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19 LYLAELJ 523

(Cite as: 19 Loy. L.A. Ent. L.J. 523)

Loyola of Los Angeles Entertainment Law Journal 1999

***523 SURVIVING TITANIC: INDEPENDENT PRODUCTION IN AN INCREASINGLY CENTRALIZED FILM INDUSTRY**

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Introduction

Independent films received four of the five 1997 Academy Award nominations for “Best Picture.” The Crying Game,¹ Pulp Fiction,² and Four Weddings and a Funeral³ reached previously unheard of box office figures for independent films in the United States. Hundreds of independent submissions flood film festivals each year. Established independent companies like Miramax, New Line, and October have been purchased by studios. The independent film business, by all accounts, is an increasingly important component of an increasingly large American industry.

This success follows a period in which numerous independent film companies failed as the motion picture industry became more centralized. Time, Warner and Turner merged (after Turner had acquired New Line and Castle Rock), as did Disney-ABC and Paramount-Viacom.⁴ Meanwhile, the average cost of producing and marketing films has skyrocketed --Titanic⁵ alone cost well over \$200 million to produce and has generated theatrical gross receipts of \$1.8 billion.⁶ This

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¹ The Crying Game (Miramax 1992).

² Pulp Fiction (Miramax 1994).

³ Four Weddings and a Funeral (PolyGram Filmed Ent. 1994).

⁴ Turner acquired New Line and Castle Rock. See Rex Weiner, Kerkorian: Lion King Once Again, *Variety*, July 22-28, 1996, at 1. Later, Time, Warner and Turner merged. Id. Disney acquired ABC. See Harvey Enchin, Canuck Companies Make a Deal To Merge, *Variety*, Sept. 7-13, 1998, at 42. Viacom acquired Paramount. See Jenny Hontz & Martin Peers, Ailing Webs Gird for Change, *Variety*, Sept. 20-26, 1998, at 19.

⁵ Titanic (Twentieth Century Fox 1997).

⁶ Titanic's approximately \$1.2 billion in international box office gross receipts exceeded the cumulative international box office receipts for every studio's entire slate of pictures in 1998 except for Buena Vista. Jon Herskovitz, Great '98 for Japan, *Daily Variety*, Jan. 26, 1999, at 16. As an example of its dominance, Titanic alone

staggering success *524 encourages studios to expend their resources on developing the next Titanic,⁷ Jurassic Park,⁸ or Star Wars⁹ and control the means to exploit such pictures in every possible way.

Such size and consolidation may foreshadow a day where the world's communication, entertainment and even educational needs are controlled by a small number of international behemoths. Does this signal a new trend or merely a continuation of traditional studio power?

The American film industry is of vital importance. The entire entertainment business has become essential to the American economy as perhaps our second most successful export industry.¹⁰ It is even more central to the economy of Los Angeles and California.¹¹

The international cultural impact of American films is perhaps the primary way America influences people throughout the world. Thus, to the extent most of our programming is produced by or for the studios, they are essential to our economic and cultural well-being.

But independent production also has become an important economic factor¹² and remains the source of new ideas and new talent necessary for the film industry to flourish. Thus, despite the inherent tension between the studios and independent producers, the independent side of this equation can and should be nourished. Independent productions help maintain the industry's economic and artistic strength and resiliency, which consequentially benefits the studios. Steven Spielberg has said, "I think the independent revolution is the most exciting thing that's happened since the French New Wave. The independent film has always been with us, but its never had this commercial reception."¹³

***525 A. The Studio System and Independent Production**

One commentator described the studios as:

[M]eshing into a vast interlocking system, unified by standardized production and marketing practices, a code of acceptable content, and an increasingly stable system of technical and narrative conventions. These manifested a narrower sense of audience interest and public taste, which in turn limited what passed in Hollywood as a viable story property. The prospect of

accounted for \$220 million of Japan's 1998 box office receipts--approximately 13 percent of all such revenues in Japan from all films that year. Id.

⁷ Titanic (Twentieth Century Fox 1997).

⁸ Jurassic Park (Universal 1993).

⁹ Star Wars (Twentieth Century Fox 1977).

¹⁰ Cf. Don Groves, Mouse: All-Mighty, Daily Variety, Jan. 13, 1997, at 5, 43. The studios reported theatrical box office for their films in excess of \$5.5 billion outside of North America in 1996, an increase of \$400 million over the previous year. Id.

¹¹ Robert Lansing, Brand Name: Entertainment Has Become the Defining Industry for the City of Los Angeles, The Hollywood Rep., Dec. 7, 1998, at S- 1. From 1990 to 1997, film, television and commercial production "boosted employment by more than 95,000 jobs" in the Los Angeles area, becoming the fifth largest city employer with 239,000 employees. Id. The industry "infused \$10.5 billion into the local economy from 1992 through 1996." Id. "By some estimates, entertainment at its broadest definition will grow to as large as a \$40-billion annual business in California by 2000." James Bates, In Local Economy, Hollywood is Star, L.A. Times, Jan. 18, 1998, at A1.

¹² Kenneth Turan, The Thrill Isn't Gone, L.A. Times, Dec. 28, 1998, at F1, F4.

¹³ Id.

anything truly innovative or distinctive being produced in Hollywood was becoming more remote . . .¹⁴ Perhaps surprisingly, this writer was analyzing the film studios of the mid-1930s.¹⁵

To a great extent, the studio system was held together by three crucial elements: (1) strong-willed individual leadership; (2) control of talent through exclusive contracts; and (3) merged film production, distribution and exhibition capabilities. Individual leadership changed over time, causing studios to grow, collapse, and rebuild. Nevertheless, control over talent, distribution and exhibition remained the essence of the system.

A 1948 Supreme Court antitrust ruling and resultant consent decrees required the studios to sell their theaters, which started a revolution in the film industry.¹⁶ The Justice Department argued that such a ruling was needed to diversify film content, that only by opening distribution channels “to all may the fullest diversity of film content be had.”¹⁷ The Justice Department suggested the need “to satisfy the wide variety of tastes possessed by the potential American film audience, rather than a standardized mass product adapted to profitable exhibition in a controlled market.”¹⁸

Change continued as individual actors and directors loosened the grip of exclusive services agreements, and began to work on a picture-by-picture basis. New technology, in the form of television, challenged the vision of studio leadership. One result was a substantial increase in independent production and the emergence of large, stand-alone exhibitors and independent theater owners.

Nevertheless, the apparent demise of the original studio system--while causing great shifts in exhibition and talent--has not resulted in independent film producers holding any meaningful power. Rather, collapse of the studio system only changed the nature of the studios' stranglehold on the film business: the increasing cost of production and marketing¹⁹ allows the studios, due to their control over available capital and film libraries, to build distribution systems (even without exhibition), which in turn exclude most competition. As the studios bid up the price of talent²⁰ and marketing (despite their complaints about cost), they make it exceedingly difficult for smaller, independent companies to compete--the most important actors, writers and directors insist upon the best possible distribution for their pictures and/or nobody else can afford their salaries.

¹⁴ Thomas Schatz, *The Genius of the System* 198 (1988).

¹⁵ *Id.*

¹⁶ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). For a good discussion of changes in exhibition practices at that time, see Ralph Cassady, Jr., *Impact of the Paramount Decision on Motion Picture Distribution and Price Making*, 31 *S. Cal. L. Rev.* 150 (1958).

¹⁷ Otto Friedrich, *City Of Nets* 349 (1997).

¹⁸ *Id.*

¹⁹ Leonard Klady, *Studios Ring Out '96 with B.O. Up 7.9%*, *Daily Variety*, Jan. 2, 1997, at 1, 26. The Motion Picture Association of America (“MPAA”) announced that studio pictures averaged \$36.4 million to produce and \$17.7 million to market. *Id.* However, some observers believed that average marketing costs per picture were actually in the range of \$25-30 million. *Id.*

²⁰ Columbia's decision to sign Jim Carrey for \$20 million to star in *The Cable Guy* not only increased the fees payable to other “A” lead actors, but also increased the salaries available for many other artists on studio films. Dan Cox, *Exex Stand Tough on Big Ticket Pix*, *Variety*, Apr. 7-13, 1997, at 32; see Ted Johnson, *Can \$20 Mil Fill the Bill*, *Variety*, Dec. 9-15, 1996, at 1.

This centralization of capital, production and distribution helps keep the motion picture system unfriendly or even inaccessible to most independent producers. Yet, despite such economic centralization of commercial filmmaking, non-studio films have grown in number and may continue to do so--even if they usually cannot find major (or any substantial) distribution.

Reasons for this growth in independent films include the fact that filmmaking is also an art form and, as happened in past centuries with novels and paintings, new artists cannot be denied by censorship, social pressure or economic deprivation. Economic hardship even becomes a source of creative inspiration, if not a badge of true independence. Film production is a democratic medium, particularly with new technology which allows those with little money an opportunity to make films with consumer equipment.²¹

*527 Filmmaking and film watching are also deeply rooted international activities which many nations see as essential to develop or symbolize their unique cultural attributes. Finally, production is necessary for television, advertising, educational, non-theatrical, and industrial purposes, thus assuring new artists a means of developing their craft. The existence of such independent production is a reason to ask how to expedite that process and make it easier for such filmmakers to bring their work to the world's audience, rather than a justification for continued centralization and dependence upon a few large and often artistically stifling studios.²²

This Article discusses problems facing independent producers and whether-- and, if so, how--independents can be freed sufficiently from studio dominance to enhance the values which arise from such independence. Collective bargaining agreements with those who are employed to make films (directors, writers, actors and crew) have assisted in maintaining studio power. If the more numerous, but less economically influential, independent producers organize to reach their own agreements with the powerful guilds and unions, it could increase the viability of independent filmmaking, loosen the binds of the studios on certain kinds of production, and provide additional work for many who, for various reasons, are not regularly employed by the studios.

Some have argued that studios hire and promote on the basis of sex, race, age, and other biases. Certainly the result, no matter how attained, is less diverse than the audience for film and television productions. This problem might be addressed with additional resources and more theaters available for independent productions.

To approach these goals, one must examine how the film industry tends toward stagnation and centralization and try to point to long-range goals filmmakers might place above the short-term gains which have become so common in the increasingly centralized American economy.

I. A Brief History of Independent Production

The birth of "independent" production probably started with those early producers who attempted to fight the Motion Picture Trust Company ("Trust") by producing films without licenses. On

²¹ However, even more access to increasingly powerful equipment "does not automatically make for better results All of us today are able to walk into an art store and buy--inexpensively--pigments and supplies that the Renaissance painters would have paid fortunes for. And yet, how many of us paint on their level today?" Walter Murch, *In the Blink of an Eye: A Perspective on Film Editing*, 107 (1995).

²² For a discussion about the eight year development journey of screenwriters Joan Didion and John Gregory Dunne with Disney on *Up Close & Personal*, see John Gregory Dunne, *Monster* 97-98 (1997).

January 1, 1909, the Trust came into existence. It consisted of nine film “manufacturers,” led by Thomas Edison, which owned or claimed ownership in motion picture camera or projection patents. These companies included two French *528 manufacturers and one distributor which imported European films into the U.S., banded together to solidify their patents.²³

The Trust's members entered into an agreement with the only source of film stock, Eastman Kodak, thus creating a monopoly in cameras, film, and projectors--three items essential for filmmaking.²⁴ They licensed each other the right to utilize such controlled items, and refused to provide licenses to others. The only way to make films legally was through the Trust.²⁵

However, production was not a particularly complicated endeavor in the early years of this century. Most films were “shorts” lasting between five and ten minutes.²⁶ The Trust initially ordered that no film was to be longer than one reel, and later two reels.²⁷ Cameras were stationary, simply being pointed at the subject. No major studios or facilities were needed and independent filmmakers attempting to create films outside the Trust located second-hand equipment and film stock. Many of these independent filmmakers ended up moving outside of the New York area, where the Trust companies were based, to avoid attack--legal and otherwise.

Independent producers formed a competitive entity--the Independent Motion Picture Company. After the Trust formed its own distribution entity, General Film Company, the independents formed Motion Picture Distributing Company, with Carl Laemmle in charge.²⁸ Lawsuits were filed by the hundreds. Cameras were confiscated. Productions were shut down. The independents became even more adaptable. By 1915, General Film Company lost a major court decision and, as multiple reel films were imported from Europe, the motion picture industry began to change dramatically.²⁹ Actors were becoming stars, the independents were becoming established in California, and the Trust was losing its power.

Although filmmakers worked in Philadelphia, Chicago, Cuba and other locales to escape the Trust, most production moved to Southern California.³⁰ The companies which later evolved into the major film *529 studios began in this way as early independent filmmakers. These included Adolph Zukor (Famous Players/Paramount), Carl Laemmle (Universal) and William Fox (Twentieth Century Fox).

As the Hollywood film industry became structured into studios, “independent” production could best be identified as that production occurring outside the studios.³¹ It arose on occasion as a result

²³ David Putnam, *The Undeclared War* 47-49, 60-61 (1996).

²⁴ See Lewis Jacobs, *The Rise of the American Film: A Critical History* 81-85 (1939).

²⁵ *Id.*; see Neil Gabler, *An Empire of Their Own: How the Jews Invented Hollywood* 57-64 (1988).

²⁶ Bosley Crowther, *The Lion's Share: The Story of an Entertainment Empire* 34 (1957).

²⁷ *Id.*

²⁸ Leslie Wood, *The Miracle of the Movies* 170-83 (1947).

²⁹ Garth Jowett, *Film: The Democratic Art* 34 (1976); see Wood, *supra* note 28, at 183 (referring to the events of 1915).

³⁰ Wood, *supra* note 28, at 224-28.

³¹ The definition of an “independent” can be debated at length. In this Article, studio production is being distinguished from films produced outside the studio system. From the distribution perspective, Ira Deutchman, then President of Fine Line and a Vice President of New Line, its parent company, suggested calling such entities “‘niche’ companies.” He primarily distinguished niche companies from the studios in their marketing approach.

of new companies being formed. For example, production companies started by actors Charlie Chaplin, Mary Pickford and Douglas Fairbanks, with director D.W. Griffith, led to the formation of United Artists.³² Other well-known producers or directors raised money to form their own production entities, such as D.W. Griffith³³ after he left United Artists (unsuccessfully) and David O. Selznick (far more successfully).³⁴ Samuel Goldwyn was also an independent for many years. But with the studios' stranglehold on capital, talent, production, distribution and exhibition, independent producers accounted for a small portion of films each year.

By the time the initial studio system began to unravel in the mid to late 1940s, independent production arose in a number of ways. Initially, stars and major directors, formerly attached to the studios by long-term contracts,³⁵ began their own production entities. Nevertheless, most of their pictures were studio productions in which they starred.³⁶ By the 1950s production began directly for television, leading to companies such as Desilu and ZIV. Moreover, new companies moved into film production from exhibition or distribution.

*530 Also in the 1950s, opportunities arose due to the studios' loss of control over their theaters. The studios stopped producing "B" movies (which had been cut back originally during World War II due to shortages of film stock).³⁷ This also gave rise to the development of drive-ins (particularly in the South and West), and led to other changes in the manner in which films were exhibited, especially as television grew.³⁸ As a result, Sam Arkoff and Jim Nicholson successfully began American International Pictures, followed by Roger Corman's New World and his successful importation of European films.³⁹

During this time, John Cassavetes financed and produced his own independent films in addition to European films. He eventually formed his own distribution company after a less than satisfying studio experience.

Studio marketing is driven by the attempt to obtain "large numbers" while niche companies attempt to "identify a market that is currently underserved by the studios," evaluating its potential and then determining the "costs inherent in trying to reach it." He suggested that niche companies could be "flexible enough to react to the marketplace" more quickly than the larger studios. Ira Deutchman, *The Movie Business Book* 321 (Jason E. Squire ed., Simon & Schuster, Inc. 1983).

³² See Steven Bach, *Final Cut* 35-42 (1985).

³³ See Janet Wasko, *D.W. Griffith and the Banks: A Case Study in Film Financing*, 30 *J.U. Film Ass'n* 15 (1978).

³⁴ David Thomson, *Showman: The Life of David O. Selznick* 345-49 (1992).

³⁵ See generally *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983 (Cal. Ct. App. 1944) (upholding enforcement of the seven-year limitation on employment agreements).

³⁶ For example, despite producing films such as *It's A Wonderful Life* and *State of The Union*, Liberty--founded by Frank Capra--lasted only a few years. Friedrich, *supra* note 17, at 350.

³⁷ In 1939, 761 motion pictures were released; in 1945, only 377 pictures were released. Independent producers, who traditionally produced more "B" movies, were particularly hurt, as they had less access to facilities and equipment. Jowett, *supra* note 29, at 310.

³⁸ Cassady, *supra* note 16, at 180 n.171-72. In 1948, there were 189,900 television sets in the U.S. *Id.* at 180 n.172. By the beginning of 1956, the total was 36,900,000. *Id.* From the end of the War until 1956, weekly theatre attendance dropped from 90,000,000 to 46,530,000. *Id.* at 180 n.171.

³⁹ See Sam Arkoff, *Flying Through Hollywood By the Seat of My Pants* (1992); Roger Corman & Jim Jerome, *How I Made a Hundred Movies in Hollywood and Never Lost a Dime* (1990).

There was even a period during the 1960s and early 1970s where the studios were considered by many to be a dying structure. In the early 1970s, a number of filmmakers, including Steve McQueen, Barbra Streisand, Peter Bogdanovich, Frances Ford Coppola, and others joined forces in different combinations to produce films through their own companies (including Allied Artists and The Director's Company) without studio interference. Coppola began American Zoetrope as an interesting but ultimately financially unsuccessful attempt to create a new, independent version of a studio.⁴⁰ However, the traditional studios regained their position of prominence and seeming invincibility as income grew from cable television and home video. As a result, many independent *531 companies failed,⁴¹ and economic centralization went from potentially illegal to an accepted corporate goal.

The international nature of the industry and the increasing amount of capital required to begin new media ventures have helped cement the power of the studios. The lack of antitrust enforcement, especially under former actor and Screen Actors Guild (“SAG”) President Ronald Reagan, accelerated this conglomeration. As the cost of studio production and marketing soared, the difference between studio and independent films has become even more glaring.

In recent years, the artistic and, in some cases, commercial, success of independent films like Howard's End,⁴² sex, lies and videotape,⁴³ The Crying Game,⁴⁴ and Four Weddings and a Funeral,⁴⁵ did not go unnoticed by the studios. Nor did they overlook the critical success, best exemplified by the 1997 Academy Award nominations where four of the five “best picture” nominees were independent productions,⁴⁶ as well as other critically acclaimed independent film releases in 1996⁴⁷ such as The Big Night,⁴⁸ Lone Star,⁴⁹ Breaking the Waves,⁵⁰ and Sling Blade.⁵¹

Despite the overwhelming number of independent films produced which do not succeed theatrically, the increasing (although still small) number of such films managing large box office revenues led to numerous corporate transactions. Merchant Ivory entered into a distribution

⁴⁰ Nicholas Kent, *Naked Hollywood* 158 (1991). Following its initial failure after being formed by Coppola and George Lucas in 1969, Zoetrope was resurrected when Coppola purchased a Los Angeles studio complex a decade later, only to flounder again, primarily on the inflated budget of *One From the Heart*. *Id.* at 159-60; see Mike Bygrave & Joan Goodman, *Meet Me in Las Vegas*, *American Film*, Oct. 1981, at 38-43, 84; Jon Lewis, *Whom God Wishes to Destroy... Francis Coppola and the New Hollywood* 1, 3, 8-10 (1995).

⁴¹ These independent companies included Cannon, De Laurentiis Entertainment Group, Atlantic, Trans-World Entertainment, Cinecom, Avenue, MCEG, Empire, 21st Century, Hemdale, Vestron, Orion, Weintraub, Cineplex Odeon Films and, more recently, Prism, Carolco, Cinergi, Goldwyn, and IRS.

⁴² *Howard's End* (Merchant-Ivory Prods. 1992).

⁴³ *Sex, lies and videotape* (Miramax Films 1989).

⁴⁴ *The Crying Game* (Miramax Films 1992).

⁴⁵ *Four Weddings and a Funeral* (PolyGram Filmed Ent. 1994).

⁴⁶ *Secrets & Lies* (October Films 1996), *Fargo* (PolyGram Filmed Ent. 1996), *Shine* (Fine Line 1996), and *The English Patient* (Miramax Films 1996).

⁴⁷ Rex Weiner & Andrew Hindes, *Indies' Lesson in '96: More May Mean Less*, *Daily Variety*, Jan. 10, 1997, at 12, 64 (reviewing independent films released in 1996).

⁴⁸ *The Big Night* (Samuel Goldwyn Co. 1996).

⁴⁹ *Lone Star* (Columbia Pictures 1996).

⁵⁰ *Breaking the Waves* (October Films 1996).

⁵¹ *Sling Blade* (Miramax Films 1996).

agreement with Disney.⁵² New Line established Fine Line Pictures.⁵³ Turner purchased Castle Rock and New Line (and then Time Warner *532 acquired Turner).⁵⁴ Disney purchased Miramax.⁵⁵ PolyGram acquired a number of independent production companies, including Working Title, Propaganda and Interscope, and then was purchased itself by Universal.⁵⁶ Fox started a new distribution division, Fox Searchlight, to access new talent and independent producers.⁵⁷ Paramount also started such a division.⁵⁸ Metromedia acquired Orion, MCEG and Goldwyn, and then MGM-UA acquired Metromedia.⁵⁹ Universal acquired October Films.⁶⁰ Also, studio distribution agreements were entered into by many of the larger independent producers, including Beacon, Cinergi, Lakeshore, Mandalay, New Regency, and Spyglass Entertainment.⁶¹ The line between independents and studios has blurred as a result of such transactions.

Whether studio ownership, distribution or financing in these situations is successful will undoubtedly differ from one circumstance to another; however, the importance to the studios of non-studio production and off-balance sheet production financing, and the corollary importance of studio distribution to independents, has been highlighted by these and similar events.

II. The Problem with Independence

A. The Failure of Independent Production Companies

Why have so many independent production companies failed in the last decade? In one sense, the reasons are as numerous as the failures. However, some trends are clear.

Undercapitalization is always a problem in the film industry. Given the increasing cost of production and marketing, in addition to the inherent risk of each film production, huge amounts of money can be spent before a *533 hit is released.⁶² Therefore, any business plan has to consider such substantial risks. Some companies attempt to do this by pre-selling distribution rights, thus reducing their downside, but endangering their potential profits. Others attempt to create value by finding ways to retain talent without large up-front salaries. Another method of reducing risk is to structure joint ventures to share costs.

⁵² See Hugo Davenport, Cannes Turns the Tide from This Year's Cannes Film Festival, Daily Tel. (London), May 27, 1995, at 1.

⁵³ Catherine Jordan, Move Over Clint: Tough-Gal Films Start a Stampede, L.A. Times, Apr. 26, 1994, at 1.

⁵⁴ Steven Galloway, Like a Rock, Hollywood Rep., Oct. 16, 1995, at S23; Monica Roman, Wall Street Sweet on In-The-Black October, Variety, Oct. 21-27, 1996, at 19.

⁵⁵ Todd Lothery, Art of the Matter, News & Observer, Feb. 28, 1999, at G1.

⁵⁶ See Claudia Eller, PolyGram's Challenge Is Separating Serious Bids from Press Releases, L.A. Times, Aug. 14, 1998, at D1.

⁵⁷ Lothery, supra note 55, at G1.

⁵⁸ Id.

⁵⁹ Carl DiOrio, PolyGram's Open House Held for Kerkorian Today, Hollywood Rep., Aug. 26, 1998, at 1.

⁶⁰ Id.

⁶¹ Claudia Eller, Spyglass Offers Disney Lower-Risk Deals, L.A. Times, Aug. 21, 1998, at D5; Kirk Honeycutt and Stephen Galloway, Dis Looks through Spyglass, Daily Variety, at 1, 33

⁶² See Norman G. Rudman, *The Movie Business Book 190-97* (Jason E. Squire ed. 1983).

Another apparent solution during the 1980s was to raise equity funding, usually from the public, in order to have a cushion against failure. However, such windfalls created numerous other problems and often gave companies a false sense of security based on the belief they could compete with and act like the studios--a major threat to independent filmmaking. It is often the very sense of danger and risk which creates originality, tight budgets, hard work and cooperation. Public funding reduced the motivation for such characteristics and led to companies such as Weintraub Entertainment, where hundreds of millions of dollars resulted only in films such as *My Stepmother Is an Alien*.⁶³

A second major problem for independents is excessive overhead. Obviously, ongoing overhead costs, whether for personnel, benefits, facilities, underperforming libraries, development costs, or production and marketing, can eat away at a company's capital. Most independents have a limited time to prove themselves, given their capital base. In light of the risk inherent in film production and the long period of time before most films, no matter how successful, actually result in revenue, large overhead and interest can dangerously shorten the time a company has available to succeed.

Even when a production company does succeed, that success may result in increased overhead and production costs, eventually leading to corporate collapse. One company which was unable to survive long enough to outlast its long-awaited hits was Orion, which released *Dances With Wolves*⁶⁴ late in its existence and was forced to sell *The Addams Family*⁶⁵ to Paramount before its completion. Vestron, which produced *Dirty Dancing*,⁶⁶ was among several companies which created one hit and then failed to repeat their success, thus leading to their collapse. On a smaller scale, Atlantic--with *Valley Girl*⁶⁷ and *Teen Wolf*⁶⁸--suffered the same fate. One problem with substantial overhead and interest is that it reduces a company's time in which to get a hit film released and to collect resulting revenues. Eventually, this leads to failure unless the amount of capitalization is substantially greater than what the company has committed to spend in its initial years.

One reason independent companies are not able to generate revenues fast enough to survive is that they control only limited or no distribution facilities. This is common with many independent companies, although theatrical distributors like Goldwyn, Orion, Republic, and Cannon have also ultimately gone out of business or been subsumed by studios. The increasing cost of marketing a film nationally makes theatrical distribution a dangerous business for independent companies. Even those companies which raised large sums of capital--such as Weintraub and Savoy--found that they had a limited time to develop, produce and distribute successful pictures.

Each motion picture needs to be seen as an independent business, although it must be consistent with the business plan for the overall company. If films are made with no expectation except that eventually one will become a hit, corporate failure is almost guaranteed. The means of financing and marketing each picture must be part of the decision to produce it. The riskiness inherent in film production has seen brilliant actors, directors, writers, producers and executives fail when

⁶³ *My Stepmother Is an Alien* (Weintraub Ent. 1988).

⁶⁴ *Dances with Wolves* (Orion 1990).

⁶⁵ *The Addams Family* (Paramount Pictures 1991).

⁶⁶ *Dirty Dancing* (Vestron 1987).

⁶⁷ *Valley Girl* (Valley 2000 1983).

⁶⁸ *Teen Wolf* (Atlantic 1985).

attempting to structure independent production companies. While independent production continues in great quantity, usually on a picture-by-picture basis,⁶⁹ such corporate failures have obviously led to the conclusion by many that size is the best protection against failure.⁷⁰

B. The Difficulty of Single-Picture Financing

Independent productions⁷¹ are normally financed through pre-sales, bank loans, equity or non-picture collateral, gap financing, and completion bonds.⁷² Independent filmmaking in many cases requires more time spent raising money than producing films. At a minimum, this requires the ability to contract with one or more distribution companies for each film project before it is produced, or having the property's distribution and presale handled by the same people who are going to produce it.

A "presale" is the licensing of a pending film project, rather than a completed picture, typically to international territories, based upon some combination of budget, cast, director, producer, script and marketing tools.⁷³ Many independent producers utilize presale agreements as collateral to obtain production loans, which are then used (sometimes in conjunction with additional sales "estimates" from a reputable sales agent) to finance the film. For a bank to agree to such a loan, of course, there must be some guarantee that the motion picture will be completed on a sufficiently timely basis to be delivered to the entities who have purchased the film. This is accomplished by obtaining a completion bond, which is essentially insurance that a film will either be finished by its producer, or will be taken over and completed by the company that issued the bond.

An independent production must simultaneously balance many factors, including: satisfying a bank and bond company; pursuing, documenting and solidifying presales; completing adequate budgets and schedules; finalizing the script; and, perhaps most difficult, obtaining and securing a cast and director. If any of these aspects fall short, the entire project can collapse. Many films are presold and then never completed and delivered. The market's awareness of this problem reduces the prices available when a film is presold. Thus, in many ways producers are selling their potential profit margin in exchange for the ability to produce a picture. With lower revenues available from presales and the cost of documenting such agreements, providing letters of credit or other necessary security, obtaining sufficient documentation to satisfy banks, bond companies and other insurers, interest, finance charges, and completion bond premiums, the amount actually available for any given production is stretched extremely tight and the potential "upside" in the event of a successful film is substantially reduced.

This process puts a premium on the ability to budget a film properly. The budget must be realistic for the script and yet take into account these various financing problems. There is also an ongoing

⁶⁹ Claudia Eller, *He's Leaving Las Vegas--and Big Studios--for Creative Control*, L.A. Times, May 23, 1997, at D4.

⁷⁰ But certain artists continue to prioritize their artistic vision and control, forgoing large fees and budgets. *Id.* For example, Mike Figgis, after the success of *Leaving Las Vegas*, decided to write and direct a film with independent international distributor Summit Entertainment budgeted under six million dollars in order to maintain control. *Id.*

⁷¹ See *supra* note 31 for a discussion regarding how to define "independent" pictures.

⁷² For a discussion regarding how independent production companies developed, see Wood, *supra* note 28, at 224-28.

⁷³ See Arnold Kopelson, *One Producer's Inside View of Foreign and Domestic Pre-Sales in the Independent Financing of Motion Pictures*, 12 Loy. L.A. Ent. L.J. 1, 1-18 (1992).

balancing act between the film's schedule, availability of actors and director, and time needed for presales, loans and bonding to be completed. Actors can become unavailable during this process, which then leads to problems with *536 the film's licensees if they purchased it based upon that cast. The entire process is a complicated juggling act.

When unexpected labor costs, residuals, and the like arise, such unanticipated expenses can torpedo an entire production. Residuals are a particular problem because they are calculated on the basis of gross sales in most instances, and it is those sales revenues (the presale contract's guarantees) which are banked to produce the film. Thus, as described more fully below, the money needed as collateral to acquire a loan to produce the film is being taxed by the guilds.

Artistic tension arises because key artists know their agreement to provide services allows the film to be presold and, thus, produced. When that power is added to the fact most independent productions have no substantial amount of funding available for unexpected costs, and the normal demands of artists in this industry, substantial tension is no surprise.

Even when a negative pick-up agreement, joint venture or other mechanism is utilized to produce a film, most independent films require completion bonds for the comfort of their distributor or other financier. Thus, the process for most independents is a complicated one in which art and commerce are at best precariously balanced.

V. Why We Need and Will Continue To Have Independent Film Production

Many supporters of independent production assume its value without question. Others assume its demise without remorse. Why is independent film production important?

The disparity of views regarding most motion picture issues arises from the fact that motion pictures are both art and commerce.⁷⁴ Depending on which element is emphasized, the evaluation of independent film's purpose changes dramatically. However, independent films need to flourish for both business and artistic reasons.

We have traditionally assumed--particularly in the United States--that anyone, anywhere in the world, from any class or background, should be able to express his or her artistic vision. However, the impact of this principle is often undesirable to many. For example, the development of *537 rap music and other black and Latino-oriented artistic endeavors have been often attacked by critics, politicians, media and "mainstream" artists as soon as they become successful. Whether the argument is obscenity, immorality, or sedition, it should not be surprising to anyone that encouraging expression by young people surrounded by poverty, discrimination and abuse might sometimes lead to art which expresses the most extreme versions of their pain.

Results have included the influence of graffiti on modern art; of rock 'n roll and rap on much of world culture; and of "subversive" 1960s films like *Z*, *Midnight Cowboy*,⁷⁵ *The Battle of*

⁷⁴ The tension between art and commerce is, of course, at the heart of the filmmaking process. Roger Corman described it as follows, "It's a compromised art form. It's a 50-50 split, art and commerce. Maybe that's why Americans are good at it. In a time when American industry is falling behind other countries, the American film industry is by far the most successful in the world. That's what we're good at--art and commerce, compromised." Corman & Jerome, *supra* note 39, at 237.

⁷⁵ *Midnight Cowboy* (United Artists 1969).

Algiers,⁷⁶ and Andy Warhol's films on artistic and business elements in the motion picture industry. Only by allowing artists to stretch their (and, sometimes unpleasantly, our) limits can we establish a society based on awareness, discipline and responsibility. This is similarly true in the technical field where experimental films, documentaries, and an assortment of acting, camera, lighting, editing and other new techniques are developed in independent films before finding their way into more commercial endeavors. For example, look at the extraordinary impact of music video techniques in recent action blockbusters.

Viewing independent film from a business standpoint, independents can be seen as the “minor leagues” which feed “players” to the “major leagues” (studios), thus providing substantial stability and value to the overall industry. Where can film directors learn their craft if not by making films? Must (or can) all directors of photography, producers, writers, actors, assistant directors and others who wish to direct a film be allowed to start with a large studio picture as Jan DeBont did with *Speed*?⁷⁷ Most directors need substantial experience before they find their place in the market and reach their full abilities. For every director who can begin with a great film, hundreds start with smaller efforts where they can make mistakes with much smaller financial and career consequences.⁷⁸

Even oft-celebrated “auteurs” like George Lucas, Spike Lee, Quentin Tarantino, Martin Scorsese, and Steven Spielberg began with student and/or independent films to learn their craft. While there are many who *538 look at Scorsese's *Mean Streets*⁷⁹ or Tarantino's *Reservoir Dogs*⁸⁰ as brilliant films, neither performed well financially during initial release--and the burden of requiring a superior economic performance could have lessened those films' impact and perhaps slowed each director's career.

Artists can often regenerate or expand their careers by making smaller, less controlled films without the commercial burdens which accompany a studio film.⁸¹ For example, look at actors Andie MacDowell and James Spader in *sex, lies and videotape*,⁸² Harvey Keitel in *Reservoir Dogs*,⁸³ Kevin Spacey in *The Usual Suspects*,⁸⁴ John Travolta in *Pulp Fiction*⁸⁵ or, more recently, Ian McKellen in *Love & Death on Long Island*,⁸⁶ and *Gods and Monsters*,⁸⁷ and Nick Nolte in *Affliction*.⁸⁸

⁷⁶ *The Battle of Algiers (La Battaglia di Algeri)* (Magna 1965).

⁷⁷ *Speed* (Twentieth Century Fox 1994).

⁷⁸ Roger Corman alone provided such early experience for directors Francis Ford Coppola, Peter Bogdanovich, Martin Scorsese, Jonathan Demme, Ron Howard, Joe Dante, John Sayles and James Cameron, along with Jack Nicholson, Robert Towne, and Dennis Hopper. Corman & Jerome, supra note 39, at vii.

⁷⁹ *Mean Streets* (Warner Bros. 1973).

⁸⁰ *Reservoir Dogs* (Miramax 1992).

⁸¹ As Sam Arkoff wrote: “New independent companies will find niches to fill that the majors don't wish to enter. Young actors, writers, and directors who have something new and original to offer will discover avenues for displaying their talents, too.” Arkoff, supra note 39, at 252.

⁸² *sex, lies and videotape* (Miramax 1989).

⁸³ *Reservoir Dogs* (Miramax 1992).

⁸⁴ *The Usual Suspects* (Gramercy Pictures 1995).

⁸⁵ *Pulp Fiction* (Miramax 1994).

⁸⁶ *Love & Death on Long Island* (Regents Ent. 1998).

Large film companies are not well-suited to attempt new content, or technical or marketing approaches, or to renew older film techniques or stories that have fallen from favor--in other words, to take chances.⁸⁹ Thus, it is not surprising that various genres, such as horror films from *A Nightmare on Elm Street*⁹⁰ to *Scream*,⁹¹ made comebacks or found new methods of reaching their audiences through independently made pictures. Independents can (because they must) see where audiences exist for certain kinds of films the studios usually do not and, perhaps cannot, make.

*539 Perhaps even more important, culturally based films from around the world will always find a place in international cinema. In such films new talent can be discovered or established talent can work in a new culture or with different themes than are commonly allowed in studio pictures. No matter how dominant the studios become, the internationalization of film will be a continuing process.⁹²

For these and other reasons, independent films have become a major source of artistic achievement. Academy Award success has been bestowed on many independently produced films in the last decade,⁹³ including *The English Patient*,⁹⁴ *Shine*,⁹⁵ *Sling Blade*,⁹⁶ *Platoon*,⁹⁷ *My Left*

⁸⁷ *Gods & Monsters* (Regents Ent. 1998).

⁸⁸ *Affliction* (Kingsgate Prods. 1997).

⁸⁹ Interestingly, witness this 50 year-old analysis:

Today, the hope of the American film lies not in the heavily supervised output of the big studios--with their tendency to make pictures which conform to ingredients for success at the box office culled from inquiries directed at ascertaining the elements which the majority of the public likes--but in those independently made pictures.... It makes for individuality.

Wood, *supra* note 28 at 344-45. The author commented on independent filmmakers who, making one to four pictures each year for studio distribution, were free from "the attendant worries of distribution" to make pictures "with freshness, resource and ideas." *Id.* But, an independent's "path is still beset with the one difficulty that has always obstructed independent production, namely finance." *Id.* at 345.

⁹⁰ *A Nightmare on Elm Street* (New Line 1984).

⁹¹ *Scream* (Miramax 1996).

⁹² See Howard M. Frumes, *Distributing Motion Pictures Around the World: The International Nature of the Film Industry*, 17 *Whittier L. Rev.* 285 (1995).

⁹³ Sabine Meyer, *Critics Choice: The Year of the Independent*, 5 *AFMA Independent* 1, (1997). Independent films comprised 54 out of the 89 Academy Award nominations in 1997. *Id.*

⁹⁴ *The English Patient* (Miramax 1996).

⁹⁵ *Shine* (Fine Line Features 1996).

⁹⁶ *Sling Blade* (Miramax 1996).

⁹⁷ *Platoon* (Hemdale Film Corp. 1986).

Foot,⁹⁸ Babe,⁹⁹ Leaving Las Vegas,¹⁰⁰ Dead Man Walking,¹⁰¹ The Piano,¹⁰² Pulp Fiction,¹⁰³ The Usual Suspects,¹⁰⁴ Il Postino,¹⁰⁵ Howard's End,¹⁰⁶ and The Crying Game.¹⁰⁷

Independent films serve all these purposes; but it is often a nearly impossible task to get a quality independent picture financed, cast, developed, produced, marketed and distributed.

V. The Collective Bargaining System

A. History and Structure of Collective Bargaining in the Film Industry

Independent production most often depends on carefully controlled budgets. Uncontrollable costs often threaten the filmmaking process. *540 Union and guild “minimum” requirements have a very different impact on independent producers than on studio production, where they can be incorporated into broader cost and overhead analyses. One would thus assume that industry collective bargaining agreements are negotiated separately by the studios and the independents--but this is not the case.

Early industry union agreements understandably arose from unionizing the studios, which continue to negotiate together as a management group (through the Alliance of Motion Picture and Television Producers ('AMPTP')). The formation of SAG and the Screen Writers Guild (the forerunner of the current Writer's Guild of America ('WGA')) in 1933 were courageous and difficult challenges for studio employees.¹⁰⁸ However, the entertainment guilds and unions have become strong and often relentlessly inflexible. Independents who wish to hire union workers are expected to acquiesce to studio negotiated terms. Neither the studios nor these unions have had any incentive to change this mutually beneficial system. The studios and guilds have reached a balance in bargaining power and have learned to work together to meet many of their respective needs.¹⁰⁹ However, independents have had little, if any, say in the industry's current union agreements.

Forty years ago, in a University of California-Berkeley study, *Collective Bargaining In The Motion Picture Industry*,¹¹⁰ the authors pointed out that the International Alliance of Theatrical & Stage Employees (“IATSE”), which represents most film crew employees, negotiates a basic agreement

⁹⁸ My Left Foot (Miramax 1989).

⁹⁹ Babe (Universal Pictures 1998).

¹⁰⁰ Leaving Las Vegas (United Artists 1995).

¹⁰¹ Dead Man Walking (Gramercy Pictures 1995).

¹⁰² The Piano (CiBy 2000 1993).

¹⁰³ Pulp Fiction (Miramax 1994).

¹⁰⁴ The Usual Suspects (Gramercy Pictures 1995).

¹⁰⁵ Il Postino (Miramax 1994).

¹⁰⁶ Howard's End (Merchant-Ivory Prods. 1992).

¹⁰⁷ The Crying Game (Miramax 1992). Academy Award nominations in 1997 included 54 of 89 nominations to “independent films.” Meyer, *supra* note 93, at 1.

¹⁰⁸ Jan Wilson, *Special Effects of Unions in Hollywood*, 12 *Loy. L.A. Ent. L.J.* 403, 408-11 (1992).

¹⁰⁹ *Id.* at 434.

¹¹⁰ Hugh Lovell & Tasile Carter, *Collective Bargaining in the Motion Picture Industry: A Struggle for Stability* 26 (1955).

with the major producers which sets up a collective bargaining unit, “provides [for] recognition of the union, and stipulates the basic obligations between the parties to negotiate the specific local union agreements.”¹¹¹ They also observed that the key negotiations of issues with the Screen Writer's Guild, now the WGA, are those with the major producers, for the terms of the agreement arrived at here are ordinarily accepted by the independents.”¹¹² This overstates the choice--all studio terms must be accepted by independents or they are not allowed to work with WGA members. Just one example: an independent company which asks to become a signatory must accept all WGA rules retroactively to the beginning of the then-current collective bargaining agreement, even though *541 the independent producer may have had no knowledge whatsoever of the applicable rules during that earlier period and no money budgeted for any retroactive assessments the WGA may later decide to require. In such ways, the WGA exercises its power arbitrarily in a manner befitting famous studio moguls like Sam Cohn of Columbia and Louis B. Mayer of MGM.

The diverse needs of different employees are resolved by a variety of unions and guilds. The similarly diverse needs of independent producers are almost always overlooked, leaving independents without the flexibility needed to meet the requirements of independent films.

B. The Collective Bargaining Agreements

At present, the collective bargaining agreements independent film producers primarily need to address are those with the Directors Guild of America (“DGA”) (directors), WGA (writers), SAG (actors) and IATSE (crew). Most pictures, including small independent films, utilize the Teamsters for transportation personnel.

The first step in evaluating which collective bargaining agreements to accept is to determine where a production is to be organized and produced (including its pre-production, production and post-production). Some states remain particularly invulnerable to union organizing. A motion picture being fully organized and produced outside the United States, while potentially subject to local union requirements, can often proceed outside of the scope of these U.S. film industry collective bargaining agreements.

Independent film producers face substantial problems with the DGA, WGA and SAG as a result of rules prepared for and by the studios that are often applied harshly to independents. These include personal guarantees, security agreements, priority security interests ahead of distributors (even when those distributors are essentially financiers), and questions about whether a guild or union even will accept a production entity as a guild signatory. These problems will be discussed further below. The decision about whether a production will be subject to applicable unions is increasingly taken out of the hands of production companies. In any event, this decision has a substantial impact on the budget, available talent, locations, production schedules, and eventually upon potential profits for the independent producer.

C. Use of Non-Unionized Labor in Independent Production

Independent film companies arguably can use non-union personnel. However, doing so can undermine a film's completion or quality while succumbing to the unions can destroy a picture's

¹¹¹ Id.

¹¹² Id. at 39.

budget. Initially, a *542 producer must determine whether non-union crew members are available and if they can work professionally, on schedule and on budget. While many countries have such skilled personnel, cultural or language issues may stretch schedules, ruin budgets or make necessary communication all but impossible. Furthermore, proven actors are almost always SAG members. Making a film without recognizable actors can destroy its desirability for distributors and exhibitors and undermine its ability to be financed.

Even if a production proceeds in whole or in part on a non-union basis, union organizing activities (including picketing or more subtle forms of harassment) may throw a delicate schedule or tight budget off course. Suddenly, an independently financed production can face unbudgeted costs beyond its financial wherewithal.¹¹³ While one might expect unions to compromise in such instances in order to sign up new companies and allow films to be made, this is often not the case. Their power is often exercised as a means to frighten other independent companies or to win membership approval (or elections) no matter the dire consequences to small producers trying to realize their artistic dreams or build their production skills.

The question of whether to utilize union talent often is an essential one and should be dealt with early and knowingly by any independent producer.

VI. Bias Against Independent Producers in the Guild Agreements

The producers' voice for industry collective bargaining is the AMPTP, which consists of the studios and networks. Independents have no voice and certainly no influence over this bargaining entity.¹¹⁴ Independent companies can choose to either sign with the entertainment *543 unions and guilds or not. With some exceptions for extremely low-budget pictures, and a few recent discussions with some of the unions, independents have not been able to negotiate directly with the guilds or unions in any meaningful fashion. Neither the studios nor the guilds have seen any reason to include the independent voice in any negotiations of substance.

Studio control of this collective bargaining process results in many terms being accepted which are reasonable for a studio making many pictures each year and also expending huge annual amounts for prints, advertising, overhead and distribution costs; however, smaller, independent companies (many of which are formed to make a single picture) often find such collective bargaining requirements a substantial hindrance to even getting films made. Moreover, such rules

¹¹³ Although many independents are sympathetic with the idea of unions, IATSE requirements are seen as:

[A]t best a throwback to an earlier era, at worst a coarse blockade to their style of filmmaking. Stretching tight budgets to accommodate the cost of pension and welfare benefits is one concern, but so are union regulations-- crew size, the number of hours and days of work, who is permitted to do what tasks. It goes against the grain, they say, of the family-style work ethic indie helmers strive for.

Dan Cox, IA Amends Local Wage Provision, *Daily Variety*, July 19, 1995, at 16. However, in 1996 the IATSE did agree on a low-budget agreement with certain independent filmmakers which reportedly has caused 95 percent (as opposed to 55 percent only a few years ago) of films budgeted over three million dollars and shot in Los Angeles to be done under IATSE auspices. Dan Margolis, Union, Indies Work Through Uneasy Peace, *Variety*, Sept. 1-7, 1997, at 7, 15.

¹¹⁴ See Alan Paul & Archie Kleingartner, Flexible Production and the Transformation of Industrial Relations in the Motion Picture Industry, 47 *Indus. & Lab. Rel. Rev.* 663, 666 (1994).

greatly reduce the likelihood that completed independent films will become sufficiently profitable to encourage future films to be independently financed and produced.

A. Residuals as a Tax

This concern is best exemplified by the residual payments required under the industry's existing collective bargaining agreements. Residuals are a means for individuals who work on motion pictures to share in the profits reaped by the producer. However, the way in which residuals are structured essentially works as a tax on production for independent filmmakers who do not own their own distribution entities.

Most residuals are payable from gross revenues derived from a film's exploitation in certain markets (video, cable, etc.).¹¹⁵ The theory accepted by the studios was that this would be a simple method of calculating a seemingly small percentage of a film's revenues earmarked to pay those artists who otherwise might not be able to negotiate individually for a reasonable participation in a film's true profits. Such a system arose *544 because of the studios' historic reluctance (to say the least) to negotiate fair "back-end" agreements, and their decision to define and account for "net profits" in order to make such proceeds available at best to only an elite group of actors, directors and writers.

Residuals were acceptable for the studios since, among other reasons, they can simply incorporate such costs into their budgetary calculations for each year and each picture, and adjust other business agreements and obligations accordingly. An independent producer is in a very different situation.¹¹⁶

Many independent pictures are produced by companies which obtain loans secured by future contractual streams of income from pre-sales of distribution rights for an unfinished picture. These pre-sales are "taxed" by the obligation to pay residuals on them, thus directly reducing the amount of money available to the independent producer to actually produce the picture. In the independent filmmaking world, residuals actually make it less possible to produce pictures and less probable that independent companies will be able to make better and more successful pictures, and thus less likely to make or share profits with participants. Ultimately, this structure taxes independent filmmakers and helps keep the current centralized studio system tightly locked in place.

¹¹⁵ Residuals are calculated as a set payment per television run or a percentage of gross receipts. For example, SAG negotiated minimum compensation for its actors in television motion pictures for one domestic telecast. Any subsequent run requires an additional payment of 100 percent of the total compensation for each network prime time telecast, with a ceiling (through July 1, 1997) of \$3,100 for one hour and \$3,472 for two hours. A lesser amount is payable for network non-prime time runs, syndication, and other telecasts. Additional payments are required for international telecasts. For a theatrical motion picture, the producer is required to pay 3.6 percent of gross receipts from free or pay television, 4.5 percent of the first million dollars, and 5.4 percent thereafter for home video gross receipts. There are also residual payments required for pay television and basic cable releases. Residuals are also payable to WGA, DGA and IATSE members, requiring additional calculations, reports and payments. The total payments due on residuals for all these guilds can be an amazingly large and indeterminate assessment for an independent producer struggling to raise production money by licensing a picture's distribution rights.

¹¹⁶ Monica Roman, *Guilds Team in Resids Battle*, *Variety*, Feb. 2-8, 1998, at 5, 11 ("[I]ndependent producers are developing new financing methods that do not readily fit into a framework of rules written largely with the studios in mind.").

B. Minimum Payments and Rigid Rules

Collective bargaining agreements set minimum guaranteed salaries, benefits, work rules, required personnel, and conditions. These have been accepted by the studios which incorporate such costs into their overall budgets. While the studios regularly battle the unions over such requirements, it is a fight over dividing profits rather than a question of survival. For smaller filmmakers, these minimum requirements make many films unfinanceable or remove qualitative elements from the screen in order to pay for unneeded personnel or to incorporate rules inappropriate for small, cooperative artistic endeavors.

***545 C. Security Interests, Escrow Accounts, Guarantees and Other Financial Obstacles**

The guilds have taken the position in recent years that they have the right to insist upon any and every financial penalty and security¹¹⁷ they can develop to attempt to protect themselves from unpaid residuals, benefits and compensation. While protecting members' compensation is an understandable goal when dealing with a small production company, the guilds do not negotiate financial protection for their members' benefits and residuals; instead, they simply insist that before an independent production company can become a signatory or hire any guild members, it must do whatever the guilds demand. Because the studios are capable of making required payments, it is the independents which pay the price of such demands, although the negotiations in which such requirements are set are only between the studios and guilds. Thus, independents are again burdened by matters the studios find perfectly reasonable.

Rather than seeing independent production as a sometimes risky but eminently important part of the business, the guilds will halt production and undermine films in order to protect potential losses. This overreaction to the bankruptcies and failures of independent companies in the 1980s is understandable in purpose, but not in method. The requirement that payment of future residuals be secured ahead of film distributors, who are essentially investors in most independent projects, often makes it impossible to close appropriate financial deals with those distributors. Such security interests often interfere with a producer's ability to borrow money from a bank based on a picture's pre-sales. Therefore, many pictures must be made outside of the guild and union system, which only angers those guilds and unions further, as they cannot understand why anyone would want to make small films without them-- despite the obstacles they place in the way of independent producers.

The budgets for even small motion pictures are expensive when compared to a capital investment in a start-up company. For example, a five million dollar film may be minuscule in the motion picture industry, but a new business capitalized in that amount is often perceived very differently. Therefore, when unions and guilds demand that investors provide stringent security agreements and personal guarantees, collateralize future benefits and residuals, and/or escrow large sums of money, it can *546 become virtually impossible for some films to generate enough funds to be produced. At minimum, this causes available money not to appear on the screen. With finance charges, interest, completion bond premiums, residuals, pension, health and welfare payments,

¹¹⁷ See *Peregrine Entertainment, Ltd., v. Capitol Fed. Sav. & Loan Ass'n of Denver*, 116 B.R. 194, 197-98 (Bankr. C.D. Cal. 1990). A security interest in copyrightable intellectual property is obtained by filing a mortgage of copyright with the U.S. Copyright office. *Id.* at 198-99.

escrow costs, legal fees, finder's fees and similar expenses, independent producers often find their small budgets shrinking away to amounts which can greatly reduce the artistic, and thus the commercial, potential for their film.¹¹⁸ The increased use of gap financing and insurance-backed loans has made this problem even greater for independent producers.

The guilds might reasonably look at such projects as additional employment opportunities subject to a certain amount of financial risk. They could advise their members that such a film includes risks if they agree to be involved. Their members could then be allowed to decide for themselves whether to insist on partial escrows, to waive residuals, to take the risk of future non-payment, or to otherwise structure an unusual deal, in exchange for being involved in artistically challenging and exciting projects. However, artists are not allowed to make these kinds of decisions because the guilds believe they know what is appropriate in all cases. The guilds look to their institutional, short term benefit rather than the industry's--and their members'--long term health. While such an approach may be quite reasonable when dealing with the studios, the guilds have far more bargaining power than independent production companies and have no need for such strict, unbending requirements on all independent films, particularly those with lower budgets.

D. Creative Rights

A special collective bargaining committee exists to negotiate creative rights under the DGA Basic Agreement. No independent company is represented in that process. This is endemic to the problem of so-called "creative" rights in the film industry.¹¹⁹

*547 Questions of how much time a director must have to cut a film, the amount of involvement a producer or writer may have in post-production, the ability to replace a director on a film during (or after) principal photography, and other issues have been negotiated over the years by the studios and guilds. These and many other issues--like recent efforts to reduce producer credits--often find the guilds and studios in agreement as to underlying goals. However, independent production companies, which must raise money for each picture, utilize everything, including credits, as a means of doing so. With time and money usually of equivalent importance for the independent producer, their available approaches to creative rights determinations are far more limited than the studios.

If a studio errs in one area in order to solve another problem (for example, if it overrides creative rights to expedite delivery of a picture for exhibition), it can either persuade the guild member not to raise the issue at all in order to work with that studio in the future, or it can afford to settle the claim by paying damages. An independent production company can usually do neither. There are

¹¹⁸ Some of these expenses include interest, completion bond premiums, residuals, pension, health and welfare payments, escrow costs, legal fees, finder's fees, and similar expenses. Also, the increased use of gap financing exacerbates the problems independent producers face.

¹¹⁹ The DGA's 1996 Creative Rights Handbook contains an introductory letter to DGA members which includes the following: "During the 1996 negotiations, our committee met for several months with studio CEOs as well as network executives, grappling with many issues which confront directors in our work This Code is a set of guidelines that the studios and networks have agreed is the way the directing process ought to work." Director's Guild of America, Introduction to 1996 Creative Rights Handbook (1996). How broad are these rights? In the DGA Handbook's opening "checklist," the following appears in bold print, "At all times were you consulted about every creative decision?" Id. (emphasis in original).

many creative rights issues which need to be determined very differently for smaller pictures, but independent producers are not even given a voice in negotiations about these topics.

E. Dispute Resolution with the Guilds

A myriad of issues arise under the collective bargaining agreements with the DGA, WGA and SAG. Each agreement includes its own provisions for handling grievances and, in most cases, pursuing them through arbitration.¹²⁰ Arbitrators are approved for each new agreement by the guilds and studios. If those arbitrators rule in a manner outside the acceptable norm, either powerful side can eliminate them during the next round of negotiations. No matter how objective these individuals are, an arbitrator's risk is quite different when ruling against a studio than ruling against an independent producer.

*548 The most obvious influencing factor in resolving disputes with the guilds is the cost of doing so. In any situation where resolving a dispute will cost one party substantially more than the other, the nature of the negotiation and resolution is greatly influenced. In this case, there are two factors helpful to guild members which are harmful to independent producers. First, the guilds provide legal representation for their members in any such disputes without cost. Most independent producers have no in-house attorneys (or, if they do, no one trained or available for litigation) and no budget for litigation costs. This is particularly true when a company has raised money to produce one or two films and budgeted the cost of production carefully. Knowing this, the guilds can pursue new and unsupported theories or even attempt to stretch the meaning of language in their basic agreements. They have nothing to lose, while the independent production company is greatly threatened by the whole process.

The second factor of this problem is that no independent production company is likely to convince an outside lawyer to pursue an expensive claim against an actor, writer or director with little, if any, legal basis to do so. However, if a guild member takes such a position, the guild usually gives that member every consideration in order to avoid a claim against the guild for unfair representation. Such a claim can hurt the guild's reputation or be used in inter-organizational political maneuvering. As a result, the unsupported word of a guild member can suffice for the guild to pursue an expensive claim against a production company.

If the proposed respondent is a studio, the guild might be able to convince its member that the studio will hire expensive and effective counsel--and also that the guild member will develop a reputation of being litigious and difficult. When an independent company is the target, these arguments are less persuasive and less likely to convince a guild member (or the guild itself) to refrain from pursuing a claim. Thus, the means of resolving disputes can prove biased against independent producers.

¹²⁰ For example, the WGA Basic Agreement of 1995 includes two detailed sections on grievances and arbitration (Articles 10 and 11) and even lengthier rules regarding credits and credit arbitration. 1995 Writer's Guild of America--Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement art.10, 11 (AMPTP ed., 1995). The DGA Basic Agreement has set forth its rules regarding disputes, grievances and arbitration in its Article 2. Alliance of Motion Picture & Television Producers and Directors Guild of America, Inc. Basic Agreement of 1993 art. 2 (AMPTP ed., 1993). The Screen Actors Guild Basic Agreement also sets forth grievance and arbitration procedures, and each of these guilds has negotiated arbitration procedures with licensed talent agents to cover disputes between guild members and their agents. Producer-Screen Actors Guild Codified Basic Agreement of 1995 (AMPTP ed. 1995).

VII. The MPAA Title Registration Bureau and Ratings Board Are Often Inconsistent with the Interests of Independent Producers

Independents also face problems arising from the studios' trade association, the MPAA. While the studios' positions and strength in Congress often assists the entire industry, there are MPAA activities which create concerns for independents, particularly in titling and rating their films.

***549 A. The MPAA Title Registration Bureau as a Closed System**

The MPAA set up a Title Registration Bureau ("Bureau") which was later opened to any producers who pay the necessary fees and agree to abide by that organization's rules. There is nothing in the Bureau's rules which expressly reflects prejudice toward independent production companies. The rules apply equally to everyone who joins. In essence, this is a voluntary contractual structure where everyone who wants to be on the same footing with Warner Bros., Universal or Disney can do so to protect their film titles and have a means to enforce that protection.¹²¹

Unfortunately, this system sometimes creates results different for independents than for studios. If an independent cannot afford to join the Bureau, it cannot protect its title in advance. Once an independent film is financed and completed, it can use its title in most instances, if it can obtain distribution outside of the Bureau's membership. However, if the independent producer has the good fortune of licensing its film to a studio or an independent distributor which is a Bureau member, that distributor's acquisition of the picture requires it to then register the title. If the attempted registration is protested, the distributor must arbitrate or change the title and register a new one. If a different studio has previously registered the title--or anything close to it--even if it has not produced a film with that title, a protest can and usually will be filed. The previous registrant holds a significant advantage over the independent producer, even if the independent film has been completed. Thus, by not registering earlier, the independent filmmaker suddenly may not be able to use a title it has already invested in, although it otherwise could have used the title freely under the law.

Studio members submit most of their titles to be registered, apparently accounting for around eighty percent of registrations; and thus have developed an interesting practical system. Essentially, they protest titles where they have any arguable basis--no matter how tenuous--to do so. Any overlap or similarity of a single word usually generates a protest even if the title will cause no confusion.

The studios, armed with thousands of titles and hundreds of protests, essentially barter with one another over titles, one for another, one favor for *550 another, privately working out their differences in most cases.¹²² An independent producer who has joined the Bureau and registered

¹²¹ Titles are not protected under the United States Copyright Act, although they can sometimes be protected under common law unfair competition principles and the federal Lanham Act 15 U.S.C.A. § 1125(a) (West 1998), if the title has developed "secondary meaning" with the public. See Dennis Angel, Legal Protection for Titles in the Entertainment Industry, 52 S. Cal. L. Rev. 279 (1979).

¹²² The Bureau has privately estimated that approximately 4,200 titles were registered in 1995 with approximately 4,500 resulting protests. In 1996, it appears that around 4,400 titles were registered with close to perhaps 9,000 protests. At the cost of \$30 for each protest, this is a cheap way for the studios to protect their huge marketing costs on each picture, to make sure no other studio releases a film with a similar title. The result of all this bartering is that virtually none of these protests result in arbitration. In fact, of the almost 9,000 protests in 1996, only four ended in an arbitration hearing.

one title (or even a few titles) has nothing to barter with and has to rely upon the grace and kindness of a studio or proceed with the arbitration process set forth in the Bureau's rules. To do so can delay release of a picture or, at minimum, undermine that independent's ability to work with the challenged studio on subsequent films.

In the event of a title dispute, an arbitration procedure can be utilized. While the arbitrators undoubtedly have a certain level of objectivity and skill which they bring to bear on such proceedings, they understand the film business from the perspective of the studio (their employer), not the independent.

The Bureau was not set up to create difficulties for independent producers. The Bureau's purpose was undoubtedly to avoid unnecessary title disputes and litigation between the studios. Opening this process to independent producers which are not otherwise members of the MPAA can be seen as a generous act. The Bureau has sufficient power, given the number of films developed and produced by MPAA members alone, that no alternate structure is likely to gain credibility.

Independents can choose to leave themselves open to title problems, unable to protect their titles even as they invest substantial sums into an independent production, or run the risk of ending up with a Bureau distributor and a protest which forces a late title change and economic or artistic harm. Alternatively, they can join the Bureau and fight the same difficult odds they face elsewhere in the film industry.

One could argue that the title registration system is only a symptom of the problems for independents. In any event, like the MPAA ratings board discussed below, the Bureau seems to enhance studio dominance.

B. The MPAA Ratings Board as a Studio-Run Censor

The MPAA Classification and Ratings Association is the modern version of the censorship structure imposed upon Hollywood by its own leaders in the 1920s to offset public criticism about the subject matter of *551 their films.¹²³ The current ratings system was formed as part of the MPAA effort to increase the studios' political influence and market dominance, and to alleviate pressure from citizen groups.¹²⁴ The studios wanted to prove that they still could police themselves, without governmental or judicial interference. To justify the MPAA ratings system, MPAA President Jack Valenti has cited U.S. Supreme Court decisions, which allow local and state governments to determine what is obscene as a far more draconian alternative, and public opinion polls apparently have shown substantial support by parents of minors.¹²⁵

¹²³ Friedrich, *supra* note 17, at 84. When religious and other groups complained about the subject matter of 1920s films, the studios hired Republican Postmaster Will Hays to preside over the Motion Picture Producers and Distributors of America and become Hollywood's censor. *Id.* In 1941, the so-called "Hays Office" (the Production Code Administration) was augmented with the Bureau Of Motion Pictures in the Office of War Information, which was to review film scripts to see if they were in the national interest. *Id.* Hays was replaced in 1945 by Eric Johnston, former President of the United States Chamber of Commerce, who, among other things oversaw creation of the blacklists. *Id.* at 235.

¹²⁴ Recent political attacks on the content of film and television production are not a new problem. See Jowett, *Film: The Democratic Art*, *supra* note 29, at 308-09 (discussing the Hays office and other issues related to film content).

¹²⁵ Richard Mosk, *Motion Picture Ratings in the United States*, 15 *Cardozo Arts & Ent. L.J.* 135, 142 (1997).

Originally, it was argued that these ratings would not affect anyone's ability to make films about difficult subjects. The X rating was not intended to keep people from seeing films but, rather, to allow them to decide which films contained inappropriate subject matter and should be avoided (particularly by children). In fact, an X rating did not keep *Midnight Cowboy*¹²⁶ from being advertised, theatrically distributed and winning the 1969 Best Picture Academy Award. However, over time, the X rating became identified with pornography as that industry used it to promote itself. Newspapers decided not to advertise X-rated programs. At present, Blockbuster and other video retailers will not even stock NC-17 product. Therefore, the ratings board unintentionally became the arbiter of what the public could or could not see and the ratings system became a censorship mechanism.¹²⁷

Ignoring First Amendment issues, some might applaud such a step. However, that applause, even under the best of circumstances, is only appropriate when ratings are based on objective and clear standards to reflect what constitutes acceptable material (i.e., G, PG, PG-13, or R) and what does not (i.e., X and now NC-17 rated material). With studios *552 dominating the MPAA and domestic film distribution, and advertisers and large video retailers being keenly aware of every concern about overtly sexual or violent product, this rating system effectively can result in films being banned.

How does such censorship occur if the studios are rating their own films solely for informational purposes? Virtually all studio films can and do obtain at least R ratings, although some directors like Oliver Stone have been forced to edit their films substantially. Independent films have serious problems with the ratings board far more often. Admittedly, this is sometimes because independent filmmakers are not aware of the ratings board's standards or because some independents attempt to produce something new and different and, therefore, frightening to the ratings board (and maybe even the public). The MPAA, beholden to its ultimate studio owners and desirous of maintaining its power, may react differently to independent pictures.

The board contends that it is not biased. Battles in recent years between the ratings board and formerly independent distributor Miramax (now a wholly owned Disney subsidiary) have sometimes taken on the appearance of Miramax marketing campaigns, rather than disputes over free speech or the availability of pictures for the public. It is also true that some filmmakers want to push the limits beyond what almost anyone else thinks the public should be allowed (or would want) to see and, in those cases, ego, indulgence and excess can be the true subject of ratings disputes. Nevertheless, those films which create serious difficulties for the ratings board are almost always independently produced. Examples include Miramax's *Kids*¹²⁸ and *Priest*,¹²⁹ and Spanish director Pedro Almodovar's *Tie Me Up, Tie Me Down*.¹³⁰ Surprisingly, however,

¹²⁶ *Midnight Cowboy* (United Artists 1969).

¹²⁷ While the MPAA ratings system includes an appeals board, over two-thirds of appeals during the board's first 25 years were denied, according to MPAA President Jack Valenti. Ray Bennett, *Scissors Unhappy*, *The Hollywood Rep.*, Nov. 20, 1996, at 96.

¹²⁸ *Kids* (Miramax 1995).

¹²⁹ *Priest* (Miramax 1995).

¹³⁰ *Tie Me Up, Tie Me Down* (Laurenfilm 1990).

Propaganda's Jason's Lyric¹³¹ also had to be cut to reach an "R" rating, to the consternation of its director.¹³²

Inherent in such decisions are prejudices against subject matters which, while not in and of themselves pornographic, obscene or overly violent, are subjects with which the studios and mainstream consumers may not be familiar. Such subjects can include gay themes, minority vernacular or language, or sexual themes approached from the perspective of an international filmmaker from a country where sexual norms are different than in America. These subjects may include concerns about what children *553 should see (alcohol, cigarettes, violence), use of drugs, or language.¹³³ While the audience should certainly know the kind of picture about to be seen, is it appropriate for the ratings board to be able to practically ensure that some films cannot be seen at all?

There is no independent rating board. The MPAA answers to the studios. There is thus no clear prospect for change other than a moral appeal to the ratings board's leadership and continued tinkering with the available ratings. In the latter instance, the change from the X to the NC-17 rating did not have any major impact on what could be advertised, telecast, exhibited or distributed. The new television ratings system (for the so-called "V" chip) may or may not make the problem worse, but the MPAA's leadership position in creating this new television ratings system assures one thing: no real voice for independent filmmakers.

Virtually every studio agreement concerning acquiring, directing, producing and financing films requires delivery of a picture which can receive an MPAA rating no more restrictive than R. Thus, this insipid form of censorship continues, maintaining studio strength in film distribution and keeping unusual or challenging, but often artistically valuable, independent films from obtaining the kind of release they deserve and might obtain in another country or another time.

VIII. The Disorganization of Independent Producers

A. Size, Nature and Number of Companies

Many independent film companies are, in reality, one or two filmmakers with limited resources. While there continue to be some highly professional production entities separate from the studios, they are becoming increasingly reliant on studio financing and distribution. There are also a number of "independent" companies which are tied fully or primarily to the studios for some combination of talent, production capital, or distribution, exhibition or marketing.

*554 Studio economics and constraints seep into films made independently when the studio is its ultimate distributor. Even if the studio does not pay to produce a film, its huge outlay for print and

¹³¹ Jason's Lyric (Propaganda Films 1994).

¹³² Bennett, *supra* note 127, at 48.

¹³³ Varying attitudes about sex and violence can cause certain films to be targeted by politicians, critics and media. This has happened with *Natural Born Killers*, *Kids*, and *Crash*. Religious subjects can also create substantial controversy, as with *Priest* and *The Last Temptation Of Christ*. Such controversy sometimes can be helpful commercially if a distributor stands up to it or takes advantage of the increased awareness of the film. According to former Landmark Theaters senior Vice President Bert Manzari, "It's a particular asset for a specialized movie, because it allows it to rise above the noise of all the other things in the marketplace." Leonard Klady, *Sweet Controversy: 'Crash,' 'Killers' Cash in on Public Brouhaha*, *Daily Variety*, Jan. 2, 1997 at 6.

advertising costs results in contractual and actual control over script, cast, schedule, budget, and numerous other elements.

To the extent independent film companies exist, they have been too numerous, small, disorganized and, of course, independent to organize and negotiate effectively with the unions, alter MPAA policies, or develop techniques to offset studio dominance.

B. AFMA and Independent Producers Association

It should not be terribly surprising that the studios have been able to maintain their power and to cooperate with one another, mostly through the MPAA, to structure the film industry to their liking. Meanwhile independent producers and distributors have remained on the outside looking in.

By the nature of being independent of the studios, most independent production companies work on very few films--often only one. When a film is completed, the principals move to other productions, in other combinations, and there is no overall business strategy developed except on a project-by-project basis. Even where smaller independent companies are formed to produce films, their struggle for ongoing capital, distribution and access to material and talent is such that they can hardly expend much in the way of additional time and resources to try to alter (or sometimes even understand) the industry's structure, no matter how troublesome it may be.

This may be changing somewhat. Starting with distributors, where even independent companies tend to have some ongoing income flow, the American Film Marketing Association (now simply "AFMA") was formed in 1980 by a handful of independent film distribution veterans who licensed English-language motion pictures around the world.¹³⁴ This entity had grown by 1999 to over 130 distributors based in Los Angeles, New York, London, and elsewhere, with membership also available to lending institutions and television distribution companies.¹³⁵

*555 AFMA's purpose is to represent independent companies involved in the international distribution of English-language films. In doing so, its members' dues have allowed the association to grow into an entity large enough to prepare standard form agreements, introduce an effective arbitration structure, and organize and disburse information regarding piracy, overseas markets, reliability of film buyers, and similar matters. AFMA also works for the independent film industry in Washington, D.C. and with the European Union on various goals and problems (for example, quotas, copyright issues and piracy), and holds the largest independent film market in the world in Santa Monica, California, every spring. As such, AFMA, despite some members' concerns about spending AFMA resources on such industry-wide efforts, has become an important influence on certain issues.

AFMA also supported the formation of the Independent Producers Association in 1996, which was intended as an organization for independent producers (including many AFMA member distribution

¹³⁴ Member companies "generally do not maintain overseas sales organizations; rather they license country by country and medium by medium to local or national distributors or sub-licensees." Jonas Rosenfield, American Film Marketing Association, Overview of Foreign Markets 2 (1989).

¹³⁵ AFMA's survey of its members' sales for the fiscal year ending June 30, 1998 reflected total sales worldwide, excluding U.S. sales, of \$2,283,315,000. American Film Marketing Association Statistical Survey (1998). The June 30, 1996 total sales were \$1,656,000,000, an increase of well over a quarter billion dollars from the prior fiscal year. The prior year's reported worldwide sales had been \$1.3 billion. American Film Marketing Association Statistical Survey (1996).

companies which also produce their own films).¹³⁶ This organization hoped to negotiate meaningful changes with the relevant unions and guilds and otherwise work for independent producers on issues like those identified in this article. At this early stage, the IPA has been organizing quietly, and has begun guild negotiations. The jury is out as to whether sufficient funding, support, effort and patience will be available for this very much needed organization.

C. Other Significant Organizations for Independents

There are other organizations that assist or encourage independent filmmakers. The Independent Feature Project is one such entity. A bi-coastal group originally founded by underfunded independent filmmakers, IFP organizes meetings, seminars, screenings, a film market and, perhaps most well-known, the annual Independent Spirit Awards to recognize achievement in independent films. Even the Cannes Film Festival,¹³⁷ while emphasizing non-U.S. films, exposes many independent films to the world.¹³⁸ Examples include *sex, lies and videotape*¹³⁹ (after a notable *556 Sundance Film Festival (“Sundance”) debut), *Wild at Heart*,¹⁴⁰ and *Truth or Dare*¹⁴¹ (the Madonna documentary).¹⁴² Cannes has also heightened the world's awareness of films from great international directors like Mike Leigh¹⁴³ (*Naked and Secrets & Lies*), Jane Campion¹⁴⁴ (*The Piano*), Zhang Yimou¹⁴⁵ (*To Live*), Shekhar Kapur¹⁴⁶ (*The Bandit Queen*), Lars von Trier (*Breaking the Waves*¹⁴⁷), and many others.

Sundance also includes substantial educational and organizational programs to accompany its increasingly business-oriented festival.¹⁴⁸ Sundance has increased the world's awareness and appreciation of independent films. Success there sometimes leads to little (for example, *Chameleon Street*¹⁴⁹), and sometimes leads to national acclaim and distribution (*Reservoir Dogs*¹⁵⁰ and *The Brothers McMullen*¹⁵¹). In 1996 alone, Sundance was the forum for *Shine*,¹⁵² *Big Night*,¹⁵³

¹³⁶ Ted Johnson, AFMA Creates New Indie Producers Arm, *Daily Variety*, Apr. 15, 1996, at 8, 22.

¹³⁷ Cari Beauchamp & Henri Behar, *Hollywood On The Rivera: The Inside Story of The Cannes Film Festival 1992* (1992).

¹³⁸ *Id.*

¹³⁹ *sex, lies and videotape* (Miramax 1989).

¹⁴⁰ *Wild at Heart* (PolyGram Film Entertainment 1990).

¹⁴¹ *Truth or Dare* (Miramax 1991).

¹⁴² See Beauchamp & Behar, *supra* note 137, at 21.

¹⁴³ *Naked* (Fine Line 1993) and *Secrets & Lies* (October Films 1996).

¹⁴⁴ *The Piano* (Miramax 1993).

¹⁴⁵ *To Live* (Shanghi Film Studio 1994).

¹⁴⁶ *The Bandit Queen* (Kaleidoscope 1994).

¹⁴⁷ *Breaking the Waves* (October Films 1996).

¹⁴⁸ Dan Cox, *Stone, Sayles Pix Ride High at Telluride*, *Daily Variety*, Aug. 26, 1997, at 1, 19.

¹⁴⁹ *Chameleon Street* (Fine Line 1996).

¹⁵⁰ *Reservoir Dogs* (Miramax 1991).

¹⁵¹ *Brothers McMullen* (Videography 1995).

¹⁵² *Shine* (Fine Line 1996).

¹⁵³ *Big Night* (Samuel Goldwyn 1996).

and *The Spitfire Grill*.¹⁵⁴ Many directors and actors have seen their careers jumpstarted by acclaim at Sundance (including Allison Anders, Brad Pitt, Ashley Judd, Quentin Tarantino, Kevin Smith, Ed Burns, Bryan Singer, and David O. Russell).

Other film festivals--in Toronto, Venice, Berlin and elsewhere--have proven records of supporting international and independent filmmakers. As Sundance has grown, another well-established Rocky Mountain film festival, in Telluride, Colorado, has become a favorite of many independents. Started in 1974, Telluride has become successful without quite the commercial (and studio) pressures of Sundance. Recent domestic *557 premieres at Telluride have included *Sling Blade*,¹⁵⁵ *Swingers*,¹⁵⁶ *Breaking The Waves*,¹⁵⁷ *The Piano*,¹⁵⁸ *The Crying Game*,¹⁵⁹ and *Secrets & Lies*.¹⁶⁰

The American Film Institute (“AFI”) and numerous film schools also provide training, education, and interaction between many in the independent film business. AFI is also very involved in the history and preservation of film, which tends to lead to an appreciation of the creativity of independent films.

These and other organizations help foster independent production but, ultimately, can do only a limited amount to assist in the ultimate problem of financing and marketing independent films.

X. The Benefits of Forming a New Bargaining Unit for Independent Producers

The problems caused independent producers by residuals, minimum guaranteed compensation, work rules, and other strict requirements and mandated personnel must be approached in a completely fresh manner by independent producers and industry guilds and unions. As long as such negotiations are separate from the studios, they need not impact existing rules covering the majority of money spent on film production.

Such negotiations should be focused not on the “independence” of the producers, but on the limited size of their pictures' budgets. For now, negotiated rules for three budget levels (e.g., three million dollars, five million dollars, and ten million dollars) would be a useful and practical approach. For these purposes, the “budget” must be defined to include costs inherent in independent films, but not prevalent in studio pictures--completion bond premiums, finance charges and interest, contingencies, single picture errors & omissions insurance, escrow fees, finder's fees, legal fees, gap financing and related insurance costs, and guaranteed deferments.

Cooperation between negotiators could lead to bonus and deferment provisions for successful films, elimination of inflexible gross revenue-based residuals, inclusion of a pre-negotiated true “profit” calculation, altered provisions for personnel hired for multiple guaranteed films, and acceptance of a certain amount of “speculative” or contingent work so all *558 major participants

¹⁵⁴ *The Spitfire Grill* (Castle Rock 1996).

¹⁵⁵ *Sling Blade* (Miramax 1996).

¹⁵⁶ *Swingers* (Miramax 1996).

¹⁵⁷ *Breaking the Waves* (October Films 1996).

¹⁵⁸ *The Piano* (Miramax 1993).

¹⁵⁹ *The Crying Game* (Miramax 1992).

¹⁶⁰ *Secrets and Lies* (October Films 1996); Cox, *supra* note 148, at 1, 19.

are financial, if not legal, partners in the highly cooperative and collaborative independent filmmaking process.

Directors need to understand how little time and money is often available in post-production for experiments and freedom when a film must be delivered to a film market, festival, or distributor to pay off a loan or free money to pay for ongoing post-production. Writers must be allowed to write without financial guarantees in the hope that their product will excite actors, entice investors, and interest distributors. They should share in that success, but not negotiate provisions which impair its likelihood.

Crew negotiations must be flexible. Safety and health cannot be compromised, but precedent and power must be. Unions should be open to all talented personnel. This would allow merit and the market to determine the staffing of independent films and thus enhance the development of new and diverse talent.

The financial realities of each film must--and reasonably should--be allowed to influence the structure of employment arrangements. No one would be required to perform work on any film, but their desire to do so, especially if derived from artistic, political or philosophical concerns, should not be destroyed or barred by overly rigid rules. Each film is different, and this should apply to its economics as well as its organization and content.

X. Centralization and Independence

The increasing centralization in the entertainment industry as a whole raises issues of independence for all concerned.¹⁶¹ Miramax's success with *sex, Lies and Videotape*¹⁶² in 1989 (with reported domestic box office of \$24.7 million), followed by *The Crying Game*¹⁶³ in 1992 (\$62.4 million) and *The Piano*¹⁶⁴ in 1993 (\$40.2 million)¹⁶⁵ allowed that company to survive and to market itself to Disney. Thus, while still distributing independently produced films, Miramax has mapped out a middle ground which provides it with substantial capital resources and domestic distribution strength.

*559 The purchase of Turner by Time Warner created serious questions about what to do with three film production units. Castle Rock, New Line and Turner Pictures all faced questions of being dissolved, merged, sold, or controlled. New Line was perhaps the most successful independent production and distribution company in the prior decade due to films (and their sequels) like *A Nightmare on Elm Street*,¹⁶⁶ *Teenage Mutant Ninja Turtles*,¹⁶⁷ *House Party*,¹⁶⁸ *The*

¹⁶¹ See *The National Entertainment State*, *The Nation*, June 3, 1992, at 3-15.

¹⁶² *sex, lies and videotape* (Miramax 1989); *The Top 40*, *The Hollywood Rep.* (1994 Independent Producers & Distributors Special Issue), 1994, at 33.

¹⁶³ *The Crying Game* (Miramax 1992); see *The Top 40*, supra note 162, at 33.

¹⁶⁴ *The Piano* (Miramax 1993); see *The Top 40*, supra note 162, at 33.

¹⁶⁵ These box office figures are from Entertainment Data, Inc. and *The Hollywood Reporter*. See *The Top 40*, supra note 162, at 33.

¹⁶⁶ *A Nightmare on Elm Street* (New Line Cinema 1984).

¹⁶⁷ *Teenage Mutant Ninja Turtles* (New Line Cinema 1990).

¹⁶⁸ *House Party* (New Line Cinema 1990).

Mask,¹⁶⁹ Mortal Kombat,¹⁷⁰ and Seven,¹⁷¹ but suddenly saw its plan to combine independence with larger scale film production and distribution endangered. Castle Rock faced the reality of being purchased by one of the studios, scaling back its operations, and looking for a new financial structure. Turner Pictures was almost immediately dissolved into Warner Bros., leaving an operation which had prided itself on being small, non-bureaucratic and personal as only the defunct repository of dozens of development projects.

Working outside the studios can be, as described in part above, a daunting task. Working within the studios can similarly be frustrating and uncertain, dominated as it is by structures which are far from what's best for any single motion picture. The increased centralization of the industry is likely to lead to creative problems and restrictions.¹⁷² Thus, the more centralized each studio becomes, the more it may turn to independent producers for different kinds of product. As always, the motion picture industry seems to work in a cyclical manner with respect to everything except the seemingly ever upward cost of production and marketing.

***560 A. Are There Antitrust Laws? Should There Be?**

The original effort to “bust” the trusts of the early Twentieth century was possible to a great extent because of the individual energy, single-mindedness and political power of Theodore Roosevelt. Nevertheless, depending upon the nation's (and world's) economy, changes in political philosophy, and current unemployment, inflation and interest rates, the attention given to antitrust laws ebbs and flows. When Ronald Reagan became president in 1981, large businesses believed (rightly) that they had gained carte blanche to grow, merge and conduct business as they wished. If anything, the government was there to protect large business from any regulation or benefits that might remain available to employees, smaller businesses or consumers.

As a result, communications, broadcasting and entertainment companies grew larger and merged. The 1948 United States v. Paramount¹⁷³ Supreme Court decision and resulting consent decrees had left the motion picture industry with a stark division between exhibition and distribution/production. This phenomenon reversed itself in the 1980s as the studios bought and invested in theaters. In addition, battles arose before the Federal Communications Commission and in Congress over various other issues, including whether the television networks could own their own programming in a world where home video and pay, cable, and satellite television revenues exceed theatrical box office.

¹⁶⁹ The Mask (New Line Cinema 1994).

¹⁷⁰ Mortal Kombat (New Line Cinema 1995).

¹⁷¹ Seven (New Line Cinema 1995).

¹⁷² A good example is the complaint to Disney registered by the Chinese government in December, 1996 over Disney's domestic distribution of Kundun, the biographical film about the Dalai Lama. With Martin Scorsese directing, Disney indicated it would abide by its contractual commitments. But what will happen in the future when Disney is again presented with such a sensitive project? As companies like Disney see their international revenues grow, they tend to become much more subject to such political pressures. Subsequently, China's Ministry of Radio, Film And Television directed a memo to three studios allegedly halting deals with those studios due to Chinese displeasure over Red Corner, Seven Years In Tibet, and Kundun. Robert W. Welkos & Maggie Farley, Insulted By Films, Beijing Orders Halt to Studio Deals, L.A. Times, Oct. 31, 1997, at A1, A6. Similar issues arise in the imposition of censorship and quotas in various countries around the world.

¹⁷³ 334 U.S. 131 (1948).

Despite occasional inquiries about specific antitrust issues, with few exceptions, every merger or large scale purchase seriously pursued in the entertainment industry has been allowed to proceed. Whether the synergy sought by Warner Communications and Time (and then Turner), Viacom and Paramount, or Disney and ABC will lead to better programming, more efficient distribution, or any other business benefits, “growth for the sake of growth” seems to have become an acceptable goal. Even with six years of a Democratic administration, nothing has changed much in antitrust enforcement.¹⁷⁴

The “free market” argument on this subject leads to interesting ramifications. For example, one could argue that the voracious growth of News Corp., Disney, Viacom, Time Warner, and a few other massive companies will inevitably lead to various units, divisions and talented executives leaving these behemoths to form their own successful *561 independent companies. Perhaps a new period of privately financed companies or public offerings will lead to new film production entities. However, such companies would have to learn from recent failures and come to grips with problems inherent in working under the shadows of the studios.

Some form of antitrust analysis needs to occur if the studios are to know whether they have any legal limits and if the motion picture industry as a whole is to properly evaluate its direction. Government certainly can play a part in determining the point, if any, at which it is unsafe for the public's access to entertainment and educational products to be in the hands of so few.

B. Changed Government Attitudes Toward Labor Organizations

The Reagan presidency not only frowned on antitrust enforcement but voraciously attacked labor unions, starting almost at once with an attempt to break the air traffic controllers' union. While the motion picture industry's unions are quite different from those in many manufacturing industries, particularly due to the nature of the work done and the unionization of highly paid individuals, this anti-union approach has had its impact even in this industry. However, due to the resources available to the WGA, DGA and SAG--and their members' sophistication and education--these organizations have flourished while other unions suffered. Moreover, “management” (in this case, the studios) can and does benefit by developing a system in which the guilds and studios work together to set mutually beneficial rules--which do not take into consideration the interest of independents. Thus, while the studios have been virtually free to grow and to impose certain structures, so have the guilds.

In essence, government has stopped regulating the growth of all entities in the entertainment industry.

C. The Effect of Overseas Ownership and European Collectivization

The huge impact of studio films is felt around the world. Many countries have instituted means to limit the pictures available, or attempted to enhance the likelihood of distribution for local motion pictures. In both instances, whether as a result of cultural or economic reasons, studio films are viewed elsewhere as a problem. These issues have intertwined themselves into a variety of international trade, piracy, copyright, and cultural questions.

¹⁷⁴ “And yet, to most Americans, the economic arguments against the trust may matter less than its offenses against taste.” Mark Crispin Miller, *Free the Media*, *The Nation*, June 3, 1996, at 10; see Monroe E. Price, *Making Antitrust Work*, *The Nation*, June 3, 1996, at 28.

*562 Censorship boards have been set up in numerous countries, and quotas have been imposed. These issues are attempts in one way or another to limit the influence of the “Hollywood Film” and prop up usually suffering local film industries.

Two distinct events during the last decade have raised interesting challenges to the studios and, in some cases, have provided opportunities for non-studio filmmaking.

First, Japanese companies attempted to purchase substantial American-based assets. Among the highest-profile purchases were Sony's purchase of first CBS Records and then Columbia/Tri-Star. Later Matsushita purchased MCA/Universal. As this was happening, Australian (now U.S.) citizen Rupert Murdoch's News Corp. acquired Twentieth Century Fox. PolyGram, while not acquiring a studio, began to acquire independent film companies (Propaganda, Interscope, Egg, Working Title, A&M) and built a joint venture distribution entity (Gramercy) with Universal, which it then acquired. (Of course, more recently, Universal purchased Polygram in order to obtain its substantial music business).

The media and U.S. politicians attacked the perceived threat of foreign acquisition of U.S. entertainment companies. However, with Matsushita eventually having sold MCA to Seagram's (interestingly, a Canadian-based entity), with Polygram being purchased by Universal, and with Sony's problems and patience with its studio, such concerns have waned. Nevertheless, some issues still require attention.

The insularity of studio executives and structures clearly proved inconsistent with “foreign” ownership. This has proved equally true for U.S. corporations which do not understand the entertainment industry, such as when TransAmerica bought MGM-UA and when Coca-Cola bought Columbia. Thus, it is not simply independent filmmakers who find it difficult to cope with the studio structure. Even with seemingly limitless resources and power, its owners cannot always manage a film studio.

A second trend is European collectivization, in the form of the European Union. This organization was originally structured to bring some amount of free trade and free travel, as well as collective economic stability, to Europe. With the economic development of Japan and, increasingly, other Asian countries, Europe saw that cooperation would be required to compete in the international business world. This has had an impact on the entertainment industry in part because of the clash of philosophies regarding copyright and ownership of films.

The English and American view--to allow ownership by the studio or production entity--is inconsistent with the French attitude regarding “moral rights” of authors. That approach assumes ownership by those who *563 actually “create” a picture. This seemingly esoteric and philosophical difference has brought about serious disputes over cultural identity, artistic freedom, copyright, and free trade. It led to major battles in the most recent GATT trade negotiations (known as the Uruguay Round) and the United States eventually removed all “cultural” issues from those negotiations to conclude an agreement at the deadline.

What this has done for independent filmmakers is to cause Europeans to attempt to set up a schedule of quotas, subsidies, tax advantages, and other support systems which allow them to work together and to try to limit the influence of studio pictures. However, because independent filmmaking by its nature is not limited to Southern California, independents can join forces with producers, actors and writers from other countries to take advantage of such subsidies and tax

breaks. As a result, substantial “independent” filmmaking is on the rise in Canada, Australia, Ireland, the United Kingdom, and the rest of Europe.

XI. Diversity and Independence

The lack of diversity in film industry content, artists and executives arose in a number of contexts as a political issue.¹⁷⁵ To some extent, of course, changes in this area are triggered by demand in the marketplace. However, “demand” can be artificially created and altered by supply. For example, when studios produce the same kinds of movies over and over, the public's desire for those films is assumed.

Naturally, once an original film or a renewed genre becomes successful, everyone pronounces a change in what consumers want. Whether those consumers would have been thrilled to see that same film years earlier if it had been available is something they never had an opportunity to establish. Generally, whether films starring a greater diversity of actors and actresses or containing unusual themes could become profitable for the studios is difficult, if not impossible, to prove under the present system. We know that independent films do spring from a variety of sources, allow for substantial diversity, and often help highlight themes that would otherwise never be seen.¹⁷⁶

*564 In addition, when movies are based upon smaller budgets (both for production and marketing), more chances are taken, since the opportunities and risk are both smaller. Thus, independent production inevitably allows for new approaches and unusual themes.

Affirmative action and other social changes have affected hiring in the entertainment industry. For example, the increased number of women in law school during the past twenty five years has resulted in a similar rise in women attorneys, agents and mid-level executives. However, the growth of diversity in hiring for films has been slow in coming. Recent statistics have shown a substantial increase in the number of black acting roles, but have also shown a much smaller increase for other minorities. Women's roles have increased in features, but this is an extremely slow process compared to the number of films produced. Moreover, with very few exceptions, the higher salaried, starring roles and directing jobs tend to be limited to white males.¹⁷⁷ Independent

¹⁷⁵ Jesse Jackson has raised this issue at various times, just as Bob Dole and others have used the issue of film content (for example, in *Natural Born Killers*) to generate political support. If progress is to be made, it would seem far more effective to treat this as a civil rights--rather than a political--issue.

¹⁷⁶ See Ted Johnson, DGA Minority Report Bleak, *Daily Variety*, June 13, 1997, at 1, 103; David Robb, *Who's Hiring*, *The Hollywood Rep.*, June 19-21, 1998, at 21-25. The DGA's 1995 report on women and minority hiring showed that, while women comprise 28 percent of tape directing work, they are hired for only eight percent of film directing days. Ted Johnson, DGA Minority Report Bleak, *Daily Variety*, June 13, 1997, at 103. Meanwhile, minorities held only 5.9 percent of tape and four percent of film directing days. *Id.* at 103. The 1996 DGA figures saw the percentage of total work days for women actually drop slightly from the prior year. Minority work days did increase, with total minority work days still accounting for only 9.7 percent. David Robb, *supra* note 177, at 20-21. For the period from 1988-1997, minorities directed only 7.5 percent of all films. *Id.*

¹⁷⁷ This is not a new point. In a January 1939 radio speech, Screen Writers Guild President Dudley Nichols acknowledged the limits imposed by the studios on film content: “Hollywood, in its fear of losing profits by making enemies, in its mad desire to appease the prejudices of every group, has submitted to an ever-tightening censorship under which it becomes impossible to deal with reality.” Jacobs, *supra* note 24, at 507-08.

production raises such issues of diversity and, to some extent, provides a training ground for people from different backgrounds.

Diversity of content can also be enhanced--as argued by the Justice Department in *Paramount* by more open distribution systems and, impliedly, independent production.¹⁷⁸ Perhaps stronger independent production would have seen the release of films questioning the Vietnam War while it was being fought. Perhaps, a stronger group of independent employers could have weakened the blacklist which ravaged so many brilliant writers and directors beginning with the so-called "Hollywood Ten" in late 1947.¹⁷⁹ Decentralized production, by also decentralizing decision-making, increases the chances that all forms of new, different and risky people and ideas will be given an opportunity to succeed.

***565 XII. Distribution and Exhibition: Access Denied?**

A. The Domestic Exhibition Problem

While the studios' historical control of domestic motion picture theaters ended decades ago, the current situation provides precious little access to available screens for independent films. The reason for this scarcity is more complicated than the issue of studio ownership itself, which has been renewed in recent years. Nevertheless, studios dominate the most desirable screens.

There have been no recent lawsuits, private or governmental, asserting that the recent upsurge of studio theater ownership has created discriminatory booking policies. However, studio films dominate desirable theaters, particularly during the most valuable holiday and summer exhibition periods. The number of screens booked for the top five or six major studio releases often includes half or more of all available screens.

While a release on one thousand screens was a large one a decade ago, it is now common to see releases on 2,500 to 3,000 and more screens.¹⁸⁰ Some of this can be accounted for by the upgrading and multiplexing of theaters, which provides many screens with smaller seating capacities than was normal in the past. Admissions are also up.¹⁸¹ Nevertheless, studio releases have become far more extensive.

The studios believe they need such wide releases, given the huge cost of national saturation marketing and advertising for most studio films. A studio spending well in excess of twenty million dollars to release a film, naturally wants to make certain that every potential ticket-buyer can see that film during its first two weekends. In addition, the mentality of the "hit film" has changed. The potential revenues for any one hit, particularly when including sequels, merchandising and

¹⁷⁸ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹⁷⁹ See Friedrich, *supra* note 17, at 298-337. This contains a good summary of the 1947 House Un-American Activities Committee hearings and the beginning of the blacklist. *Id.*

¹⁸⁰ When *Lost World*, the sequel to *Jurassic Park*, was released in May, 1997, it reportedly was released on 3,000 screens. Andrew Hindes, *Wow Bow of \$93 mil for 'World,' Daily Variety*, May 28, 1997, at 8. Multiplexes often now make an exact screen count difficult. *Id.* In any event, the number for *Lost World* was greater than for any past release and has pushed most other major releases onto more screens than ever before. This trend continued the following summer for *Godzilla*, *Armageddon*, and other major releases.

¹⁸¹ "In 1996, there were 1.34 billion theatre admissions, the largest since 1959." Peter M. Nichols, *Land of the Cineplex, Home of the Cassette*, *N.Y. Times*, July 13, 1997, at 1, 22.

increased library value, makes *566 the search for a Batman,¹⁸² Lethal Weapon,¹⁸³ Jurassic Park,¹⁸⁴ or Titanic,¹⁸⁵ the primary goal of the studios.

Only recently have film-goers become generally aware of box office results, the number of screens on which a film is being released, budgets, and similar “business” matters. This knowledge seems to alter consumer decisions. Entertainment and business aspects have become inextricably locked together, creating a cycle in which few films are released slowly to build momentum.

A result of this saturation booking release pattern is that comparatively few theaters are available for smaller or specialized films. Many of those available screens are older “arthouse” theatres in need of restoration.¹⁸⁶ There is also more competition for these screens, since “(a)s many as 20 indie films are distributed each weekend, a fact that has bumped up marketing costs more than 10% in the past year.”¹⁸⁷ Moreover, since independent films often rely upon word of mouth, a slow building of momentum, good reviews, and access to a supposedly small “art film” audience, the lack of available screens makes it extremely difficult for most independent or foreign language films to reach their audience.¹⁸⁸ Miramax Co-Chairman Harvey Weinstein has compared independent releases to studio releases by pointing out that the studios focus on the opening weekend, while for Miramax “six weeks into a movie [release] is when you really have to concentrate, because these movies need nurturing and special handling It's a whole process of seeding the marketplace, going *567 through waves and waves of it.”¹⁸⁹ Finally, the skyrocketing cost of print, radio and television advertising makes it hard for independent and specialized films to compete.

B. Film Festivals and the Attempt To Gain Public Awareness

Independent films have found success by utilizing film festivals as an alternate market, promoting films by creating controversy (for example, Miramax's rating battles), or obtaining Academy Award nominations or other critical awards to promote a film's release. While these means are

¹⁸² Batman (Warner Bros. 1989).

¹⁸³ Lethal Weapon (Warner Bros. 1987).

¹⁸⁴ Jurassic Park (Universal 1993).

¹⁸⁵ Titanic (Twentieth Century Fox 1997).

¹⁸⁶ “There are currently about 400 screens domestically dedicated to arthouse product and that includes everything from modern multiplexes to decaying calendar operations.” Leonard Klady, *The Special Needs of the Speciality Pic Biz*, *Daily Variety*, Aug. 13, 1997, at 19. However, some independent films have been able to book more “mainstream” theatres. For example, “Miramax's *Emma* and Gramercy's *Fargo* could be seen in 848 and 716 theatres, respectively. These are the kind of numbers that a decade ago were considered respectable for a mainstream Hollywood picture.” *Id.*; Joseph Steuer, *The Indies: Too Much of a Good Thing*, *The Hollywood Rep.*, Jan. 9, 1997. However, in the 'first nine months of 1997, U.S. indie acquisitions accounted for just 1.3% of the domestic box office, down 50% from each of the prior three years.” Leonard Klady, *Odds for Indie Pic Distribution Get Longer*, *Daily Variety*, Oct. 8, 1997, at 19.

¹⁸⁷ Thom Geier, *Hopes for Hits Broken by Fractured Audiences*, *Daily Variety*, Jan. 7, 1999, at 1, 15.

¹⁸⁸ For an “in the trenches” description of the effort involved in obtaining distribution for independent films, especially during the period from 1985 (*She's Gotta Have It*) to 1994 (*Clerks*). See John Pierson, *Spike, Mike, Slackers & Dykes 1* (1995).

¹⁸⁹ Kenneth Turan, *The Reel World*, *L.A. Times*, Dec. 29, 1997, at F1, F11 (interviewing Harvey Weinstein). Miramax's unique success at this is reflected in 1999 Academy Award winners and domestic box office successes *Shakespeare in Love* and *Life is Beautiful*.

possible, they are difficult for all but the most fortunate of independent films. One result has been a torrent of submissions to Sundance, Cannes, Toronto and the few other major film festivals that can make a difference in the market. Moreover, obtaining Golden Globe and Academy Award nominations has become big business, requiring substantial trade ads, video mailings, screenings, and promotion just to obtain such nominations. Thus, the need to spend money to succeed creates a vicious cycle when attempting to create a commercial market for an independent film.

While independent film companies have suffered, there also appears to be a glut of small, independently produced motion pictures. "In 1998, indeed, there were twice as many independent films" as in 1995 and "nearly 20% more than in 1997."¹⁹⁰ Over 600 dramatic features were submitted for consideration by Sundance Film Festival officials for 1997, primarily for eighteen dramatic film competition slots and 22 "American Spectrum" screenings.¹⁹¹ For the 1998 Sundance Film Festival, 750 "fictional" films were submitted for thirty-two screening positions.¹⁹² By 1999, there were 850 feature submissions for Sundance screening positions.¹⁹³ These odds create a lottery-like situation, a feeling enhanced by recent Sundance films which obtained high profile distribution. However, even after obtaining such a cherished screening position, many Sundance films do not obtain meaningful distribution, or obtain distribution for a lot less money than actually spent on production. Thus, obtaining distribution and theatrical exhibition for independent films is a far more *568 torturous process than appears from just looking at the success of a few films.¹⁹⁴

Active independent production companies attempt to develop and produce films consistent with the apparent needs and desires of the market. But many current independent films are made by first-time producers or directors on shoestring budgets, with artistic motivations--but commercial dreams. The need for such art and experience is not in question, but there is little likelihood of the theatrical market seeking out such films.

C. The Shrinking Video Market

The video market has retracted substantially, first in the United States and then around the world. This has eliminated video distributors and retail shelf space for many motion pictures. The studios have increased their video shipments¹⁹⁵ (Disney has shipped more than twenty million units on a number of sell-through titles, and thirty million units of *The Lion King*¹⁹⁶) while over 800,000 rental units of *The Rock*¹⁹⁷ and over 700,000 units of *Die Hard With a Vengeance*¹⁹⁸ and *Pulp*

¹⁹⁰ Thom Geier, Hopes for Hits Broken by Fractured Audiences, *Daily Variety*, Jan. 7, 1999, at 1, 13.

¹⁹¹ Sights & Sounds, *Daily Variety*, Jan. 15, 1997.

¹⁹² Todd McCarthy, Leaner, Cleaner Sundance, *Variety*, Dec. 8-14, 1997, at 7, 8, 18, 20.

¹⁹³ Todd McCarthy, Dance Card Full, *Daily Variety*, Dec. 2, 1998, at 1, 10.

¹⁹⁴ "Through the first nine months of 1997, U.S. indie acquisitions accounted for just 1.3% of the domestic box office, down 50% from each of the prior three years." Klady, *supra* note 186, at 19. Also, according to John Krier of Exhibitor Relations, "The number of screens for independent film has not increased proportionately with all the specialized films now available." Andrew Collier & Joseph Steuer, *Indie Films: Life in the Cash Lane*, *The Hollywood Rep.*, Jan. 16-18, 1998, at 96.

¹⁹⁵ Carl DiOrio, Rock Cages Vid Record for Rental Bookings, *The Hollywood Rep.*, Dec. 3, 1996, at 7.

¹⁹⁶ Scott Hettrick, Dis to Unleash 'Dalmations' Vid With Huge Push, *The Hollywood Rep.*, Feb. 10, 1997, at 1, *The Lion King* (Walt Disney Pictures 1994).

¹⁹⁷ *The Rock* (Hollywood Pictures 1996).

¹⁹⁸ *Die Hard With A Vengeance* (Twentieth Century Fox 1995).

Fiction¹⁹⁹ were shipped.²⁰⁰ The studios have also begun to create direct sell-through videos like Disney's Aladdin²⁰¹ sequel. In addition, CD-ROMS and video games have become video store staples. Shelf space thus fell--and independent films are the obvious loser.²⁰²

Smaller exploitation films, which often were shipped directly to video, have lost much, if not all, of their market. Where smaller action and martial arts films could be expected to ship between 25,000 and 75,000 units domestically just a few years ago, many of these pictures now sell *569 well under 20,000 units, and quite often under 10,000 units.²⁰³ This in turn caused a number of independent video distributors to go out of business, eliminating companies that knew how to market and sell such independent product. It is not accidental that Miramax, for example, despite retaining its independent approach in acquiring independent films, distributes its films to the video market through Disney's powerful video division. Thus, the safety net of video revenues no longer exists for independently produced films.

D. The Television Boom

The substantial growth in pay and free television has had an impact on independent production in a number of ways. There has been substantial new production by Showtime, HBO, USA, and other pay and cable channels. This can provide additional work and experience for independent filmmakers, but it also tends to offer far less independence for filmmakers, as each of these entities has a view of what subjects, actors, budget and style works for them and their particular audience. Thus, employment grows, but not the other attributes of independent production.

Some are optimistic about the increased commercial prospects for independent films as a result of new cable channels (such as the Independent Film Channel or the Sundance Channel) and increasing film exploitation over the Internet. However, such "narrow casting" (that is, access to more specialized product as sold through catalogues and direct mail), while certainly pointing toward access for previously unseen product, also has the effect of "ghettoizing" such independent programming.

As an example of this concern, many video stores set aside a small section for "foreign language" films. This appears to be a step forward, since it helps remind the retailer to acquire a certain number of such productions, and also helps market that product by letting the consumer know that there is a place to look for such video rentals. However, this approach differentiates between all English language and foreign language product, thus limiting the audience for the latter, no matter how successful a particular foreign language film might become. In addition, if one non-English language film (such as *Il Postino*) does especially well, thereby creating a perceived consumer appetite, the increased number of videos for *570 that title purchased by retailers can automatically reduce the amount of shelf space in the "foreign language section" available to

¹⁹⁹ Pulp Fiction (Miramax 1994).

²⁰⁰ Carl DiOrio, Rock Cages Video Record for Rental Bookings, *The Hollywood Rep.*, Dec. 3, 1996, at 1.

²⁰¹ Aladdin (Walt Disney Pictures 1992).

²⁰² Thomas K. Arnold, *Independents' Daze*, *L.A. Times*, Nov.12, 1997, at D10

²⁰³ Independent films have seen a freefall in domestic video sales. See, Collier & Steuer, *supra* note 194, at 91. One analyst has reported that independent films rarely sell over 30,000 units, "down from average sales of 60,000 three years ago. He added that smaller films are being swept out of the market by Hollywood blockbusters." *Id.* (quoting Tom Adams).

promote any other foreign language films. Thus, such differentiation provides some access to the market, but usually limits that access at the same time.

A similar problem could occur when independent films are televised on separate “independent” channels, just as they often now are pushed to the few “art” theaters in most urban areas. This is certainly not an attempt to criticize the few effective means that exist to provide access to independents. But the separation of this product from studio films has not only made it more difficult for some films to get into the marketplace at all, but it has also created an awareness by consumers of differences between studio and non-studio product. This can occasionally become a marketing advantage, but usually creates an artificial ceiling for sales, revenues, or viewers.

The independent film community must reevaluate this process and market its product differently and creatively. This challenge has been met by companies like Miramax and New Line, who approach it in their own distinct ways. Attempts to include the exhibition, distribution and production community in any such efforts is a challenge that independents must meet.

XIII. Conclusion

Independent production will never be easy, particularly in light of the power and resources of the studios. Obtaining distribution for an independent film is always a difficult challenge. As discussed above, the studios are, by nature, not engines of diversity, creativity, original expression or opportunity. They nurture a structure which makes it difficult for artists to function in any but the most repetitive ways. Some artists do flourish in such a system. Many do not. There is nothing wrong with artists attempting to learn how to utilize the studio system to their advantage. Similarly, those who do not fit in, cannot gain an opportunity, or who have no interest in working on traditional studio pictures need to be aware of the overall context in which they operate.

Independent filmmakers can educate one another, organize information, and develop models of representation and negotiation. They can attempt to convince the studios, guilds, unions and media at every opportunity that enhancing independent production is not antithetical to the success of those large organizations. Some of the ways to do this have been discussed above. There are many others. To curse the studios for their success, size and power is of little value to independent and *571 international filmmakers. To understand the circumstances and work within those areas which are untouched by or of no interest to the studios will provide a myriad of opportunities.

Independence cannot, by its nature, be pursued through a dogmatic, formalized plan. Each film requires adaptations and compromises. However, independent companies can be more efficient, move and adapt more quickly, and take chances to seize short term opportunities. They must think internationally and strategically. They must utilize every opportunity and share information with other independent filmmakers. Cooperation rather than fear, creativity rather than greed, must be the independent film community's credo.

The creativity of an independent filmmaker cannot stop with the film itself. Perhaps even more creativity must be applied to the acquisition of capital, formation of a business plan, licensing of distribution rights, and marketing of each production made outside the studio system.