. Since the Reagan Presidency, however, and partly due to the effective lobbying effort of the MPAA, the U.S. Justice Department has relaxed its enforcement of the antitrust laws as applied to the major movie studios and vertical integration with all of its anti-competitive effects is once again on the rise. Independent producers need to organize a permanent professional association and seek to protect their long term economic interests by making sure the current administration, the Justice Department and Congress is aware of the impact of the major studio/distributors' re-entry into movie exhibition, (i.e., vertical integration has on independent producers) [see "Antitrust Law Violations", "Block Booking", "Clearance" and "Vertical Integration"].

**232. Patterns of Bias**--The tendency for Hollywood movies to portray certain issues and characters in a favorable manner, while consistently portraying other issues and characters in a negative or stereotypical manner. For example, Hollywood movies tend to favor violence, gratuitous sex, foul language and liberal political positions. On the other hand, such films tend to negatively portray conservative political issue, religious leaders or individuals (specifically Christians and Muslims), government officials, teachers and school officials, parents (particularly fathers), Arabs and Arab Americans, Latinos, Whites from the American South, Asians and Asian-Americans and the free enterprise system (see "Hidden Agendas").

**233. Political Contributions**--Money given to candidates running for public office ostensibly for the purpose of helping such candidates get elected, but accompanied by the underlying assumption that the candidate will help his or her "friends" on issues that come to the attention of such elected officials. Federal Election Commission records show that the arbitrarily selected and excessively overpaid Hollywood studio executives, their spouses and multiple political action committees gave some \$23.5 million dollars in so-called "political contributions" during a recent five year reporting period to candidates for the U.S. Presidency (from both major political parties) and in key Congressional races. Consequently, it is absolutely absurd for us to expect, or even hope, that any U.S. President who accepts such "generosity" would turn around and direct the head of the Justice Department to vigorously enforce existing federal antitrust laws in the film industry. Of course, a similar phenomenon occurs at the federal Equal Employment Opportunities Commission, in Congress and at the local level with District Attorneys. We have to face up to the fact that our system of justice is vulnerable to the indirect political bribe, particularly in this area of white-collar crime. And, that is one of the important reasons why the antitrust law violations in the film industry are occurring and will continue to occur until the U.S. public becomes sufficiently informed and outraged to force an end to the practices.

**234. Political Influence**--The ability to persuade governmental decision-makers. The most powerful group of companies in the motion picture business, the MPAA, finally realized a long-term goal with the installation of its friend, Ronald Reagan, in the U.S. Presidency during the decade of the 1980s. Reagan did not disappoint the MPAA when he adopted a policy of relaxed federal antitrust law enforcement for the entertainment industry. That policy change made it possible for some of the MPAA companies to re-enter the exhibition arena, become even more vertically integrated than they had been since the 1940's and regain the additional clout in the market place that would allow them to exert even greater control over the exhibition, distribution and production of feature films and generally at the expense of the independent producers and independent distributors (see "Antitrust Law Violations", "Lobbying", "Market Power", "Paramount Consent Decrees" and "TriStar Case").

**235. Predatory Practices**--An aggressive manner of conducting business which is designed to exploit or destroy others for the gain of the business. Many of the major studio business practices described herein may be considered predatory practices (see

"Adhesion Contract", "Cartel", "Conduct Restrictions", "Inferior Bargaining Position", "Polarization" and "Reciprocal Preferences").

**236. Prejudice**--Preconceived judgment or opinion; an irrational attitude of hostility directed against an individual, a group, a race or their supposed characteristics. The prejudices of the top studio executives are consistently expressed in the films we see because motion pictures tend to mirror the values, interests, cultural perspectives and prejudices of their makers (see "Discrimination", "Insider's Game", "Nepotism" and "Patterns of Bias").

**237. Print Costs**--The expenses incurred in making a film's release prints for theatrical exhibition. The cost of a single print may be in the \$2,000 range, thus if a distributor were to effect a 2,000 print release, its print costs would equal \$4,000,000. Clearly then, print costs are one of the major distribution expenses (advertising being the other) and present a significant opportunity for overstating the amount or for possible kickback arrangements (see "Audit", "Discounts", "Kickbacks" and "Rebates").

**238. Private Propaganda**--The ideas, facts or allegations spread deliberately by non-governmental entities or individuals to further their own causes or to damage opposing causes. Viewed in conjunction with Hollywood's blatant and consistent patterns of bias, fact manipulation and negative Hollywood film stereotypes of those who do not control Hollywood, along with favoritism for a single group (some of whose members do control Hollywood) makes it apparent that movies are effectively being used as a deceptive but powerful form of propaganda, disseminated by a private sub-group within our society, and supported ironically, by the action or, more often, the inaction of our own federal government, along with all the rest of us who pay to see such movies (partly because that's what's available to be seen), or those of us who buy any of the products these movies promote.

**239. Problem Producer**--A term used to describe a producer considered by the person applying the label to be difficult to work with as a film producer or who does not play along with some of the inequities in the studio/distributor dominated U.S. film industry. This label has been used by the studios from time to time to damage the careers of producers who did not want to go along with studio policies (see "Blacklist" and "Discrimination").

**240. Proclivity for Wrongful Conduct**--A tendency to engage in unfair, unethical, unconscionable, anti-competitive, predatory and/or illegal business practices. The behavior of this rather small Hollywood control group has been so reprehensible that over a period of some 50 years, three different informed and sophisticated individuals who were specifically knowledgeable about the operation of the U.S. film industry (a U.S. Supreme Court Justice, the federal judge who supervised 30 years of film industry compliance [or non-compliance] with the Paramount Consent decrees and the Los Angeles-based litigating attorney who sued Paramount on behalf of Art Buchwald), all proclaimed in writing that the Hollywood control group has a "proclivity for wrongful conduct" (see "Hollywood Insiders").

**241. Producer's Share**--A term defined in some distribution agreements as the accountable gross remaining after the deduction, on a continuing basis, of the aggregate of the distributor's distribution fees, distribution expenses and gross participations, if any. Some distribution agreements provide that third party participations, if any, be deducted from the producer's share. The reasoning used to support this position is that the producer, to a greater or lesser extent, is responsible for the production of the motion picture, including all of the associated costs, (i.e., the producer is responsible for negotiating and allowing such third party participations--including talent participations since talent is not a party to the distribution agreement between the producer and distributor). Thus, logically (from the distributor's point of view) the producer should pay the costs of these contingent commitments to talent out of the producer's portion of the film's revenue stream, (i.e., out of net profits). The producer may readily agree with this analysis since the producer and all other net profit participants are likely to fare better if they are paid on a pari passu basis with the talent as opposed to allowing talent to receive gross participations. On the other hand, in the studio/distributor financed films, gross participations are sometimes also defined as a production cost and thus the studio/distributor collects interest and overhead charges on these "expenses" which were never actually paid out by the studio/distributor (see "Accountable Gross", "Creative Accounting", "Gross Participations" and "Interest").

**242. Production Costs**--The costs of producing a film, (i.e., the expenses incurred in the production of a film negative). Such costs are generally incurred in four stages: story rights acquisition, pre-production, principal photography and post-production and the complete production process can take a year to 18 months. Production expenses may include the cost of the story, salaries of cast, directors, producers, etc., set construction and operations, wardrobe, sound synchronization, editing and any other costs necessary to create a finished film negative. Other components of movie production costs might include (depending on the form of film finance used) residuals, participations, allocated studio overhead, abandonment costs and capitalized interest. Production costs may also include contractual overheads and contractual facility and equipment charges in excess of actual costs, rebates and receipts from sales of props and sets, provision for self-insurance, a completion bond charge, participations before break-even and overhead there-on and deferments, along with actual or imputed interest. The production cost for studio financed films does not mean the studio's cost in providing a certain service or product but what it arbitrarily decides to charge the film for such service or product and the studio markup for such items is often extremely high or grossly over-stated. Studios sometimes wrongfully characterize a distribution expense as a production cost and seek to charge interest on the cost of producing the negative (production expenses) as well as apply the overhead percentage against this inflated production cost total. Such practices will tend to delay any net profit participation (see "Creative Accounting", "Direct Distribution Expenses", "Gross Participations", "Interest", "Negative Costs" and "Rising Production Costs").

**243. Production Overhead**--Those costs and expenses incurred by a studio/distributor in the business of producing and distributing motion pictures generally, that cannot be directly charged to specific pictures, regardless of whether or not such facilities or staff



are actually used on a given picture. They include such things as rental of sound stages or other studio facilities such as dressing facilities, vehicles, telephones, office space and equipment, secretaries' salaries, studio executives salaries and their expenses, development and story-abandonment costs and general administrative costs relating to the production area. In view of the fact that distributors are generally permitted to recoup at least 100% of their direct distribution expenses and distribution fees for distributing a film in various media and markets, some take the position that such indirect distribution or other expenses should not be charged against a specific film, either on an actual cost or percentage basis, but rather such studio/distributors should cover such costs as most businesses do with their earned fees. It is particularly troublesome for some to have a studio/distributor finance the production costs of a film, then add such overhead to the negative cost of the film and charge interest on that overhead while delaying recoupment of the negative cost until after distribution fees are collected and distribution expenses are recovered, if ever (see "Gross Participations", "Interest", "Leverage", "Overhead", "Overhead Surcharge" and "Overreaching").

**244. Profit Participations**--Percentage participations typically based on net profits as defined in the distribution agreement; payments to talent or others computed as a percentage of the profits generated by a film or fixed sums to be paid if a movie's profits reach a certain level. Such participations are negotiable and thus may be based on gross receipts, net profits or other stages in a movie's revenue stream. If reasonable controls and/or limitations are not imposed on the distributor's claim to distribution expenses, the distribution fees are not reasonable and other parties are allowed to participate in the distributor's gross film rentals, net profit participations are not likely to occur. Such practices could impact adversely on the financial interests of investors, producers, executive producers, directors, screenwriters, actors/actresses or others who have negotiated a profit participation interest in a given motion picture. Studio executives often complain that they have to pay certain top actors or actresses large fees up front, but on the other hand, if the studios had a reputation for dealing fairly with profit participations on the backside, those few who do have the leverage would not insist on being paid up front (see "Audit").

**245. Prompt payment**--The timely remittance of amounts due. It is not uncommon for studios or other distributors to hold payments from television and cable sales until actual play dates, even though the funds have been received one or two or more years in advance. Such held payments are excluded from the calculation of net profit participations (see "Unethical Business Practices").

**246. Propaganda**--Ideas, facts or allegations disseminated with the expressed intent of furthering one's cause or of damaging an opposing cause. Hollywood's blatant patterns of bias in its movies rise to the level of private propaganda (see "Idea", "Marketplace of Ideas", "Movies With a Message", "Multi-Cultural Society" and "Unfavorable Portrayal").

**247. Puffed Numbers**--The inflated reports of the performance of a motion picture at the box office. Exhibitor's sometimes exaggerate the box office performance of a film at a

specific theatre when responding to the inquiries of the trades or various box office reporting services in order to create the impression in the industry that a film is doing better at that theatre than it actually is. Distributor's also may "puff" their numbers for industry consumption in order to encourage exhibitors to increase their bids for subsequent runs or to continue an ongoing run. Such reports then mislead prospective net profit participants into thinking that a film may achieve net profits when it actually will not because the subsequent distributor reports of the film's earnings are inevitably much lower (see "Settlement Transaction").

**248. Racketeering**--Originally, an organized conspiracy to commit extortion, but the concept has in more recent times, been superseded by RICO (acronym for Racketeer Influenced and Corrupt Organizations Act), a federal statute which provides for four punishable racketeering offenses (1) for directly or indirectly investing income derived from a pattern of racketeering activity or through collection of an unlawful debt in any enterprise affecting trade or commerce; (2) for acquiring or maintaining any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt; (3) for conducting or participating in the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt; or (4) for conspiring to violate the racketeering provisions.

A "pattern of racketeering activity" requires engaging in at least two incidents of racketeering conduct within 10 years of each other. Racketeering activity includes among other acts, certain indictable acts under federal and state laws including bribery, embezzlement from pension and welfare funds, extortionate credit transactions, mail fraud, wire fraud, interference with commerce and fraud in the sale of securities. The term "enterprise" in the federal act includes any individual, partnership, corporation or any union or group of individuals associated in fact though not a legal entity. RICO also makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity.

Criminal violations may result in fines of \$25,000 and/or a 20 year prison term and the forfeiture to the United States of any interest or security or contractual right of any kind affording a source of influence over the enterprise. RICO also provides for civil remedies. Any person injured in his business or property by reason of a violation may sue in any federal district court and may recover triple the substantial damages, cost of the suit, including a reasonable attorney's fees.

The principal purpose of the act, is to strengthen means of preventing money and power obtained from illegal endeavors to corrupt democratic business practices so as to interfere with free competition and to burden interstate and foreign commerce. Essentially Congress is seeking to halt a pattern of infiltration of business by organized crime.

Although most profit participants, including investors in film corporations and film limited partnerships do not think of film distributors as "organized crime", in fact, a given distributor engages in a number of the practices described herein, and raises

production and/or distribution funds through the sale of corporate stock or limited partnership interests (both of which are securities), such distributors may have committed securities fraud since the disclosure of such practices would almost certainly be considered material to prospective investors and issuers of securities are under an obligation to disclose all material aspects of any such securities transaction. Thus, a disgruntled investor or other person "wronged" by the activities of a film distributor may be able to establish that the film distributor engaged in numerous instances of racketeering activity, (i.e., securities fraud by selling its stock or limited partnership interests without disclosing that it engaged in anti-competitive business practices, questionable or unethical conduct, creative accounting or sharp negotiating tactics, all of which may have an adverse impact on the interests of the investor, shareholder and/or other profit participants).

**249. Ratings**--A very general system of movie classification provided by the MPAA for films to be released, utilizing the following letter designations: "G" for general audience (all ages, that is, a family film), "PG" for parental guidance (i.e., some of the material might not be suitable for children), "PG-13" (some material may be inappropriate for pre-teenagers), "R" for restricted to those of a certain age (this age varies from sixteen to twenty-one, with eighteen being the Motion Picture Association of America's suggested age) and "NC-17" for adults only. The stated purpose of the rating system is to provide advance information to enable parents to make judgments as to whether they want their children to see certain movies. A full-time rating board (employees of the MPAA), composed of seven persons (all who have shared the parenthood experience), headed by a chairman decide on the rating for a given movie by a majority vote. The rating board does not rate films for quality or the lack thereof. The rating board's criteria include theme, language, nudity, sex and violence. The rating assigned can in some cases significantly increase or decrease the potential audience for a movie and thus impact a movie's potential revenue, (e.g., the difference in revenue potential between an "R" rated movie and the previously used "X" rating was substantial). Producers who are not satisfied with the MPAA rating assigned to their film have the right to re-edit the film and re-submit to the ratings board or they can release the film without an MPAA rating. Producers also have a right to appeal a rating board decision to the Rating Appeals Board and can of course litigate the question in court. A number of lawsuits were filed in 1989 and 1990 by independent producers challenging the ratings assigned to their movies, particularly the former "X" rating. This prompted the MPAA to adopt the "NC-17" rating, even though some members of the public and exhibitors contend that such a change is merely a substitution of labels and makes no substantive change. Such lawsuits and criticism have also raised the basic question relating to the inherent conflict of interest in a system which allows an MPAA sponsored organization to rate movies produced by its members as well as the movies produced by non-members of the MPAA, although this issue has yet to be resolved. The MPAA has traditionally been opposed to attempts by any governmental entity (or other organization) which tries to set up a system for rating motion pictures as to their content and has used the existence of the MPAA ratings systems (controlled by the MPAA) as an argument against such efforts (see "Minimum Rating" and "NC-17").

**250. Reasonable and Customary**--A general standard of conduct for commercial affairs which may only be ascertained on a case by case basis after the fact by testimony in the context of litigation. Somewhat more fair

than just "customary" by itself but still ambiguous and open to interpretation by the distributor's employees who are notorious for interpreting such language in favor of the distributor (see "Customary", "Deal Memo" and "Ordinary Course of Business").

**251. Reasonable Efforts Clause**--A provision in film distribution contracts which merely obligates the distributor to put forth reasonable efforts in distributing the film. Less effort is required of the distributor pursuant to a reasonable efforts clause than a best efforts clause. It would be even more reasonable for the distributor to commit to certain specified distribution activities on behalf of the film, but they will often refuse because they can.

**252. Rebate**--A return of a portion of a payment. Rebates, like discounts, are often negotiated and/or awarded by exhibitors and other feature film licensees to distributors on a given picture or they are also sometimes based on the volume of pictures provided by the distributor. Distributors often seek to exclude the value of such rebates in profit participation calculations, arguing that the distributor's activities are solely responsible for earning them. However, as with discounts, without the feature film or films made available to the distributor by the producer and other profit participants, the distributor would not be in a position to either negotiate or receive such rebates. Producers should seek to negotiate a fair provision in the distribution agreement which includes the value of such rebates in the profit participation calculations. Even if a producer is successful in negotiating such a provision, it is not unthinkable for a distributor who has a particularly close relationship with a given exhibitor or other film licensee to have the rebate shifted (on paper) to another producer's film and/or included as part of an overall settlement as between the distributor and the licensee, in which case the distributor may have the discretion to allocate the amount of the settlement among various films distributed by the distributor on behalf of several different producers (also see "Discounts").

**253. Reciprocal Preferences**--Mutual partiality among competing businesses, an illegal trade practice which violates Section 1 of the Sherman Antitrust Act. In the context of a vertically integrated motion picture industry, a reciprocal preference might take the form of a group of competing distributors/exhibitors, such as the major studio/distributors providing the other major studio/distributor/exhibitors selective contracts for exclusive first runs in their best theatres or at just the exhibitor level with the competing major exhibition chains, each giving some preference to the other's films by organizing splitting arrangements which can help to guarantee the distribution of the best films in their theatres as opposed to the theatres of the smaller independent exhibitors. The concept of reciprocal preferences may also apply to the exhibitor practice of bidding aggressively on films that are distributed by distributors who are fairly lenient when it comes time to settle with the exhibitor, (i.e., accept a lesser round-dollar amount for the exhibition of a certain film in exchange for the exhibitor's showing a less desirable film in the past or in the future) [see "Blind Bidding", "Block Booking", "Major Exhibition Chains", "Major

Studio/Distributors", "Paramount Consent Decrees", "Predatory Practices", "Selling Subject to Review", "Settlement Transaction" and "Vertical Integration"].

**254. Relationship-Driven Business**--An industry in which business choices and decisions relating to whether business should be conducted with certain other individuals or entities are based to a great extent on some affinity, link, affiliation or association which may or may not be directly related to the nature of the business. In this sense, such relationship choices might be viewed as another barrier to entry in any of the production, distribution and/or exhibition levels of the motion picture business. Many in the Hollywood-based U.S. film industry are fond of stating that the film business is a "relationship-driven business", but recognizing the fact that most of the individuals in the key positions in Hollywood share a common cultural, religious and ethnic background, and that their relationships tend to focus on persons with similar backgrounds, this is actually an admission of the existence and operation of an insider community in Hollywood (see "Barriers to Entry", "Insider's Game", "Level Playing Field", "Member of the Club", "Movies With a Message", "Nepotism", "Reciprocal Preferences" and "Role of Government").

**255. Release Commitment**--The pledges, promises or guarantees of a film distributor relating to the distribution of a given film (e.g., agreements by a distributor to spend a certain amount of money on prints and advertising and/or to release a film in the major population centers in the U.S.) Such commitments are usually required by home video companies before such companies will provide a home video advance or guarantee. Unfortunately for many film producers, there is no effective way to police the activities of or enforce the commitments of distributors.

**256. Release Slots**--A limited measure of time or distributor resources that a feature film distributor is able to commit to the distribution of a film. In any one year, most major studio/distributors will not commit to release more than 24 or so motion pictures, (i.e., they have approximately 24 release slots to fill each year or an average of one film released each two weeks or so). On the other hand, the production side of the major studio/distributors is seldom able to produce more than 15 quality films a year (as either in-house product, on a production-financing/distribution basis or as negative pickup where the studio has significant controls and approvals. Thus, in order to be able to amortize the studio/distributor's ongoing operating costs, many will take in other product to fill those release slots and to maintain their relationships and leverage with the exhibitors as consistent suppliers of quality film product. The additional films will be distributed either on a pure acquisition or rent-a-system basis. Unfortunately, the average ratio of film rentals to box office gross is typically lower for these independently produced films that a distributed by the major studio/distributors.

**257. Remitted or Remittable**--Already sent back or that which is able to be sent back. With respect to foreign receipts for the exploitation of a motion picture in international territories, the question often arises as to whether a net profit participant should receive the benefit of monies collected in the foreign territory and that could be remitted back to the United States but which have not yet been sent back. The typical major

studio/distributor definition of the term gross receipts excludes foreign receipts until they are collected and

converted into dollars here in the U. S. thus net profit participants do not get the benefit of such funds until much later, if at all (see "Foreign Receipts" and "Net Profit").

**258. Reserve for Returns**--A deduction by the distributor from video gross receipts to account for the estimated dollar value of videocassettes sent back to the distributor from the video wholesaler because they were defective or for other reasons. The distributor may want to hold back as much as 25% of the video gross receipts as reserves for video returns (without adequate support information), once again delaying the net profit participants' opportunity to share in revenues on a timely basis (see "Videocassette Revenue Reporting").

**259. Residuals and Royalties Provision**--Residuals (or residual payments) are percentage participations for television, (i.e., payments as to an actor or writer for each re-run after the initial showing and pursuant to a union agreement). Residuals are generally based on the number of times the film is exhibited on television, or as a percentage of revenues from television exhibition. Royalties, on the other hand, are payment to the holder for the right to use property such as copyrighted material, (i.e., a negotiated percentage of income paid to an author or composer for each copy of the work sold). A royalty is a share of the product or of the proceeds therefrom reserved by an owner for permitting another to exploit and use his or her property, (i.e., the rental that is paid to the original owner of property based on a percentage of profit or production). Royalty is compensation for the use of property, but it is based as to amount entirely upon the use actually made of the property. The residual and royalty provision in a film distribution agreement is language or a paragraph which provides for the payment of residuals and royalties associated with the picture (e.g., that the distribution company agrees to make all residual and supplemental payments required to be made in the distribution of the picture). Some distributors will try to shift the burden of making such payments to the producer and ask the producer to make such payments out of the producer's share, a tactic which would tend to reduce the producer's profit participation in relation to other profit participants.

**260. Restraint of Trade**--Illegal restraints interfering with free competition in business and commercial transactions, which tend to restrict production, affect prices or otherwise control the market to the detriment of purchasers or consumers of goods and services. What would otherwise be considered a reasonable restraint of trade may be made unreasonable if they are intended to accomplish the equivalent of an illegal restraint. Many of the business practices cited herein may be considered illegal restraints of trade by a properly focused U.S. Justice Department not distracted by excessive political contributions to the sitting President) (see "Antitrust Law Violations", "Conspiracy", "Paramount Consent Decrees" and "TriStar Case").

**261. Restricted Currencies**--A foreign currency which is or becomes subject to moratorium, embargo, banking or exchange restrictions, or impediments against

remittances to the United States. Distributors often exclude such funds from its definition of gross receipts, even though the distributor will eventually benefit from the existence of such funds (see "Blocked Currencies").

**262. Retroactive Increase**--A larger payment which is not triggered until a certain event occurs, but which when triggered, permits the recipient to go back to the first revenue dollars relating to the transaction and recoup at the higher rate. Some film distribution agreements provide for distribution fees that escalate retroactively and the distributor will most likely take its retroactive increase from 100% of the subsequently accruing revenues (i.e., after the triggering event occurs, the distributor will take all of the next revenues to pay for the increase in its distribution fees back to the first dollar).

**263. Revolving Door**--A concept more commonly applied to government which refers to the practice of private citizens, such as attorneys, who go into the service of the government, typically in some regulatory capacity, only to return to private practice following government service and in a position to utilize the expertise and/or contacts gained in government service to enhance their abilities and economic prospects in the commercial marketplace. The problem with this practice typically occurs in the form of conflicts of interest, (i.e., the government official makes a government decision influenced by a possible private benefit which might accrue to such individual when he or she becomes a private citizen again). Generally speaking, in a private industry such as the film business, the revolving door concept is not a problem. However, when a relatively small but highly visible industry like film, with a high concentration of its participating companies primarily based in one city, like Los Angeles, is dominated by a small number of corporate entities and individual executives, many or most of whom share a common cultural, religious and ethnic background, with large monetary rewards floating around, it is not unusual to see people in that industry, entertainment attorneys, studio executives and agents in particular, move from private practice into the corporate structure of major studio/distributor and back, creating similar conflicts of interest. This constant movement back and forth between and among the studios and other segments of the industry does create numerous conflict of interests, which many in the industry are not even aware of or seem to completely disregard in their blind quest for power, fame and fortune.

**264. RICO**--Acronym for Racketeer Influenced and Corrupt Organizations, a federal statute which provides for four punishable racketeering offenses (1) directly or indirectly investing income derived from a pattern of racketeering activity or through collection of an unlawful debt in any enterprise affecting trade or commerce; (2) acquiring or maintaining any interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt; (3) conducting or participating in the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt; or (4) conspiring to violate the racketeering provisions. A "pattern of racketeering activity" requires engaging in at least two incidents of racketeering conduct within 10 years of each other. Specified offenses involved in racketeering include criminal usury, theft and forgery. Theft may include larceny (i.e., the taking of another's property unlawfully with the intention of depriving the owner of its use). The term "enterprise" in the federal act includes any individual, partnership, corporation or any union or group of individuals

associated in fact though not a legal entity. Many states have also passed RICO statutes. Many of the business practices described herein rise to the level of a pattern of racketeering activity (see "Antitrust Law Violations", "Fraud", "Mob-Controlled Distribution Company", "Money Laundering", "Racketeering", "Self-Dealing", "Usurious Contract" and "White Collar Crime").

**265. Rising Production Costs**--The seemingly ever increasing expense involved in the making of a motion picture. Many in the film industry have complained for years about the rising production costs. The warning has gone out that this lack of profitability in the film business will make it more and more difficult to attract capital. But it appears that the only thing the business leaders in various segments of the film industry can suggest to lower production costs is for the other guy to quit being so greedy. For example, the studio/distributors complain that the agents and their actor clients need to reduce their up front and gross participation demands. In response the high priced talent attorneys counter that they will consider such a proposal if the studio/distributors will handle net profit participations more fairly, particularly in the area of home video. This inter-industry economic warfare is not merely unfortunate, but a sham, since it acts as a smokescreen for the insider cash infusion strategy (see "Insider Cash Infusion").

**266. Role of Government**--The function and activities of the sovereign ruling agency in any given jurisdiction. In a country like the United States where an essentially free enterprise economy is part of the national fabric the role of the federal government is generally minimized, except in situations where private enterprise engages in business practices that reduce or tend to reduce the competitiveness within an industry, (i.e., businesses engage in unreasonable restraints of trade, or other civil or criminal violations of the U.S. laws). In the current economic environment, one of the government's regulatory dilemma's relating to the balancing of competitive interests in an industry like the motion picture industry is how to permit combinations of businesses to grow large enough to compete in an increasingly international economy without stifling the small business interests within the domestic industry. However, so long as no organized interest group speaks up for the interests of the small businesses in such an industry, the government is very likely to respond favorably to requests from the larger entities in that industry to allow them the freedom to grow and compete effectively on an international scale. Unfortunately, this balance between the interests of the major studio/distributors and smaller companies and individuals in the film industry has long been severely tilted in favor of the majors, and the government's role as a referee has been perverted (see "Antitrust Law Violations", "Fair Competition", "Free Enterprise", "Predatory Practices", "Money Laundering", "Movies With a Message", "Political Influence", "Restraint of Trade", "Unfair Competition" and "Vertical Integration").

**267. Rolling Break-Even**--A point at which a film's revenues are equal to expenses on a continuing basis, (i.e., after all appropriate deductions are taken from film rentals in each accounting period). Too much discretion, latitude, flexibility in the standards of conduct, lack of definition and too little auditing leeway, etc. in the distribution deal, provides the distributor with the power to keep pushing break-even farther and farther back in time, thus the concept does not protect the interests of net profit participants.



**268. Royalty Basis**--The payment of percentage compensation based on the use of property or rights as a royalty as opposed to making such payments in the form of a distribution fee. Unlike other areas of the feature film business, home video revenue percentage participations have been handled on a royalty basis (similar to the record industry) rather than on a distribution fee basis. Royalty payments are traditionally much lower than distribution fees. Also, although the royalty approach is used for determining what goes into the film distributor's gross, the film distributors have, not surprisingly, generally opted for the distribution fee approach with regard to home video revenue once it reaches the distributor's gross receipts pool (see "Videocassette Revenue Reporting").

**269. Rules**--Another term with different levels of meanings, (i.e., [1] a prescribed guide for conduct or action, [2] an accepted procedure, custom or habit and [3] a law or regulation governing procedure or conduct). One of the more common statements made by film industry "insiders" who participate in discussions regarding film finance is "There are no rules". In at least a couple of ways, this may be true, (i.e., there is no overall best way to go about financing a motion picture [it really depends on the project] and there are no prescribed guidelines for what works at the box office). But in other ways, this can be an extremely misleading and dangerous statement in that there certainly are a great number of rules when it comes to forming a corporation, creating a limited partnership or limited liability company, raising money from investors, running a business, contracting with others, structuring a deal with tax considerations in mind, etc. In that sense, the people who are making the statement "There are no rules" may in reality be saying, "We know there are rules, but we are not going to abide by them because we know that no one who wants to stay in this business will complain and even if they do, their remedies are woefully inadequate." In other words, it has long been the practice of Hollywood insiders to simply do whatever they can do and want to do that cannot be prevented by others (see "Antitrust Law Violations", "Blacklist", "Conduct Restrictions", "Conflicts of Interest", "Extortion", "Insider's Game", "Larceny", "Merger Guidelines", "Sue Us" and "Usury").

**270. Running Time**--The total length of time needed to project a film at its normal speed. Feature films usually require a running time of 90 to 120 minutes. However, many distribution agreements specify a range in which the running time must fall and may make compliance a condition of delivery. Thus, if the producer comes close but fails to come within the prescribed running time, the distributor may be able to use this technical default to avoid its obligations to make payments to the producer pursuant to pre-sale or negative pickup agreements and avoid its obligation to distribute the picture. Such arbitrary time limits also impinge on the creative decisions of the producer/director team.

**271. Same Percentage as Film Rental Earned (SPFRE)**--A financial arrangement negotiated between a film distributor and exhibitor in which the exhibitor agrees to pay the same percentage of the week's advertising cost for the movie as the exhibitor's percentage of the box office receipts received by the exhibitor in that same week. Distributors, however, refuse to use a similar concept in negotiating a feature film

distribution deal with producers (i.e., using the SPFRE concept in place of the distributor's "discretion" to make allocations among films licensed as a package (see "Allocation").

**272. Scam**--A planned deception in which persons pretending to be engaged in some form of business transaction are actually involved in a ruse designed to separate a victim from his or her money. Much of the complexities of the Hollywood-based U.S. film industry have evolved over a nearly 100-year period for the purpose of allowing the Hollywood insiders to accomplish three things (1) steal the good film ideas from outsiders, (2) steal the screenplays of ideas and/or (3) steal the money that might otherwise flow to outsiders following the exploitation of a feature in which an outsider has a financial interest. In other words, the so-called Hollywood system is a scam (see "Fraud" and "White Collar Crime").

**273. Scrapping of Prints**--The selling of used feature film prints for their salvage value. Even though the distributor will often financially benefit from selling film prints for salvage, such amounts are seldom credited to the film's revenue stream for the benefit of net profit participants.

**274. Script Changes**--Modifications to a screenplay. Such changes will inevitably occur during production of a picture and may create problems with a distributor and/or the completion guarantor. In the event that a distribution agreement was negotiated and signed prior to principal photography, the distributor typically includes a provision providing for script approval. In other words, to the extent a producer relies on a distributor for some portion of the film's production financing, the distributor will extract some creative control. The significant role that distributors play in film development and production financing is partly a result of a lack of trust among other potential financiers in the distributors' ability to deal fairly with such outside sources of financing. Distributors have further used this situation to ensure their ability to self-deal from the revenue stream generated by the exploitation of a feature film.

**275. Second Breakeven**--A contractually defined point in a motion picture's revenue stream when revenues equal costs again, (i.e., following the first such occurrence). The term is another artificial and arbitrary definition that has to be interpreted and implemented by distributor accountants who have a tendency to make mistakes in favor of their distributor employers (see "Actual Breakeven", "Artificial Breakeven", "Cash Breakeven", "First Breakeven" and "Rolling Breakeven").

**276. Self-Dealing**--Transactions in which a fiduciary uses or appropriates the property held in his or her fiduciary capacity for his or her own benefit. Many federal and state statutes prohibit self-dealing. Distributors refuse to allow any language in their distribution agreements that specifically characterize their relationship with producers as a fiduciary relationship (see "Conflicts of Interest", "RICO" and "Videocassette Revenue Reporting").

**277. Settlement**--A conclusive fixing or resolution, usually a compromise, between the distributor and exhibitor or distributor and sub-distributors relating to the amount of monies due to be paid to the distributor for a film's exploitation. Generally, settlements are calculated or negotiated on a weekly basis, at least initially between the individual theatre and the branch office of the distributor. As between the distributor and exhibitor, settlement is sometimes used to refer to the percentage retained by the exhibitor. The amount actually settled upon may be 10% to 30% below what the contractual amount would have been. There is almost never any written communication between the distributor and exhibitor relating to such settlement negotiations, (i.e., it's all oral, thus the net profit participation auditor can only compare what was paid with what should have been paid pursuant to the contract between the distributor and exhibitor). These settlements may significantly reduce the chances that a given film will ever reach net profits, thus such negotiations impact on the financial interests of a film's producer and its other net profit participants. For example, a distributor may be willing to settle for less than the money actually owed by an exhibitor on a given film in order to help the distributor obtain more favorable exhibition terms on its next film. Some entertainment attorneys have suggested that these settlement transactions would not hold up in court if challenged because the distributor, in its distribution agreement, generally has contracted to maximize its distribution revenue on the film on behalf of all gross and net profit participants. Few if any producers or other profit participants, however, have chosen to litigate this issue and even when confronted by profit participation auditors, this appears to be one of those issues the distributors routinely respond to by saying "sue us" (see "Blacklisting", "Contract of Adhesion", "Creative Accounting", "Outstandings", "Problem Producer", "Selling Subject to Review" and "Sue Us").

**278. Sex**--Hollywood studio executives and others in the film industry have long known that many men are interested in the film industry partly because the industry attracts beautiful women from all over the world, and that many of these women are so ambitious about becoming stars that they will do most anything to move their careers along. Studio executives have long exploited this phenomenon to gain sexual favors for themselves and others and to attract investment into the industry.

**279. Shared Employee Salaries**--A movie studio accounting concept in which the compensation paid to certain employees of the studio are allocated among the various movies that are being produced at the studio. Actual instances of studio executives being given time cards to arbitrarily fill out so that the studio can allocate their time as a cost of a given film have been reported, even though such individuals did nothing to benefit that film.

**280. Significant Barriers**--Serious things that impede or separate. In an antitrust law context, the phrase "significant barriers" refers to the serious things that may keep a business from either entering or continuing to do business in a particular field (e.g. feature film distribution or exhibition). Several of the U.S. Justice Department vertical merger guidelines relate to the issue of whether or not a feature film distributor or exhibitor must be vertically integrated in order to enter or continue in the distribution or exhibition business (i.e., to successfully compete in those levels of the motion picture

business today). As a means of analyzing proposed vertical mergers in the motion picture business, these guidelines further ask how difficult is it to achieve such vertical integration (assuming it is necessary to succeed in today's marketplace), and if vertical integration is required and there are significant barriers to such integration, is the market otherwise conducive to non-competitive performance. In other words, the U.S. Justice Department has apparently taken the position that in a market not otherwise conducive to single firm market power or coordination among several firms, even significant increases in barriers to entry are unlikely to affect competitive market performance adversely. Of course, this Justice Department analysis is wrong, since it is clear that vertical integration in the film business is a significant barrier to entry for non-integrated competitors (see "Barriers to Entry", "Merger Guidelines", "Paramount Consent Decrees" and "TriStar Case").

**281. Skimming**--Stealing at various stages in a film's revenue stream (e.g., by a theatre's cashier and doorman, the theatre owner under reporting ticket sales to the sub-distributor, the sub-distributor taking a little off the top before reporting to the distributor or the distributor doing the same before reporting to the producer). Various forms of skimming is and has long been a pervasive problem in the film industry.

**282. Slate Cross-Collateralization**--A feature film distributor practice in which the distributor offsets the financial performance of one motion picture against the financial performance of other films produced by the same production company (i.e., the production company's slate of films). This often allows the distributor to avoid paying the profits of one of the production company's films because another of the same production company's films, distributed by the same distributor, suffered a loss. Often those loss figures are inflated (see "Cross-Collateralization").

**283. Squeeze-Out**--In corporate law, any transaction engaged in by the parties in control of a corporation for the purpose of eliminating minority shareholders. In a more general business sense, the gradual elimination of smaller less powerful competitors through the use of anti-competitive practices. Many independent production and distribution companies in the film business have been squeezed out due to such unfair, unethical, unconscionable, anti-competitive, predatory and illegal practices (see "Anti-Competitive Practices", "Antitrust Law Violations" and "Cartel").

**284. Standard Contract**--Agreements that are so similar in language and provisions that they have pretty much been adopted by most similar entities engaging in the transactions being documented. A document that does not exist in reality in any business transaction involving negotiations. Often distributors will offer producers their "standard" contract, thereby discouraging any negotiation of terms. Important terms are generally not negotiable anyway (see "Contract of Adhesion").

**285. Standard Terms and Conditions**--A major section of the typical studio/distributor feature film distribution agreement which sets out the terms and provisions relating to the distribution of a feature film that the studio considers standard. It is important to recognize that what is considered standard for that studio may or may not be standard for

another major studio/distributor or for an independent distributor, regardless of the fact that such provisions are often similar. For example, it would be a violation of the antitrust laws for competitors like the major studio/distributors, even through the facilities of their trade association (the MPAA) to get together and agree on standard terms and conditions. Thus, the phrase "standard terms and conditions" does not necessarily mean that such terms and conditions are standard in the industry, nor should independent producers allow themselves to be led to believe that is the case. In other words, a distributor's standard terms and conditions should also be negotiable (even though in reality important provisions of such agreements seldom are). Generally, the studio/distributor distribution agreement will also contain a provision that says "To the extent any terms or conditions of the Standard Terms and Conditions are inconsistent with the Deal Terms, the Deal Terms shall govern. Thus, the studio is setting out in the "Standard Terms and Conditions" section what it would prefer with respect to certain issues and if producers want something different, they need to speak up during the negotiations and ask that the language in the "Standard Terms and Conditions" section be crossed out, modified or otherwise altered or that different language be included in the "Deal Terms" section of the agreement which overrules the "Standard Terms and Conditions" section. Once again, the problem for most producers is that they do not have the leverage to effectuate desirable terms, and often times the agreement becomes so convoluted that it is difficult if not impossible to interpret, thus giving the distributor's accountants a free hand in implementing the deal (see "Antitrust Law Violations").

**286. Stock Fraud**--In the sale or offer of corporate stocks, the intentional misrepresentation, concealment or omission of the truth, for the purpose of deception or manipulation to the detriment of an investor or prospective investor. It would appear that the failure of any feature film studio/distributor or independent distributor that is publicly or even privately owned by shareholders, to disclose that they engage in many of the practices described herein, might constitute stock fraud, since such business practices may make the distributor subject to the civil and/or criminal liability of a RICO action. It is also possible that the publication of this list of distributor/industry practices might create a greater need for stock brokers who offer or sell the stocks of studio distributors, independent distributors or other film industry corporations, to conduct more thorough due diligence investigations of such entities before offering their stocks, otherwise the stock brokers themselves may be exposed to greater liability based on their failure to discover and disclose such practices which tend to be detrimental to the interests of the investor clients of the stock brokers. This compilation may also encourage closer scrutiny by shareholders of the manner in which a film distributor operates and could conceivably prompt shareholder lawsuits in instances where such practices seem to be prevalent and harmful to such shareholders (see "Creative Accounting" and "Due Diligence").

**287. Stockholder**--Individual or organization with an equity ownership interest in a corporation. Stockholders must own at least one share. The shareholders of corporate entities may be individuals or other corporations. Some corporate conglomerates that have purchased equity ownership interests in motion picture production companies and/or distributors where a certain level of autonomy for the existing management remains intact as part of the deal have been somewhat disappointed in the financial results of their

investment. In other words, even though the entertainment entity operates at an acceptable level of profitability, for various reasons, the profits do not always seem to flow through to the equity shareholders. The literature of the film industry is littered with examples of shareholder interests being subordinated to studio management (also called "Shareholder" or "Shareowner"; see "Dividend", "Greed" and "Rising Production Costs").

**288. Stonewall Defense**--A position taken by a prospective defendant in negotiations between parties designed to avoid litigation in which the defendant simply says "see you in court". Hollywood studio executives commonly offer contracts of adhesion on a take-it-or-leave-it basis because they know that outsiders so desperately want to become involved in the glamorous film industry that they will take an initial bad deal in the hopes of eventually getting a fair deal. Unfortunately, those fair deals seldom come along. The tort of "bad faith denial of contract" seeks to provide a recovery based on a defendant's bad faith conduct in asserting a stonewall defense to an ordinary commercial contract. Once again, it is so expensive and time consuming to sue major studios, and the very fact of such litigation may be so damaging to the future career of a claimant, that few individuals in the film industry pursue such claims, and the studio executives know that (see "Bad Faith Denial of Contract" and "Sue Us").

**289. Studio Accounting Practices**--Various methods of accounting for motion picture revenues that have long been alleged to be unfair, unethical, unconscionable, anti-competitive, predatory and/or illegal. Such methods include the practice of charging unauthorized and excessive expenses to a given film being produced at the studio; the rolling break-even which keeps rolling just beyond net profits; and unfair overhead charges imposed by the studio on net profit participants. In other words, the studio has the books and records, it interprets the production/distribution agreement, it computes the profit and it decides how much should be paid. Industry insiders have long maintained that there is a certain amount of inadvertent and some intentional abusive or unconscionable accounting practices regularly occurring at the studios. This work maintains that this pattern of abuse is intentional.

**290. Sub-Distribution**--Depending on the size and extent of the distributor's organization, it may contract directly with exhibitors or it may utilize sub-distributors, (i.e., distributors who handle a specific, limited geographic territory for a film--territorial distributors who have contracted to represent an independent distribution company). Sub-distributors sub-contract with the main distributor who co-ordinates the distribution plans and marketing for all the sub-distributors of a film. Sub-distributors specialize in cities, states or territories. For foreign distribution, the distributor may contract with sub-distributors who cover entire countries. Since sub-distributors handle a limited territory or "exchange", they generally have an excellent working knowledge of their markets.

However, they are paid a commission for booking a film and this system of sub-distribution often makes it difficult to audit the independent distributors. Distributors also sometimes ask producers to commit to pay the distributor a specified fee percentage in each territory while still allowing the distributor the discretion as to whether or not to use a sub-distributor whose commission is in addition to the distributor's fee (that amounts to

a double fee). This same double distribution fee might also occur if an independent distributor utilizes the services of a major distributor on a given film (also see "Outright Sales").

**291. Submission Release**--A written agreement that producers and/or production companies sometimes require to be signed by screenwriters or others submitting literary material to the producer/production company for consideration as the basis for producing a motion picture. Typically, in such submission releases the screenwriter is asked to give up his or her rights to make certain claims against the producer/production company. Most of the submission releases drafted and used by the major studio/distributors and other distributors in the industry today are ridiculously one-sided (see "Contracts of Adhesion", "Overreaching", "Theft of Ideas" and "Unconscionable Contract").

**292. Sue-Us**--A phrase that is descriptive of the attitude and a "business as usual" tactic of most major studio/distributors in their dealings with profit participants and that is used when the profit participants inquire about their share of net profits following the distribution of a film. Such distributors take the position that any net profits due the profit participant will not be voluntarily paid to the profit participant, thus the profit participant must audit and/or sue in order to be paid. Even then, if an audit is conducted, unpaid profits are uncovered and a lawsuit is filed, the distributor will generally settle out of court for a lump sum that is less than was originally owed. So there's nothing to keep a distributor from using this tactic.

**293. Sufficient Detail**--Enough information to permit a full understanding. A concept that relates to the negotiation of many provisions in a feature film distribution deal, for example, the audit rights provision. Distributors often refuse to allow the producer to insert language in the audit rights provision requiring the distributor to provide accounting statements with sufficient detail to permit a full understanding of how the accompanying payment was determined (see "Audit").

**294. Syndicated Films**--Motion pictures that are licensed for use by individual television stations or cable systems for exhibition in their own local markets. Films are usually packaged as a group for television syndication. There are some 200+ television syndication markets in the U.S. The syndication of films typically creates an allocation issue with respect to how the fee paid for syndication rights is allocated among the various films in the syndication package. Generally, a rather arbitrary syndication formula is imposed on the producers of the various films in the package by the distributor and the application of this formula does not vary from market to market (see "Allocation").

**295. Takeover**--The assumption of control over the production of a motion picture by a financier (i.e., studio) or a representative of a lender (i.e., completion guarantor). A production-financing/distribution agreement will typically set out the studio's takeover rights (e.g., if, based on the information available, including, but not limited to, the weekly reporting papers furnished by the production company), the distributor reasonably believes that the estimated cost of production of the picture will exceed the contingency,

the studio may enter into negotiations with the production company in an effort to come up with a plan designed to reduce the projected negative costs, but if not successful the studio may take over primary responsibility for the continued production of the picture. With respect to a completion guarantor takeover the completion bond company may assert its contractual rights to assume responsibility for completing the film since the producer defaulted in some way (e.g., went over-budget or did not complete the film on time). Generally, the event that triggers the takeover rights of the completion guarantor is the subjective judgment of its on-site representative that the film is going overbudget. Producers are pretty much forced to accept such terms because there are few sources of financing outside the industry willing to rely on the discretion of film distributors for their financial returns (see "Subjective Terms").

**296. Talent Participations**--Financial interests of writers, directors and/or actors who ostensibly negotiate percentage participations based on a film's earnings at some specific level of the film's revenue stream. Such participations are often expressed as points, (i.e., a percentage of the revenue at a given level, for example, "gross points" which can be defined on a number of different grosses, such as distributor's gross or film rentals). Net points may also be defined at different levels of return, such as the producer's net or partnership net for films financed by means of a limited partnership. In studio financing projects, if the studio grants gross participations to any of the film's creative personnel, it is even less likely that other creative personnel will ever receive net profit participations, thus there is a conflict of interest between those few who may be able to demand gross participations and all the rest of potential net profit participants. Of course, this conflict of interest does not have to exist, and only exists because of the manner in which distributors handle their contractual and accounting responsibilities. Many studio executives constantly complain that they have to pay top stars outrageous salaries upfront for major movies, but that's only because such stars reasonably fear that they will not get a fair shake on the backside. In other words, these studio executives are complaining about a problem of their own making.

**297. Theatre-by-Theatre Basis**--The prescribed manner in which theatrical distributors were supposed to license their film product to exhibitors in the U.S. theatrical marketplace, pursuant to the Paramount consent decrees, (i.e., without discrimination in favor of affiliated theatres). This requirement was made clear by the Paramount consent decrees and remains the law today, although the studios still are not complying [see "Paramount Consent Decrees", "TriStar Case" and "Vertical Integration"].

**298. Theatrical**--Of or relating to motion picture theatres where full-length feature films are exhibited to the public for a charge. Producers are advised to include this word as a modifier of the word "release" in a film distribution deal since without the word "theatrical" the film distributor would be free to merely sell the motion picture to cable without ever exhibiting in theatres, and presumably some distributors have done so.



**299. Theft of Ideas**--The wrongful taking of a concept for a film or other entertainment project and using it without acknowledging or compensating the originator of the idea. The incomplete protection provided by the law that has developed around the process of idea submission and copyright law, onerous submission releases required by the major studio distributors and associated talent agencies, inadequate record keeping rampant in many of the production companies associated with the major studio/distributors, and the lack of ethics on the part of many involved in the film industry, combined with the practice of passing new projects through multiple levels of script writers tends to create an environment in which theft of ideas is common (see "Submission Release").

**300. There Are No Rules**--One of the most commonly held myths among some populations within the Hollywood community, a myth that is often repeated by so-called industry insiders in speeches, lectures and seminars. A belief that probably started out as a positive expression that newcomers to the industry should not be held back by conventions relating to creative endeavors, has (as evidenced by the distributor practices related in this monograph), been perverted by some to mean that the Hollywood community is different from all other "commercial worlds" and the usual rules do not apply. This part of the Hollywood community must be reminded that the antitrust laws, securities laws, contractual provisions and criminal laws still apply to their conduct.

**301. Threat**--A declaration of an intention or determination to inflict punishment, loss or pain on another, or to injure another by some wrongful act. Many in the film industry have long complained that they are constantly subjected to the implied or sometimes explicit threat that if they do not comply with the wishes of studio executives or their agents, they "will never work in this town again" (see "Extortion", "Racketeering" and "RICO").

**302. Three Sets of Books**--A reference to the alleged practice that distributors maintain several different versions of their business records, one for their own records, one for the producer and net profit participant group and another for the IRS. Instances of such practices have been reported in industry literature (see "Creative Accounting" and "Unethical Business Practices").

**303. Ticket Switching**--The substitution of a ticket for one movie showing in a multiplex theatre for the ticket of another movie, so as to inflate the number of tickets sold for the second movie and reduce the number of tickets sold for the first movie. Such practices may be rare, but apparently occurred on a large scale in several theatres across the country when director Spike Lee's *Malcolm X* was released. Tickets for other movies were substituted for *Malcolm X*, thus reducing the box office numbers for Lee's film. In all likelihood, such schemes do not originate with the exhibitors, but stem from problems with the financing of the film at the major studio/distributor level (see "Independent Checking Company").

**304. Track System**--An arrangement under which most of a distributor's films are customarily exhibited at a certain exhibitor's theatres; additionally "track system" and "track" means a group of theatres within a major key, which may be operated by different

exhibitors, chosen by a distributor (through negotiations with the exhibitors) to play a film simultaneously. Any form of track system runs counter to the mandate that films be exhibited on a theatre-by-theatre basis.

**305. Trade Association Dues and Fees**--A category of distributor expenses that are deducted from gross receipts (sometimes off-the-top) and paid as the distributor company's allocable portion of the dues and assessments of the trade association or associations to which the distributor belongs (e.g., the MPAA and AMPTP or similarly constituted or substitute organizations throughout the world). This category of distributor expense may include legal fees to such association's outside counsel (not its in-house counsel) relating to antitrust matters, which means the major distributors are deducting from gross receipts, (i.e., reducing the amount of funds that other participants may share in), to pay for activities that help to continue or improve their position of market dominance. Thus, most independent producers who have to wait until a film's revenue stream reaches net profits (since most producers are relegated to a net profit's position), are contributing to the payment of the distributor association's costs incurred in conjunction with fighting antitrust claims or taking positions on issues most of which would be opposed by the independent producer whose funds are being used. That being the case, it would seem only fair that if an association of independent feature film producers were formed, then each film produced by a member production company and distributed by an MPAA distributor would contribute a portion of its gross receipts to the independent producer's association as association dues at the same time that the MPAA and other distributor trade organization dues were being deducted and paid. In addition, independently produced films that were distributed by AFMA member distributors would also contribute an allocable portion to the support of such an organization. In any case, producers should attempt to negotiate a flat-dollar cap on the amount of gross receipts that may be deducted for association dues (see "Blind Bidding", "Gross Receipts", "Lobbying", "Off-the-Top" and "TriStar Case").

**306. Trailer Revenues**--A distributor may incur substantial expense in preparing trailers and advertising accessories. If such expenses are charged against the distributor's proceeds as expenses of distribution then any amounts of revenues derived from trailers and advertising accessories should be included in gross receipts to the distributor for purposes of calculating profit participations. Such payments may be made by exhibitors in certain territories. Legal requirements in many countries provide that a short or trailer be included with any film sent into such country, thus allocation issues arise with respect to what portion of a film's rentals should be allocated to the costs associated with producing the shorts or trailers. If the distributor wants to keep its revenues from trailers and accessories, it should not be able to deduct costs associated with the preparation of such items as distribution expenses.

**307. Transnational Cartelization**--The combining of independent commercial enterprises beyond national boundaries in an effort to limit competition. Much of the international activity of the MPAA companies may be fairly characterized as transnational cartelization (see "Cartel").

**308. TriStar Case**--A series of court hearings relating to the application of the Paramount consent decrees to the motion picture distributor TriStar. In 1980, Loews' Theatres petitioned the judge who had been supervising the implementation of the Paramount consent decrees for slightly more than three decades for relief that would allow Loew's to enter the motion picture distribution business in addition to its activities as an exhibitor. The motion was granted subject to several conditions including (1) Loew's could not exhibit any films it distributed or any films in which it had a financial interest and (2) as a distributor, Loew's had to abide by the same conduct restrictions imposed by the original Paramount decree. After TriStar acquired Loew's in 1986 those two entities applied to the court for interim relief (1) to allow the exhibition of TriStar films in Loew's theatres during the important Christmas holiday season and (2) for removal of the trade practice injunctions prohibiting TriStar from conducting business as a distributor with any other exhibitors except Loew's. This relief was also granted, but on an interim basis. In 1987 TriStar and Loew's went back to the court and asked for permanent relief from the Paramount consent decrees and from the 1980 order. At that point the U.S. Justice Department offered its vigorous support for the TriStar application (based on its 1984 merger guidelines for vertical mergers) and again the TriStar/Loew's motion was granted. In effect, because of changing political conditions at the Presidential level, the U.S. Justice Department has allowed the major studio distributors to circumvent most of the restrictions imposed by the famous Paramount Consent Decrees (see "Conduct Restrictions", "Merger Guidelines", "Paramount Consent Decrees" and "Vertical Merger").

**309. Trust**--A combination of business firms or corporations formed by a legal agreement, particularly a combination that reduces or threatens to reduce competition. Although the major studio executives are smart enough to avoid or at least avoid creating evidence of the "legal agreement", the MPAA companies effectively function as a trust (see "Antitrust Law Violations", "Cartel", "Monopoly", "Oligopoly" and "Transnational Cartelization").

**310. Trust Me**--At some point in the conversation between representatives of film distributors and film producers, it is very likely that the distributor will say something to the effect of "Trust Me" or "There is going to have to be a certain amount of trust here." When that happens, the producer should look the distributor in the eye, smile and say, "Trust is for emergencies. So long as we have the opportunity to communicate, negotiate and express in writing, the way we think this transaction ought to occur, there is no need for trust. And even when a situation comes up that was not anticipated, there is no reason why we cannot communicate about that. Only in the rare circumstances that do not permit negotiation or consultation, should either of the parties to a film distribution agreement rely on trust." Unfortunately, distribution deals are commonly offered to producers on a take-it-or-leave-it basis and there is no meaningful opportunity for the producer to negotiate important terms of the deal.

**311. Turnaround Provision**--A provision in a studio development deal which provides the right to a producer or screenwriter to submit a film project to another production company or studio if the original developing production company (studio) at which the

project was being developed elects not to proceed with the production of the film (e.g., "...film project will be turned back to the producer for twelve months if the studio does not begin production within six months after the 120-day development period." Such right is often contingent upon the original developing production company's development expenses to date being repaid and sometimes the original development company may retain an interest in the film's earnings. Unfortunately, the first company's expenses are often inflated and the reasons for placing a project in turnaround are somewhat arbitrary.

**312. Twenty Percent Rule**--An informal guideline used by most of the home video companies that are wholly owned or controlled by the major film studio/distributors for determining what portion of wholesale video revenue is to be remitted to the studio/distributor as part of the studio/distributor's gross. Pursuant to such rule, an arbitrary share of 20% of the total of such monies is remitted to the studio/distributor. Thus, only 20% of the wholesale price becomes part of the distributor's gross receipts, and this severely impacts all net profit calculations in a negative way. The twenty percent rule is based on an early estimate of what video profits would be and has no relationship to the actual current numbers. Some in the industry have alleged that by uniformly applying this twenty percent rule, the studios are conspiring to deny profit participants in movies and television shows their fair share from the sale of videocassettes (see "Videocassette Revenue Reporting").

**313. Tying Arrangements**--The sale of one product on the condition that the purchaser also buy another product, or agree to not buy the other product from anyone else. A tying arrangement is a per se violation of the Sherman Antitrust Act, in that it allows the seller to exploit his or her control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. If a seller does not possess sufficient market power to cause an actual adverse effect on competition, a court will not find a tying arrangement and therefore the per se rule will not apply. Agent packaging of talent appears to be an example of a tying arrangement, but the studios do not complain since the agents who benefit from such arrangements are close friends with the studio executives being offered the deal. Informal studio arrangements with theatres to exhibit a poor to mediocre film today so that the same theatre will get special consideration when the studio's next blockbuster comes out is also a form of tying arrangement (modified block booking) which is simply difficult to prove (see "Antitrust Law Violations" and "Vertical Integration").

**314. Unauthorized Cross-Collateralization**--A feature film distributor's unauthorized offsetting of the profits of a movie against the same movie's profits in another market, against the profits of one movie against the profits of another movie produced by the same production company or against the profits of another movie produced by a different production company. A cross-collateralization provision may authorize one but not the other (see "Allocation", "Creative Accounting", "Cross-Collateralization", "Cross-Collateralization of Markets", "Cross-Collateralization of Slates", "De Facto Cross-Collateralization", "Discretionary Cross-Collateralization", "Overage" and "Unrecouped Expenses").

**315. Unauthorized Distribution**--The sale, rental or other exploitation of a film without a grant of distribution rights; an activity that the distributor may seek to prevent and in the process incur costs which are typically defined as deductible distribution expenses. Distributor association dues, fees, assessments or other levies are typically made to cover the costs of such activities conducted on behalf of its distributor members. Individual distributors may also incur such costs, but as with any distribution expense, such costs must be carefully reviewed, confirmed and adjudged reasonable to prevent over-stated expenses. The producer may want to ask the distributor if it anticipates any such costs beyond industry assessments for such activities.

**316. Uncollectible Indebtedness**--Debts owed to a debtor or creditor that are determined to be impossible or impractical to collect (e.g., debts owed by a sub-distributor, exhibitors or licensees to a film's distributor, which the distributor has determined to be uncollectible). Independent producers must be wary of unscrupulous distributors who may fraudulently claim that such debts cannot be collected when in fact they have been or will be in the future. This is another area where distributors have too much discretion and it is practically impossible for net profit participants to determine when and if the distributor is abusing that discretion (see "Bad Debts").

**317. Unconscionable Contractual Provision**--A contract provision that is so unreasonably detrimental to the interests of a contracting party as to render the contract unenforceable. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. This term refers to a bargain so one-sided as to amount to an "absence of meaningful choice" on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered into a one-sided bargain. But when a party of little bargaining power and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent was ever given to all the terms. In such a case the usual rule that the terms of an agreement are not to be questioned may be abandoned and a court may consider whether the terms of the contract are so unfair that enforcement should be withheld. That is part of what was involved in the Buchwald lawsuit against Paramount (see "Buchwald Case" and "Contract of Adhesion").

**318. Under-Reported Rentals**--The false and understated totals relating to the revenues earned by a given film as prepared and filed by the film's distributor with the film's producer and other net profit participants. If a distributor under reports its rentals on a given film and over-states its distribution expenses on the film, it is less likely to have to pay net profit participations (see "Creative Accounting").

**319. Unethical Business Practices**--Procedures and activities engaged in by commercial enterprises that are not in conformance with accepted standards. Many of the distributor business practices described herein would have to be considered unethical (see "Antitrust Law Violations", "Anti-Competitive Practices", "Blind Bidding", "Closed Bidding",

"Creative Accounting", "Five "O'Clock Look", "Franchise Agreements", "Predatory Practices", "Price Fixing" and "Reciprocal Preferences").

**320. Unfair Competition**--A tort (private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society's expectations regarding interpersonal conduct rather than by contract or other private relationship) consisting of representations or conduct that deceives the public into believing that the business name, reputation or good will of one person is that of another; unfair, untrue or misleading advertising that is likely to lead the public into believing that certain goods are associated with another entity; imitation of a competitor's product, package or trademark in circumstances where the consumer might be misled. Again, many of the distributor activities described in this monograph fall in the category of unfair competition.

**321. Unfair Negotiating Tactics**--Inequitable, unethical or unjust bargaining methods. The intentional and long-term creation of an environment in which film producers have little bargaining power in negotiations with film distributors rises to the level of an unfair negotiating tactic (see "Anti-Competitive Practices" and "Negotiation").

**322. Unfavorable Portrayal**--The negative depiction of someone or something in a motion picture. It is wrong for the motion picture industry to consistently portray any particular group of persons in a negative manner in its feature films (see "Discrimination", "Hidden Agenda" and "Prejudice").

**323. Unrecouped Expenses**--The expenses incurred in the production or distribution of a film that have not been recouped in distributing the film. Distributors sometimes seek to offset such losses with profits on other films or in other markets (see "Cross-Collateralization").

**324. Uses of Money**--The expenses or costs that are paid for with the huge revenues generated by the exploitation of Hollywood's films. Some of that money is used to keep the government at bay. Other illicit revenues are used to employ the services of some of the best hired guns for legal and legislative protection. Some is used to buy the loyalty and silence of high-profile members of the creative community. Other portions of these funds are used for outrageous producer deals on the studio lots for outgoing studio executives or "super golden parachutes" for these same individuals. Still other such monies are used for giving insider development deals to the girl friends, wives, other friends and family members of studio executives. Additional funds are used for philanthropic purposes to help gloss over what's really going on in Hollywood and to soften potential sources of criticism. Still other profits are used to attract other people's money to cover the costs associated with the production and release of the movies the Hollywood insiders choose.

**325. Usury**--An unconscionable or exorbitant rate of interest; an excessive and illegal requirement of compensation for forbearance on a debt (interest). State legislatures in each state determine the maximum allowable rates of interest that may be demanded in any financial transaction, however, usury laws generally do not apply to corporate

borrowers. Usury is one of the common activities of organized crime. When the major studios charge similar excessive interest on loans to producers, that same or similar practice is made legal simply because the studio insists that the producer be incorporated.

**326. Vertical Integration**--The unified ownership of several different levels of production and distribution in the same industry (e.g., a film industry in which the same owner is allowed to own or control a studio facility, a production company, a distribution entity, exhibitor chain or any two of the above which deal directly with each other, is vertically integrated). Following the issuance of the U.S. Justice Department merger guidelines and the TriStar Case, questions relating to whether film industry companies are vertically integrated at the distributor/exhibitor levels, and if so, whether such integration makes it more difficult for other companies to compete at those levels of the industry without being vertically integrated have been pivotal to the analysis regarding the anti-competitive effects of vertical mergers in that industry. Rampant vertical integration in the film industry is obviously anti-competitive, but a politically influenced Justice Department has figured out a way to avoid the obvious (see "Anti-Competitive Practices", "Antitrust Law Violations", "Blind Bidding", "Formula Deal", "Major Exhibition Chains", "Merger Guidelines", "Number of Screens", "Paramount Consent Decrees", "Transnational Cartelization", "TriStar Case" and "Vertical Merger").

**327. Vertical Merger**--The combining of the ownership of two companies at different levels in a given industry (e.g., the combining of a feature film distribution company with an exhibitor. From the perspective of the film industry, the recent AOL/Time-Warner merger was a vertical merger, in the sense that products produced by the Time-Warner subsidiary Warner Bros. will be sold through another level of the same corporate conglomerate (see "Merger Guidelines")

**328. Vertical Price Fixing**--Price Fixing engaged in by members of different levels of production, such as manufacturer and retailer. It is difficult to see how the extensive vertically integrated film industry corporations can avoid vertical price fixing (see "Antitrust Law Violations", "Price Fixing" and "Videocassette Revenue Reporting").

**329. Victimless Crime**--Criminal activities that cause no harm. The attitude of many relating to Hollywood is that no one is harmed by the unfair, unethical, unconscionable, anti-competitive, predatory and illegal business practices of the major studios. With all of the admiration one might muster for such a thing, some may reasonably choose to describe the Hollywood game as the "perfect crime". Its victims go far beyond the small production, distribution and exhibition companies in this country and around the world that are unfairly squeezed out of the marketplace each year by the predatory business practices of the majors, far beyond the many screenwriters whose ideas and screenplays are stolen annually without sufficient remedy, far beyond the diverse community of "outsider" filmmakers whose many stories cannot be told through film because they've been shut out of Hollywood, far beyond the thousands of struggling members of the creative community who don't even realize the playing field is tilted in favor of the Hollywood insiders (or if they do, they're so fearful of being blacklisted they won't speak out), far beyond the hundreds of attractive young men and women who are lured to

Hollywood every year by prospects of fame and fortune, only to end up having to sell their bodies to survive, or even worse, literally never being heard from again, far beyond all those persons who are cheated out of their fair share of the economic upside of their own films, far beyond the millions of moviegoers who are regularly deceived about the subject, suitability or quality of the films they pay money to see, far beyond the thousands of college level film students who have been misled into thinking there are reasonable opportunities waiting for them in the U.S. film industry, far beyond segments of the U.S. academic community whose intellectual honesty has been compromised by Hollywood intimidation -- to all citizens who have to cope with the powerful negative impact of irresponsible visual images and biased motion pictures on all of the world's societies.

**330. Videocassette Revenue Reporting**--The videocassette market was once the fastest growing revenue source for films, thus, the major studios created wholly-owned subsidiaries or joint ventures to act as videocassette manufacturers and these entities typically only pay 20 percent of wholesale receipts as a royalty fee to the parent company. In other words, unlike other areas of motion picture revenue reporting, home video is handled on a royalty basis (more like the record industry) rather than remitting the distributor's share of the wholesale revenues on a distribution fee basis. The system then switches back to the distribution fee basis at the distributor level, since the parent distributor, in turn, charges a distribution fee (usually about 30%) leaving only a very small percentage remaining for profit participants. In addition to allowing a studio/distributor to take a fee on a related company transaction, this structure and these calculations permit the distributor to keep a disproportionate share of videocassette revenues. In situations, where the distributor is participating in the wholesale revenues of the video company, producers must address this issue in negotiations relating to the distribution agreement and seek to substitute a reasonable distribution fee for the typical 20% royalty at the wholesale level so that the distributor will include a higher percentage of the wholesale revenues in its gross. This in turn may allow the profit participants to participate in a larger net profit pool. In addition, the producer should seek to reduce the distribution fees being taken by the distributor in recognition of the fact that the distributor is also sharing in the wholesale revenues of its wholly-owned or subsidiary video company.

**331. Waiver of Droit Moral**--The intentional and voluntary giving up, relinquishment, or surrender of the rights known as droit moral (French for moral right). Moral rights refer to the right of an author or artist (such as a film producer or director) to object to any deformation, mutilation or other alteration of his or her work. Although the term is widely recognized in civil law countries, it is not mentioned in the U.S. Copyright Act. Nevertheless, a right analogous to moral right has been recognized in this country in several situations in which the integrity and reputation of an artistic creator was protected by the courts. The express grounds on which common law protection has been given include libel, unfair competition, copyright and the right of privacy. The right of droit moral gives the author of a work certain power to prevent changes, notwithstanding the provisions of his or her contract (e.g., a director may be able to prevent cutting and editing of his or her picture, except for editing for television and censorship). Producers



should be aware that film distribution agreements often contain such a waiver and unless the producer is satisfied with the provisions of the distribution agreement with respect to the distributor's editing rights, as discussed above at "Creative Control", the producer should try to delete any attempted waiver of droit moral rights (see "Creative Control").

**332. Warranty**--An assurance by one party to a contract of the existence of a fact upon which the other party may rely, intended precisely to relieve the promisee of any duty to ascertain the fact, and amounting to a promise to indemnify the promisee for any loss if the fact warranted proves untrue. Such warranties are either made overtly (i.e., express warranties), or by implication, (i.e., implied warranties). In a film distribution agreement the distributor typically requires producer warranties and representations regarding the quality of the picture (i.e, it will be fully edited, titled, synchronized with sound and of a quality, both artistic and technical, for general theatrical release), as well as for numerous other matters relating to content, ownership, the discharge of the producer's obligations, no infringements, no advertising matter, no impairment of rights granted, valid copyright and MPAA rating. On the other hand, film distributors seldom provide many warranties relating to their side of the bargain, if any (see "Covenant of Good Faith and Fair Dealing").

**333. Warranty of Quiet Enjoyment**--A warranty required by film distributors and given by the producer providing that the producer does not know of any actual, or potential, adverse claims which might be made against the distribution of the picture (i.e, the producer warrants that the distributor has the right to the unimpaired use and enjoyment of the film property). Again, distributors often require such warranties from producers but seldom provide similar warranties themselves. Some distribution agreements are even worded in a manner that is asking the producer to warrant against matters not even known or knowable as of the date the agreement was signed.

**334. We're Different**--Often distributors will make oral representations early in discussions with producers that their distribution organization is not typical of other feature film distributors, (i.e., suggesting indirectly that they do not conduct their activities in a manner substantially characterized as described herein). The proof of such self-serving descriptions, should lie in the actual conduct of the distributor over a period of time and in a consistent pattern of behavior that avoids many of the business practices described in this monograph. Now that the Internet exists, it would be feasible for an organization like an association of independent feature film producers to create a site where complaints relating to specific distributor activities could be posted for other producers to see.

**335. White-Collar Crime**--A phrase connoting a variety of frauds, schemes, corruptions and commercial offenses committed by business persons, con artists and public officials; a broad range of non-violent offenses that have cheating and dishonesty as their central element. Many of the distributor activities described in this monograph fall within the parameters of white-collar crime (see "Fraud" and "Racketeering").

**336. Withholding**--Another form of over-budget penalty sometimes imposed by a studio that is financing the production of a film, in which the studio will withhold a significant amount of the producer's fee until delivery of the film's answer print. If the picture is delivered within budget the producer receives his or her complete fee, but if the film has gone over budget, the producer has to wait until first net profits to receive the balance as a deferment. Such withholdings are commonly excessive (see "Double Add-Back" and "Over-Budget Penalty").

**337. Year End Adjustments**--Changes in the accounting statements on a motion picture made at the end of a given year. The authority to make such adjustments is commonly provided for in the film distribution agreement in relation to the net profits computation. Such adjustments are ostensibly made to make corrections and/or to report items overlooked. Such provisions give the film distributors a free hand in overlooking revenues, and if anyone complains, they can then adjust if they choose to (see "Selling Subject to Review" and "Settlement Transaction").

## BIBLIOGRAPHY

"Antitrust Developments in Sports and Entertainment Law", Paul J. Tagliabue, *Antitrust Law Journal*, 1987.

*Art Murphy's Box Office Register*, 1990.

"Bank Financing of a Motion Picture Production", Jill Mazirow Eshman, *Loyola of Los Angeles Entertainment Law Journal*, 1992.

"Blind Bidding: A Need For Change", Keith M. Gregory, *Beverly Hills Bar Journal*, Winter 1982-1983.

"Block Booking--Perhaps Forgotten, Perhaps Misunderstood, But Still Illegal", Gerald F. Phillips, *The Entertainment and Sports Lawyer*, Vol. 6, No. 1, Summer 1987.

*Blue Sky Law Reporter*, Commerce Clearing, House, Inc., 1984.

*Breaking Through, Selling Out, Dropping Dead and Other Notes on Filmmaking*, William Bayer, First Limelight Edition, 1989.

Buchwald v. Paramount Pictures Corp. and the Future of Net Profit, Adam J. Marcus, *Cardozo Arts & Entertainment Law Journal*, Vol. 9, 1991.

*California Corporate Practice Guide*--2nd Ed, Morgan D. King, Lawpress Corporation, 1989.

"Commissions to Non-Broker/Dealers Under California Law", Elena R. Freshman, *Beverly Hills Bar Journal*, Volume 22, Number 2.

"Competition and Diversity Among Radio Formats: Legal and Structural Issues", Theodore L. Glasser, *Journal of Broadcasting*, Vol. 28:2, Spring 1984.

"Contingent Compensation for Theatrical Motion Pictures", David Nochimson and Leon Brachman, *The Entertainment and Sports Lawyer*, Vol. 5, No. 1, Summer 1986.

*Counseling Clients in the Entertainment Industry* (seminar), Martin E. Silfen, Chairman, Practicing Law Institute, 1989.

*Dark Victory (Ronald Reagan, MCA, and the Mob)*, Dan E. Moldea, Penguin Books, 1987.

"Defining Net Profits, Shares for a Motion Picture Deal", Edward E. Colton, *New York Law Journal*, September 30, 1988.

*Delson's Dictionary of Motion Picture Marketing Terms*, Donn Delson and Stuart Jacob, Bradson Press, Inc., 1980.

"Determining Damages for Breach of Entertainment Agreements", Melvin Simensky, *The Entertainment and Sports Lawyer*, Vol. 8, No. 1, Spring 1990.

*Dictionary of Finance and Investment Terms--2nd Ed*, John Downes and Jordan Elliot Goodman, Barron's Educational Series, Inc., 1987.

*Dictionary of Media Terms*, Edmund Penney, G.P. Putnam's Sons, 1984.

"The Director's Right of Final Cut--How Final Is Final?", John J. Dellaverson, *The Entertainment and Sports Lawyer*, Vo. 7, No. 1, Summer/Fall 1988.

*Distributing Independent Films & Video*, edited by Morrie Warshawski, The Media Project (Portland, Oregon) and Foundation for Independent Video and Filmmakers (New York), 1989.

*Encyclopedia of Exhibition*, National Association of Theatre Owners, 1990.

"Entertainment Financing for the '90s: Super Pre-Sales", Schuyler M. Moore, Stroock & Stroock & Lavan *Corporate Entertainment Newsletter*, Vol. 1, Q1 1992.

*Entertainment Industry Contracts; Negotiating and Drafting Guide*, Donald C. Farber- General Editor, Matthew Bender, 1990.

*Entertainment Industry Economics*, Harold L. Vogel, Cambridge University Press, 1986 & 1990.

*Entertainment Law*, Melvin Simensky and Thomas Selz, 1984.

*Ernst & Young Business Plan Guide*, Eric S. Siegel, Loren A. Schultz, Brian R. Ford and David C. Carney, John Wiley & Sons, 1987.

*Fatal Subtraction: How Hollywood Really Does Business*, Pierce O'Donnell and Dennis McDougal, Doubleday, July, 1992.

*Feature Development: From Concept to Production*, (seminar) Independent Feature Project/West, November, 1991.

"Feature Film Limited Partnerships: A Practical Guide Focusing on Securities and Marketing for Independent Producers and Their Attorneys", John W. Cones, *Loyola of Los Angeles Entertainment Law Journal*, 1992.

*Federal Tax Coordinator 2d*, Research Institute of America, Inc., 1990.

"Film Directors Agreements", Marc Jacobson, *The Entertainment & Sports Lawyer*, Vol. 8, No. 1, Spring 1990.

"Film Studios Threaten Retaliation Against States Banning Blind Bids", *Los Angeles Times*, June 1, 1981.

*Film-TV Law*--3rd Ed, Walter E. Hurst, Johnny Minus and William Storm Hale, Seven Arts Press, Inc., 1976.

*Filmmaker's Dictionary*, Ralph S. Singleton, Lone Eagle Publishing Co., 1990.

"Financial Guidelines for Investing in Motion Picture Limited Partnerships", L. M. Farrell, *Loyola of Los Angeles Entertainment Law Journal*, 1992.

"Financing the Production of Theatrical Motion Pictures", Lionel S. Sobel, *Entertainment Law Reporter*, May, 1984.

*Financing Your Film*, Trisha Curran, Praeger Publishers, 1985.

"Foreign Productions and Foreign Financing--The Canadian Perspective", Michael A. Levine and David B. Zitzerman, *The Entertainment and Sports Lawyer*, Vol. 5, No. 4, Spring 1987.

*Hollywood Reporter*, (a world entertainment news daily publication) published by Billboard Publications, Los Angeles, California (numerous issues from 1986 through early 1992).

*Hollywood Reporter Blu-Book*, Billboard Publications, 1990.

"Hollywood's Hard Times", Jeffrey Goodell, *Premiere*, January, 1992.

*How Contracts Escalate into Torts*, Kurt E. Wilson, *California Lawyer*, January, 1992.

"How to Draft Multi-Picture Deals", Nigel Sinclair, *Entertainment Law & Finance*, January, 1987.

"How to Negotiate Contracts, Deals in the Movie Industry", Edward E. Colton, *New York Law Journal*, September 23, 1988.

*Independent Feature Film Production*, Gregory Goodell, St. Martin's Press, 1982.

"Insolvency and the Production and Distribution of Entertainment Products", Stephen Chrystie, David Gould and Lou Spoto, *The Entertainment and Sports Lawyer*, Vol. 6, No. 4, Spring 1988.

"The Last Emperor and Co-Producing in China: The Impossible Made Easy, and the Easy Made Impossible", Simon M. Olswang, *The Entertainment and Sports Lawyer*, Vol. 6, No. 2, Fall 1987.

*Law and Business of the Entertainment Industries*, Biederman, Berry, Pierson, Silfen, and Glasser, Auburn House, 1987.

*Law Dictionary*--2nd Ed, Steven H. Gifis, Barron's Educational Series, Inc., 1984.

*Legal Aspects of Film Financing*, Barsky, Hertz, Ros & Vinnik, April, 1990.

"Long-Term Contracts for Independent Producers", Nigel Sinclair, *Entertainment Law & Finance*, November, 1986.

"Making Millions and Going Broke, How Production Companies Make Fortunes and Bankrupt Themselves", David Royal, *American Premiere*, November/December 1991.

"Masters of the Deal", Cameron Stauth, *American Film*, May, 1991.

"Maximizing Producers' Negative Pick-Up Profits", John W. Cones, *Entertainment Law & Finance*, Vol. VIII, No. 3, June, 1992.

*Media Law*, Ralph L. Holsinger, McGraw-Hill, Inc., (2nd edition), 1991.

"Miramax Films Corp. V. Motion Picture Ass'n of Amer., Inc. The Ratings Systems Survives, for Now", David Greenspan, *The Entertainment and Sports Lawyer*, Vol. 9, No. 2, Summer 1991.

*Motion Picture Finance*, (seminar) Paul Kagan Associates, Inc., November, 1991.

*Motion Picture Investor*, (newsletter) Paul Kagan Associates, Inc., June and December issues, 1990.

"Movie Companies, TV Networks and Publishers Have Been Forced to Audition the Same Act: Cost Cutting", Kathryn Harris, *Forbes*, January 6, 1992.

*Movie Industry Update--1991*, Goldman Sachs (Investment Research), 1991.

*Music Theory Dictionary*, Dr. William F. Lee, Hansen Publications, Ltd., 1966.

*NASD Manual*, National Association of Securities Dealers, Inc., September 1990.

"Net Profit Participations in the Motion Picture Industry", Hillary Bibicoff, *Loyola Entertainment Law Journal*, Vol. 11, 1991.

*Never Enough: The "A" Deal, Business, Legal and Ethical Realities*, Sixteenth Annual UCLA Entertainment Symposium, February, 1992.

*Off-Hollywood: The Making & Marketing of American Specialty Films*, David Rosen and Peter Hamilton, The Sundance Institute and the Independent Feature Project, 1986.

"One Producer's Inside View of Foreign and Domestic Pre-Sales in the Independent Financing of Motion Pictures", Arnold Kopelson, *Loyola of Los Angeles Entertainment Law Journal*, 1992.

"Opportunities Knock (Co-Production Possibilities with Japan and Britain)", Kathryn Bowser, *The Independent*, November, 1991.

"The Paramount Cases: Golden Anniversary in a Rapidly Changing Marketplace", Charles W. "Tim" McCoy, Jr., *Antitrust*, Summer 1988.

"Pattern of Racketeering Activity-A Jury Issue", Michael A. Bertz, *Beverly Hills Bar Journal*, Vo. 26, No. 1, Winter, 1992.

"Pick-Ups, Pre-Sales and Co-Ventures", P.J. Abode, *Montage* (IFP/West publication), Winter 1991/1992.

"Profit Participation In The Motion Picture Industry", Sills, Steven D. and Axelrod, Ivan L., *Los Angeles Lawyer*, April, 1989.

*Producer's Masterguide*, Billboard Publications, Inc., 1989, 1990 & 1991.

"Producing a Film in Canada--The Legal and Regulatory Framework", David B. Zitzerman and Michael A. Levine, *The Entertainment and Sports Lawyer*, Vol. 8, No. 4, Winter 1991.

*Producing, Financing and Distributing Film--A Comprehensive Legal and Business Guide*, 2nd edition, Paul A. Baumgarten, Donald C. Farber and Mark Fleischer, Limelight Editions, 1992.

*Projecting Profits from a Motion Picture* (excerpts from an unpublished work), David J. Leedy, presented Fall 1991, for UCLA Extension class: "Contractual Aspects of Producing, Financing and Distributing Film".

"Pursuing a Business Fraud RICO Claim", Michael A. Bertz, *California Western Law Review*, Vol. 21, No. 2, 1985.

"The Recent Acquisition of Theatre Circuits by Major Distributors", Gerald F. Phillips, *The Entertainment and Sports Lawyer*, Vol. 5, No. 3, Winter 1987.

*Reel Power, The Struggle for Influence and Success in the New Hollywood*, Mark Litwak, William Morrow and Company, Inc., 1986.

"Representing Independent Motion Picture Producers", Sinclair and Gerse, *Los Angeles Law*, May, 1988.

"Role of Completion Bonding Companies in Independent Productions", Mark C. Phillips, *Loyola of Los Angeles Entertainment Law Journal*, 1992.

*Role of Production Counsel in Feature Films*, Beverly Hills Bar Association Education Publications.

*Screenplay--The Foundations of Screenwriting*, Syd Field, Dell Publishing Co., Inc., 1985.

*Securities Regulation--3rd Ed*, David L. Ratner, West Publishing Company, 1989.

*Securities: Public and Private Offerings--(Rev Ed)*, William M. Prifti, Callaghan & Company, 1980.

"Structuring Film Development Deals", Marc Jacobson, *Entertainment Law & Finance*, September, 1990.

*Successful Producing in the Entertainment Industry*, Mark Litwak, UCLA Extension, 1990.

*Tax Literacy for the Business Lawyer*, Continuing Education of the Bar, California (seminar handout, September 1991).

*Tax Shelters--The Basics*, Arthur Andersen & Co., Harper & Row, Publishers, 1983.

*Tax Shelters--The Bottom Line*, Robert A. Stanger, Robert A. Stanger & Company, Publisher, 1982.

*Television Writing (From Concept to Contract)*, Richard A. Blum, Focal Press, 1984.

"Unreported Decisions and Other Developments (RICO and Entertainment Litigation)", Richard L. Feller, *The Entertainment and Sports Lawyer*, Vol. 3, No. 2, Fall 1984.

"U.S./Foreign Film Funding (Co-Production Tips)", Nigel Sinclair, *Entertainment Law & Finance*, March, 1991.

*Variety* (Weekly and Daily Editions), Cahners Publishing Company, (numerous issues 1986-early 1992).

"What to Include in Pacts Between Author & Film Co.", Edward E. Colton, *New York Law Journal*, October 7, 1988.

"What's Really Going On In Hollywood--And How It Affects You", John W. Cones, unpublished essay, 1992.

*Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Company, Publishers, 1976.

*Writers Guild of America Theatrical and Television Basic Agreement*, 1988.

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Mr. Cones is a 1967 graduate of the University of Texas at Austin with a Bachelor of Science degree in Communications and a 1974 graduate of the UT Austin School of Law with a Doctor of Jurisprudence degree.



Prior to 1975 Mr. Cones was a Radio-Television News Reporter at KTBC (Channel 7) television, Austin where he worked at varying times as a television news anchor, general & film assignments, sports and weather. Mr. Cones worked at KTBC full-time while attending law school at UT Austin. He had also performed on-the-air duties previously at KRIS-TV Corpus Christi & KITE radio in San Antonio.

In 1975 he served as legislative counsel to the Texas House of Representatives. In that position he drafted, edited and reviewed state legislation, counseled legislator sponsors with respect to constitutional requirements and supervised union proof-readers.

During the years 1976 through 1981, Mr. Cones worked as a lobbyist association executive and in-house counsel for professional associations headquartered in Austin and Chicago. In those positions he prepared and delivered congressional testimony, drafted legislation, wrote and edited books, magazines, newsletters, speeches and press releases; was involved in long term planning, board meetings, conventions, seminars, staff supervision and the associations' membership activities.

Mr. Cones engaged in the private practice of law in Houston and Dallas from 1981 through 1986. In that practice he supervised state securities compliance aspects of Regulation D (private placement) limited partnership and corporate offerings (including movie production/distribution, oil and gas, real estate, equipment leasing, night clubs, restaurants, cattle breeding/feeding, thorough-bred breeding and medical technology. In his securities law practice, Mr. Cones has participated in the preparation of disclosure documents and the supervision of federal/state compliance for 130+ public or private limited partnership, investment contract or corporate stock offerings. In addition, he has worked with clients who sought active investor financing of their entertainment projects utilizing investor financing agreements and joint venture entities. Mr. Cones moved his law practice to California in 1987 specifically to work with independent film, television, video and theatrical producers in the manner described above.

Mr. Cones is the author of state and national association magazine articles and his law journal article "Feature Film Limited Partnerships" was published in the January 1992 edition of the *Loyola of Los Angeles Entertainment Law Journal*. He is also the author of a book entitled *Film Finance and Distribution--A Dictionary of Terms*, a dictionary with more than 3,600 entries relating to film finance and distribution in which such terms are defined, discussed and explained. The terms in this monograph were extracted from this larger work. He also wrote the *Entertainment Law & Finance* article "Maximizing Producers' Negative Pick-Up Profits" (June 1992).

He has lectured extensively (in Los Angeles, Las Vegas, Dallas, Houston and San Francisco) on "Investor Financing of Entertainment Projects" for the American Film Institute, the University of Southern California Cinema-Television Alumni Association, UCLA Extension, Loyola Marymount Continuing Education Division, Cinetex '90 and other film industry organizations. Mr. Cones has also presented a one-day UCLA

Extension sponsored seminar on "The Film Distribution Deal" and appeared as a guest speaker on film finance and distribution in the UCLA extension evening courses "Financing Feature Film Production" and "Contractual Aspects of Producing, Financing and Distributing Film".