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One Sided World

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In the entertainment industry, highly desirable producers, directors, writers and actors are often able to negotiate for "back-end" profit participation on projects. These profit participants share either in the gross or net receipts of a given project or receive a deferment, i.e., a lump sum payment when the receipts of a film reach a pre-negotiated level. Deals based on "gross revenues," traditionally reserved for highly desirable talent, are increasingly uncommon, with the majority of profit participants receiving a share of "adjusted gross" or net receipts, where many deductions are made. It has been estimated that less than five percent of productions "earn out" and go into profits. Six studios—Disney, Sony/Columbia Pictures, Paramount/CBS, NBCUniversal, Warner Bros., and Twentieth Century Fox (the "Studios")—control the entertainment industry and wield enormous power in negotiating contingent compensation contracts with talent. But for those players fortunate enough to obtain the right to receive contingent compensation, the Studios have created serious impediments to hinder profit participants from obtaining fair accounts for the fruits of their labor.

First, while contingent compensation contracts typically include accounting and audit provisions, the Studios make auditing as onerous as possible. The Studios always require forensic auditors to sign strict confidentiality agreements before commencing an audit. The Studios claim they do this because the business is competitive, but auditors and the plaintiffs' bar believe it is done to ensure that other profit participants (sometimes ones on the same property) will not discover the Studios' unfair practices. This is underscored by the general practice that when "errors" are discovered and/or adjustments are made, the Studios do not necessarily correct the error retroactively or going forward for other profit participants on the same property or as to other properties where there may be similar wrongdoing. The confidentiality requirement allows this practice. An auditor may represent two clients on the same property but cannot tell either what he has learned from each respective audit. Consider this real situation: an auditor did an audit for a producer and later for an actor on the same television show. The auditor could not advise the actor what he learned in the first audit. Further, this may cause the audit to be cost prohibitive for the actor. Sometimes the Studios will permit joint audits.

Virtually all agreements restrict access to audit records covering an incontestable time period and incorporate artificial "contractual" statutes of limitation to make objections and file litigation. Agreements often contain clauses that waive punitive damages and/or injunctive relief to try and knock out otherwise legitimate claims. While these contractual limitations are often upheld, some courts have found these provisions unenforceable where they are held to be unreasonable. At least one court has ruled that such a provision was barred because the talent

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could not possibly know an audit was warranted. *See Davis v. Capitol Records*, 2013 WL 1701746 (N.D. Cal.).

The Studios have a reputation for refusing to provide documents to auditors on many types of data sought, including "overall deals" of various kinds, such as pay cable, VOD, SVOD and EST deals, for example, which could lead to the discovery of unfair allocations to the detriment of in connection with those agreements or other monetary hanky-panky. One studio, Universal, even has a "policy" where the studio refuses to provide talent with copies of their own contract where the talent has misplaced or lost the original, so that a lawsuit must be brought to obtain the same.

The Studios sometimes prevent auditors from doing more than one audit at the same time and/or from working on a contingency basis (though they may allow auditors to audit for the same project, but require a "Chinese wall" to be erected between or among the talent). Some agreements provide that the auditor must be approved by the studio, and from a "nationally recognized firm." The problem with this is that there are only four major profit participation auditing companies, all based in Los Angeles. Moreover, why shouldn't one be able to pick one's forensic accountant, just as one should be able to pick any other professional, such as a lawyer or a dentist? At least one studio has asserted that auditors who leave firms they have previously allowed to audit because they are "nationally recognized" are not qualified when they set up on their own. This egregious "rule" means that as the other auditing companies "age out," the pool of authorized auditors will become even smaller, making auditing all the more difficult for talent. (Disclosure: the authors are currently litigating this issue with Disney.)

Auditors complain that the Studios intentionally under-staff the audit departments so that even when audits are granted they can take many years—three or more—just to be scheduled and take even longer to settle. Most audits settle because still working talent is understandably fearful of being blackballed. Aging talent and heirs of talent are not so intimidated, except by the cost involved. It is not uncommon for audits to cost talent tens of thousands of dollars and talent-imposed attempts to limit the costs of a particular audit can expose talent to certain risks associated with failing to conduct a diligent audit.

For years the biggest issue facing talent has been mandatory arbitration provisions. In nearly all agreements entered into during the last fifteen years the Studios have almost uniformly required that any controversies be heard in a confidential, binding arbitration, before one provider — JAMS — thus preventing the establishment of precedent and any of the publication of information unfavorable to the Studios. These arbitration agreements are invariably "non-negotiable" when deals are made (even for top talent) because the Studios are fearful of juries, public judges and the public disclosure of any wrongdoing. Since *Buchwald v. Paramount Pictures Corp.*, 1990 WL357611 (Cal. Supp. Ct.), when Eddie Murphy dubbed net profits "monkey points, "and generally the public was advised that net profits were usually illusory, the

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