THE WRITER'S GUIDE
TO THE
MOTION PICTURE INDUSTRY

by

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[Draft. Any quotation or citation should be from the final published version.]

The information contained in this book was correct to the best of the author's knowledge as of 2012. It has not been revised or updated since then.

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This book is intended to give some general background solely from the author's perspective. It is not intended to provide legal or business advice and should not be used for those purposes. The author assumes no liability for any use made of the information or views set forth in this book.

This book is intended for writers of feature motion pictures, and specifically for writers of original screenplays rather than adaptations from existing literary material. The goal is for the writer to

- Sell his or her screenplay;
- Make the best deal for that screenplay;
- Get the film made; and
- Get his or her project back if the film does not go into production

This is not a "how to" book, since there is no one route to achieving these objectives. Rather it is an introduction to important terms and concepts which the writer needs to know not only to meet his or her goals, but also to communicate and function in the motion picture industry. Some of the terms and concepts are specific to the deal-making process. Included are simple explanations of a few fundamental legal concepts. Other terms extend into broader entertainment industry interests and concerns.

The book is not structured as a narrative. That is to say it is not a linear description of the process of selling a script, making the deal, etc. Instead it begins with broad concepts and then gets more specific, so that by the time the reader encounters complex deal points later in the book, he or she will hopefully have the basic knowledge so that these concepts will be at least moderately comprehensible.

Most paragraphs begin with a key term or concept in **bold typ**e. Related and subsidiary concepts to that main concept are also presented in **bold type** within each paragraph. Footnotes are used to expand on the main terms and concepts and to provide information that is important but possibly tangential to the primary purpose of the book. Once again in the footnotes, key concepts and terms are presented in bold type.

Advice to the reader: If you are confident that you have a good knowledge of the term or concept introduced in a paragraph or footnote, feel free to skip or skim that paragraph or footnote. This advice is given with the caveat that many terms and concepts are used differently in the motion picture industry than in other areas of business or in colloquial speech, and may have quite different meanings.

Although this book is aimed primarily at writers of original screenplays intended for production as feature motion pictures for initial release in theaters or on video-on-demand platforms, it also contains much information applicable to writers in general who have an interest in the entertainment industry, including novelists and authors of non-fiction books. It should also prove useful to writers whose career goal is not to write original scripts, but rather to be employed doing adaptations of existing material such as novels, or doing rewrites of other writers' screenplays.

THE GOAL: To have each screenplay produced with *[your name here]* receiving sole (not shared) written by credit and sole (not shared) separation of rights, on deal terms at least equivalent to those (including compensation minimums) specified in the Writers Guild of America Minimum Basic Agreement, and preferably overscale, and with other deal terms as recommended in this book.

Essential Terms:

Agreement: The word agreement and the word **contract** are often used interchangeably. To be enforceable (to be able to go to court and force the party with whom one makes an agreement to "perform" and otherwise to abide by the agreement's terms), a contract must have a number of elements – i.e., it must have these elements to be deemed to be a legal contract in court. Contracts are generally governed under state (not federal) law, so what these elements are varies somewhat from state to state. If any of these elements (e.g., consideration) are missing, than sometimes the parties are said to have "an agreement to agree," which is not an enforceable contract. In broad general terms the elements that are necessary to have a binding, enforceable contract are an *offer (see below) and acceptance, mutual agreement as to terms,* and *consideration (see below).* In motion picture deals, the *term* (time span) of an agreement (e.g., an option agreement – see below) is often very important and must be specified in writing.

Statute of frauds: Many oral agreements *are* contracts and *can* be enforced. However certain types of contracts *must* be in writing to be enforceable: prenuptial agreements; contracts that will take longer than one year to be performed (except for contracts of indefinite duration); contracts for sale or transfer of real property (land); contracts for the sale of goods with a purchase price of $500 or more (this is in the process of being raised to $5,000).[1] The legal principle and rules governing what contracts must be in writing is known as the "statute of frauds." Example: Producer L and Writer M enter into an oral agreement under which Writer M will rewrite a screenplay for Producer L as a work for hire (see below) for a fee of $20,000, and that Writer M will have eight weeks from the date of the agreement to finish the screenplay rewrite and to deliver it to Producer L. Technically this agreement between Producer L and Writer M would *not* have to be in writing under the statute of frauds. Therefore if Producer L failed to pay or Writer M failed to deliver the rewrite, either could sue the other. Of course in actual practice there would almost always be a written agreement (contract), and there should be.

Consideration: This is the compensation the party making the agreement agrees to accept "in consideration for" making the agreement. Example #1: Joe makes an agreement (contract) for Dave to paint his house for $500. The $500 is the consideration under the agreement. Example #2: George has a conversation with Tom during which Tom says that he will paint George's house, but nothing else is discussed. In this case there is no contract because there is no consideration. Sometimes there is an issue as to the **sufficiency** of consideration. Example: Writer T options his screenplay to Producer W for

[1] There are a few others but they are not relevant to this discussion.

a term of one year for "the sum of one dollar and other good and valuable consideration.[2]" Producer W will say that the "other good and valuable consideration" consists of his "best efforts to get the picture made." Theoretically the writer could go to court to have the contract declared invalid and unenforceable because the consideration as specified in the agreement was not sufficient.[3]

Fixed consideration: This is the consideration (compensation, payment, **purchase price**, writing fee, etc.) specified in the agreement that is not contingent on (meaning dependant on or conditioned on) anything else happening, such as the picture getting made, the writer getting a certain credit, the picture's budget being at a certain level, the picture making a profit, etc. Example: An option payment (see below) is fixed consideration. The purchase price (or exercise price – see below) is fixed consideration. There are contract provisions called "**deferments**" where certain amounts become payable to writers or other talent at a later date. If these payments happen at those later dates *automatically* and are not contingent on anything else, then they could also be classified as fixed consideration.

Contingent consideration: This is all other compensation which may (but not necessarily will) become payable to the writer or other talent dependent (contingent, conditioned) on other things happening – again, the picture getting made, the writer receiving a certain credit, the picture being "in profits" according to a certain specified definition, etc. etc.

Back end: The "back end" of a deal is generally any and all contingent consideration, although it is usually thought of as being only the **profit participation** (see below) aspect of the agreement.

The Picture: In almost every agreement this means the film that may be made on the basis of the material (screenplay, book, play, etc.) Therefore in entertainment agreements one almost never sees terms such as "the film," the title of the project, etc. It is always "the Picture." In the Writers Guild (WGA) Rate Book the antique term "Photoplay" is still used.

Development (basic definition): This is the period or phase commencing with the time the Producer (see below) options or acquires a project (such as a screenplay) until the project enters pre-production (see below). The Producer may engage in a wide variety of activities during development, including but not limited to having rewrites, polishes and other writing services performed; preparing budgets for the proposed picture; making offers (see below); scouting locations; doing publicity about the project; arranging financing (including submitting the screenplay and/or other project elements to potential third party financial sources); etc.

Greenlight: When a project is "greenlighted," that means that it has been advanced from development to **formal pre-production**. In effect this means that the picture has been approved for production. The power to greenlight a project is generally in the hands of the

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[2] In an attempt to get out of the sufficiency requirement, this would often be worded "and other good and valuab le consideration, the receipt *and sufficiency* of which are hereby acknowledged."

[3] Unfortunately in the real world one sees writers making this kind of agreement quite frequently. Of course such agreements will also specify a purchase or exercise price (see below) payable if the picture is made. Or at least they should!

party who provides or controls the production financing. For studio projects this is typically the studio itself.

Start date: When a project is "greenlighted" this generally entails setting a start date for principal photography (see next section) – i.e., the day on which the picture will begin shooting.

Pre-production: After a project is greenlighted or at a time determined when a project is greenlighted, it enters pre-production, during which the budget and schedule are finalized the crew is hired, the locations are scouted, etc.

Principal photography: This is the span of time encompassing the actual shooting of the film, which can be period of as short as twenty days on a small indie film to forty days, sixty days, or much, much more on a big studio picture. Special effects and similar aspects of the production can (and very often are) done after (sometimes before) principal photography.

Second unit: This is a team that shoots parts of the film, sometimes during principal photography and sometimes after it (occasionally before). This is often done by another director (the second unit director) and/or another DP (cinematographer), and is sometimes in a state or country different from that in which principal photography takes place. It often involves shooting of backgrounds, landscapes, or sequences in which actors other than the stars are involved.

Post-production: This is essentially everything that happens subsequent to principal photography: editing, scoring (music), etc.

DP: This term is now universally in use for the director of photography. In the business one now hears the terms "cinematographer" (British "lighting cameraman") very seldom.

Above the line: This term derives from the practice of making motion picture budgets. Traditionally there was a physical line on the budget form, above which appear the script and other literary rights and writing services costs, the director, the actors (but not the extras), and costs associated with them. People such as directors and writers who fall above the line in the budget are referred to as above the line people.

Below the line: These are the costs of the physical production and post-production of the picture and the personnel who perform these tasks (as well as their guild and union "fringes" – see below), including cinematography, film and lab (in the old days – digital in the modern equivalent), sound, grip and electric, lighting, set operations, location rentals and other costs, stunts and special effects, **picture cars**[4] and other vehicles, transportation (very frequently a huge cost), editing, music rights and scoring, etc. Individuals who perform below the line functions are referred to as below the line people.

[4] **Picture cars** are motor vehicles that appear on screen.

Craft services: This is the term for the tables where snacks and beverages are available to the crew and cast during principal photography.

Star Wagon: This is actually the name of a company that rents trailers in which cast members have their dressing rooms. The term has started to become generic for such trailers even if provided by other companies. On any location shoot (shoot other than at a studio or on a studio lot) one will find many of such trailers, including ones for the producers and the director. There are also, of course, **honey wagons** (portable toilets).

Script supervisor: This is an on-set worker (if it is a union shoot they are a member of an IATSE local – see below) who maintains the **continuity** during the shooting. Simple example: The script supervisor makes certain that if an actor's jacket is buttoned when a scene is shot from one angle, it will not be unbuttoned when the same scene is shot again from another angle. Making things match in this way (which can obviously become very complex) is what is referred to as **continuity.**

Coverage: This term has another meaning as far as scripts are concerned (see below). In terms of shooting a film, in broad terms in means shooting a scene from various angles in order that there will be sufficient footage (film) of the scene to cut it together. Coverage typically includes **establishing shots** (long shots showing where the scene is taking place) and other types of shots that are fairly obvious (**two-shots**, **close-ups**, etc.)

Music supervisor: This is not the composer, but rather is a person who works with the director and the producer in selecting any pre-existing music used in the film and working to **license** the rights in that music from music publishers and record companies[5], which is often quite expensive, even for old songs. Music from a source visible onscreen (e.g., a radio, not that there are many radios anymore) is referred to as **source music.** Other music is generally either background music or **score**, meaning music composed for the film, whether it is played by an orchestra, a band, on a synthesizer, or in some other way.

Special Effects (SFX): The meaning of this term has changed substantially in recent years. Prior to the digital era there was a fairly clear distinction between **mechanical effects** and **optical effects**. Mechanical effects referred to effects accomplished during principal photography using props, models, sets, atmospheric effects (e.g. "rain towers" for rain), **pyrotechnics** (fires and explosions), etc. Effects that might fall under the heading of **mechanical** effects include matte painting and motion control photography (if done during principal photography). In contrast **optical effects** involved camera effects either achieved during principal photography or in post-production, from such simple procedures as "double exposure" of the film to using "blue screen" or "green

[5] A **synchronization license** for (e.g.) a song must be obtained from the **music publisher** to synchronize the song in the soundtrack of a film, TV show, etc. In addition to use a *specific version* of the song with the film a **master use license** must also be obtained. When music rights are negotiated it is important for the music supervisor to obtain the right to use (e.g.) a song both **in** context (as the song appears in a specific scene) and **out of context,** meaning other than it appears in the actual finished film – in the trailer or television commercial for the film, for example. Although it is customary for bands and singer/songwriters to form their own publishing companies, many music rights end up with a few larger music publishers, such as Warner/Chappell, which has a catalogue of 65,000 songwriters and over a million songs.

screen" to place performers against a different background.[6] Other optical effects techniques include digital compositing and rotoscoping. Recently the more prevalent use of the terms is to refer to any special effect accomplished during principal photography simply as **"special effects"** (*including* camera effects), and anything done during post-production as **"optical effects."**

CGI (computer-generated imagery): This is the primary tool for "optical effects" today and encompasses a range of processes and techniques beyond the scope of this book. In former times if one wished to have actors appear in a scene involving an ancient temple, one would perhaps build the bottom of the temple as a set, and then use a matte, a "glass shot," or "the Schuftan process" to extend the scene upwards so that the temple appeared to have high columns and a top. If one had a crowd scene in front of the temple involving thousands of extras, one would hire a large number of extras for that purpose. If one wished to have the temple crumble to dust at the end of the scene, the most likely way to accomplish this would be to build a small model and blow it up, perhaps in slow motion. Nowadays in all probability most of these "effects" would be rendered using **CGI**, including creating the entire temple and multiplying a few extras into a vast crowd scene. As in video games, by means of 3D animation movement through CGI environments is possible and is done all the time; of course in feature films one wishes to integrate live actors, vehicles, etc., and this is also fully achievable. If one attends professional sessions conducted by specialists in the CGI and the digital effects area, one rapidly realizes that what is possible using these techniques is limited only by the imagination. Not only can CGI substantially limit the need to build sets ("**Construction**" in film budgets), it can also reduce the need to travel to distant locations. Although CGI is not inexpensive, it is frequently (usually) cheaper than doing things the old-fashioned way.

Location: Traditionally this is any place a film is shot that is not at a studio (either on a studio "lot" or on a set at a studio). Another traditional term is "**distant location**," which meant any location beyond the "studio zone," which was usually deemed to be a radius of thirty miles from the studio.

IATSE: These initials (sometimes pronounced as the acronym Eye-At-See, other times shortened to "IA") stand for **International Alliance of Theatrical Stage Employees**, which is an umbrella labor organization (union) covering most below-the-line film and television workers in the United States, as well as legitimate stage technical workers. Some of the locals under IATSE are the Art Directors Guild, Affiliated Property Craftspersons, Costume Designers Guild, Motion Picture Studio Electrical Lighting Technicians, Motion Picture Grips/Crafts Service, Motion Picture

[6] In "**blue screen**" or "**green screen**" the actor performs against an all-blue or all-green background and appears to be in front of something completely different. This technique is used all the time in TV news and many other contexts.

Sound Technicians, Motion Picture Set Painters and Sign Writers, and Motion Picture Studio Teachers and Welfare Workers[7]. If a film in the U.S. is a "union" film, 99.999% of the time that means that it is an IA film. This means that the Producer must pay the rates set forth in the contracts ("**collective bargaining agreements**") negotiated between the studios and the television networks (the primary members of the Association of Motion Picture & Television Producers, the **AMPTP**) and the IATSE, as well as the "**fringes**" (pension health and welfare benefits) which must be paid to the IATSE on top of the workers' salaries in accordance with that union contract.[8]

> *Is it possible to shoot "non-union" in the U.S.?* In Los Angeles, New York, San Francisco, and other major cities it is very difficult. It the IA finds out that a professional non-union film is shooting they will generally step in, picket the shoot, and try to "organize it." This does not mean that they will attempt to get the non-union workers to join the union, which is very difficult to do and takes years of effort for a film worker to achieve. What they will do is to insist that the Producer of the film replace all or some of the workers on the film with IATSE member workers at IATSE rates, *and* pay fringes to the IATSE. In New York and sometimes elsewhere it is sometimes possible to negotiate a special "low budget" agreement with the IATSE local. For example, the film *Fresh* was made under a low budget agreement with the union.

Runaway production: This is a term that one still encounters sometimes to mean a feature film, television film or series shot outside the U.S. (sometimes even outside California) in order to save on costs, primarily (but not exclusively) the cost of below-the-line crews, since production technicians outside the U.S. (and sometimes even outside of California and New York) often work for lower rates. Canada and Eastern Europe are the classic examples of foreign locations to which producers have fled to lower production costs. Other countries have national systems where the governments provide tax and other benefits for film productions. These are only available to U.S. studios and producers if they enter into **co-production agreements** with local producers in those countries. These are very complicated arrangements, but they are still done quite frequently for films shot in the U.K. and sometimes also elsewhere in Europe and in Canada.

SAG-AFTRA: The two unions representing actors, the **Screen Actors Guild** and **The American Federation of Television and Radio Artists,** merged in 2012. It is virtually impossible for a Producer to make a feature film or television film in the U.S. without becoming a signatory to SAG (now SAG-AFTRA). Even if all principal photography is done outside the United States and only a small amount of **ADR** ("**automatic dialogue replacement**" or "dubbing") of voices is done in the U.S., the film still falls under SAG-AFTRA jurisdiction. Prior to the first day of principal photography the Producer must go

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[7] States have strict regulations on the use of child actors in films, specifically with respect to the number of hours they can work per day and usually also at what time of day they may work. When child actors are used it is almost always necessary to hire **studio teachers** so that they can keep up with their education while the film is shooting. Scheduling and budgeting films using child actors is often very complex, particularly when there is a need to integrate the use of child actors with sequences shot on distant locations, and with action and special effects sequences. One should also bear in mind that children are not legally competent to sign their own contracts, which must always be executed by their parents or legal guardians.

[8] Many (probably most) smaller "indie" production companies are not members of the AMPTP, but if they make union films (films employing workers who are members of the IATSE), they must nevertheless agree to and sign the contracts negotiated between the AMPTP and the IATSE, even though they had no part in the negotiation of those union contracts.

through a process called "Station 12" to prove to SAG-AFTRA that all actors on the film are SAG-AFTRA members. If this is not done the film will be shut down by the union.

Producer: Throughout this book the term Producer (with a capital P) will be used for the person or company who purchases a script and/or hires a writer. The "Producer" could be a studio, a production entity, or a network. In contracts you will sometimes see other terms used to mean the party or entity which purchases material or employs the writer. Some of these alternate terms for what this book will refer to as the "Producer" are "Company" and "Purchaser."[9]

Line producer: This is the person who performs the function of physically organizing the production and is typically on set or on location with the shoot almost every day: He or she is "on the line," so to speak. The line producer is engaged at the commencement of pre-production to work on preparing the budget (sometimes with a **unit production manager** or **UPM**[10]), hiring the crew, etc. The line producer sometimes receives credit as producer of a picture, but nowadays more typically receives another type of producer credit such as co-producer. The on-set administrative person working below the line producer is typically the "**production coordinator**."

Budget: The final approved (by the studio or financing entity) budget shows all of the costs of production and post-production, above and below the line. Along with the budget is a **production schedule** commencing with the first day of principal photography and extending through post-production. Depending on whether it is a studio or independent film, most budgets include some other charges discussed immediately below. Budgets and the **final cost** of the picture are important for profit participants, including writers, since they will determine how much revenue is required for a film to be profitable (in profits).

Cost report: One of the most important functions of the line producer, in coordination with the on-set **production accountant**, is to prepare (generally weekly) the cost report for the picture. The cost report is laid out like the budget, showing item-by-item how the actual cost of production deviates (higher or, rarely, lower) from what is allowed in the budget. The cost report is very carefully scrutinized by the Producer (studio, for example) and by the completion bond company, if there is one (see below).

Contingency: Almost all motion picture budgets add on a contingency (typically ten percent) to everything, above and below the line, although sometimes certain elements are excluded when calculating the contingency (e.g., star salaries). Example: If a film's budget is $10,000,000, the line producer will add on another $1,000,000 as a

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[9] In general in the feature film world the terms "producer," "executive producer," "co-executive producer," "co-producer," "associate producer," etc., can mean just about anything, including, for example, someone who simply made an introduction to a piece of talent or a source of financing and had no further involvement with the film subsequent to that. It can also refer to "**star baggage**," meaning a business associate or manager or even spouse of a piece of talent (star or director, usually) who is powerful enough to insist that someone receive a producer (or executive producer) credit, and often also a salary, first-class tickets to distant locations, first-class hotels, etc. The only credit that really has any importance is "producer" (not exec., assoc., etc.,) because it is that person who receives the Oscar for Best Picture, *not* the director.

[10] A UPM, unlike a line producer, is usually a union worker. The roles of the line producer and the UPM can be combined in one person.

contingency, and this will be part of the budget – i.e., with the contingency added on the budget would be $11,000,000 and not $10,000,000. When some element of the production ends up costing more than the budget allows, the contingency is "**invaded**" to make up this unanticipated additional cost. Most pictures end up invading their contingency, or even going beyond it.[11]

Overhead: In addition to the contingency, all studios and many (most) other production entities also tack on an additional item to the budget called "overhead." This is also in many cases ten percent of the budget, sometimes, as with the contingency, with some exclusions (major star salaries in the $10-$50 million range might be an example). The rationale or justification for adding an overhead charge to each film's budget is that this is the way that the studio (or other production financing entity) **recoups** (makes back – see below) the cost of developing "**abandoned**" projects (discussed further below) and other costs of running the studio. Example: In the case of the picture discussed in the last section, with both the contingency and overhead included in the budget, the budget at that point would be $12,000,000, whereas originally it was $10,000,000. Sometimes (in fact often) a studio will try to charge **interest** on overhead. This can become a deal point in negotiation: A writer (for example) does not want the Producer (studio) to be able not only take an overhead charge, but also to charge interest on that overhead charge while the picture is recouping. Why? Because that interest charge is a further cost the recoupment of which will push back the point at which the picture breaks even for profit participants such as the writer.

As discussed further below, for purpose of *profit participations* a picture's budget will often be calculated in different ways, subject to negotiations between the agent and the Producer. What a writer or other profit participant wants is for the calculation to exclude contingency, overhead, abandonment charges and completion bond. This will *lower* the cost of the picture so that it will **recoup its cost** (i.e., break even, become profitable) sooner. If all of these add-ons are included, films seldom break even.

Completion bond: This is a type of insurance that production entities take on to guarantee that a film is completed even if it goes over budget and/or has other disastrous issues develop during principal photography. There are special companies that provide such completion bond insurance. Most film financiers and others providing financing (including foreign distributors who **pre-buy** rights in films for their countries before the films are made) require that films have completion bonds. Completion bond companies (also called "**completion guarantors**") have the right to step in and take over production of a picture if it goes substantially over-schedule and (most importantly) over-budget. They have the power to replace the director, re-do the budget, take over post-production, etc. For this "insurance" completion guarantors charge a percentage of the budget (sometimes with certain exclusions, such as star cast) of between 3% (low and hard to get) and 5% or more.

Merchandising: This is a broad category that includes revenue derived from toys, games, posters, etc.

[11] It is a little bit ambiguous if, when someone says that a film is "**over-budget**," they mean that the film has invaded its contingency or has actually gone beyond its contingency. For the most part "over-budget" means that the film has used part of its contingency but not exceeded it.

Ancillaries: Also referred to as "**ancillary rights**" or "**ancillary markets,"** these are all the revenue sources for a picture other than theatrical distribution, which is obviously the exhibition of films in theaters. **Ancillaries** include, but are not limited to DVD, **video-on-demand**, cable, television, **soundtrack albums,** publishing (**novelizations**[12] of the films), **theme park rides** based on or inspired by the films or using characters from the films, use of the films or characters from the films in marketing or promotions by other businesses (e.g., fast food chains), etc.

Negative cost: This is the total cost of the film's production, generally including everything above and below the line, overhead, contingency, completion bond, and in many cases also **interest** on the cost of production. The term is derived from when movies were shot on negative film. The "negative cost" was the cost of making the final "negative" from which copies of the movie can be made. Even in the digital age this term still sticks.

P&A:[13] This stands for **prints and ads**, meaning prints (film copies sent to the **exhibitors** to show in theaters) and all forms of advertising. Even in the current era where much theatrical exhibition is digital, the expression **P&A** is still used all the time. It is not infrequent for a distributor (studio) to tack an **overhead charge** onto the P&A, also often ten percent. This is also a deal point: A profit participant such as a writer does not want for his or her backend (profit participation) to be calculated with an overhead charge added on top of the cost of P&A. Why? Because this overhead charge will push back the point at which the picture recoups, and therefore push back the point at which the writer will receive any money from his profit participation percentage.

A brief discussion of how films make money: The costs of making and marketing a picture are **recouped** (made back, recovered) in a certain order from all revenue sources (all media in which the film is exploited). The studios and a few of the large independents (most prominently Lions Gate) are financiers, producers and distributors of films, but they are *not exhibitors* –i.e., they do not own theaters. Studios were forced to divest themselves of theater ownership as a result of government anti-trust action, culminating in the Consent Decree of 1948. Studios like to act as if their distribution departments and production departments are in a certain way separate. When a film is shown in theaters, money that is collected from patrons is known as **box office revenue**. In calculations of film revenues for purposes of recoupment of profits, box office revenue is almost never used. Instead the number that is used is **film rentals**, which is the money that the exhibitors (theaters) pay to the studios. This varies widely depending on how badly the exhibitor wants the film. For very popular films the distributor (studio) can insist on as much as 90% of the box office, but this can go down to 60% or lower on less desirable pictures. Remember that the exhibitor relies for much of its revenue on **concessions** (popcorn, candy,food and drinks), and that the distributor never receives any share of revenue from those sources.

[12] Novelization interfaces with the complex subject of **separation of rights**, which will be addressed later under Deal Terms.

[13] This is another abbreviation that has different meanings in different businesses. For example, for a litigation lawyer "P&A" would mean "points and authorities," citations he or she would present to the court along with a legal brief or motion.

This is another reason why exhibitors can get buy remitting such a large percentage (90%, for example) of box office to the distributor (studio).

The distributor (studio) receives **film rentals** and then charges a **distribution fee** against those film rentals. This distribution fee compensates the studio for the cost of runnings its distribution division. A tricky thing in understanding the motion picture business is that on every picture that a studio makes, there are always several different **definitions of profits** (**profit definitions**) and definitions of recoupment operating concurrently. This means that for purposes of calculating one profit participant's deal (e.g., a major star's) the studio's **distribution fee** may be calculated at 15%, and for purposes of someone else's deal it may be calculated at 30%. For purpose of this broad overview let us simply say that on every source of revenue, including obviously all of the **ancillaries** mentioned above (DVD, cable, etc.) and also **foreign revenue**[14] the distributor (in this case a studio, such as Paramount) charges a distribution fee ranging (according to the deal and to the medium of distribution) from around 7.5% to 35%. After taking these distribution fees off-the-top (as it were) from film rentals, the studio then recoups the marketing costs (**P&A**), sometimes with **overhead** (see above), and only after that does it begin to recoup the **negative cost** (the cost of making the picture). Of course after the P&A and the negative cost have been recouped the studio, as a distributor, still continues to take distribution fees off-the-top from every dollar it receives from exploitation of the film in all media, even though the picture has "made its money back."

In the real world of large studio films, the P&A cost can be, and often is, almost as great as – and sometimes even greater than – the negative cost. What this means is that many (probably most) pictures do not recoup their both their P&A and their negative costs during theatrical distribution, and only recoup these` later from **ancillary revenues.** Therefore in a certain way theatrical distribution (showing movies in theaters) is nothing but advertising to drive later ancillary revenues (e.g., DVD, cable, etc.) BTW, according to a legal principle called **the first sale doctrine**, studios did not receive any revenue from the rental of VHS cassettes and DVDs from video rental stores. Once the video store bought the VHS tape or DVD, it got to keep all of the revenue it received from rental customers.[15]

What does all of this mean: It means that, *at least on paper*, it is very difficult for a picture to be "in profits," and it takes a long time for it to get there. But remember that the studio is, in various ways, making money much earlier: If the studio's facilities are being used (**sound stages** on **studio lots** where pictures are shot -- not as frequent now as it used to be), the studio makes money on renting those facilities to its own production. Then the studio takes its distribution fees off-the-top from film rentals, etc.; it takes those fees even if, at the end of the day, the picture fails to recoup. Then the studio takes its **overhead charges** both on the cost of the film (included in the budget, as discussed above), and

[14] Several of the studios banded together a long time ago to form a foreign distribution company called United International Pictures (UIP) to distribute their films outside the U.S. and Canada. BTW, for purposes of film deals and in the industry in general, the United States and Canada are referred to collectively as **domestic** and everything else is **foreign**. Under the Webb-Pomerene Act the studios were allowed to form this joint venture to do business outside of the United States. If they had done it in the U.S. it would have been a violation of anti-trust laws. So the Webb-Pomerene Act allows companies to do things abroad that would not be permitted here.

[15] I'm not sure what the studios' arrangements are with Netflix, for example.

frequently on the marketing costs (P&A). So in simple terms, the studio is making money all along, no matter what. But the picture for the studio is even brighter than that:

Off-balance-sheet financing: Studios often (probably more often than not) use money from outside sources to finance the negative cost, and sometimes also the marketing cost (P&A) of films. Such financing is usually referred to as **off-balance-sheet financing,** meaning that it does not appear on the balance sheet[16] of the studio or of the conglomerate that owns it. This is a very complex area and beyond the scope of this book. However we will provide one illustrative and instructive example: *The Dark Knight,* the Batman film immediately prior to the most recent one, was distributed by Warner Bros. and co-produced by Warner Bros. and Legendary Pictures, Inc. In 2000 Thomas Tull founded Legendary Pictures and raised $500,000,000 from private equity firms and hedge funds. In 2005 Legendary made a deal with Warner Bros. to co-produce and co-finance forty films over a seven year period. In 2010 Tull, Fidelity Investments and Fortress Investment Group bought out the original investors. As of last year Legendary was valued at in excess of $1 billion. Probably the most successful films co-produced and co-financed by Legendary have been the *Batman* films and the *Hangover* films. The company co-produced and co-financed quite a number of movies with Warners that were much less successful, but those two **franchises** *(Batman* and *Hangover)* more than made up for them. What is interesting that in the year that *The Dark Knight* was such a big hit, Time-Warner, Inc.(which obviously owns Warner Bros.) showed only a modest increase in corporate profits. *Why?* Because most of the profits from *The Dark Knight* went to the **off-balance-sheet financier** and co-producer, Legendary Pictures. Of course Warner Bros. still made its distribution fees on the film and doubtless had some share of the profits.

On the other side of the coin, the studios look for other investors – one might say for *sucker investors* – to finance the P&A and negative cost of groups of lower-budget films which they anticipate will be less likely to make a profit.[17]

So they let their friends (such as Legendary Pictures) finance (and make money on) the hits and the suckers finance (and lose money on) the turkeys.

And that's the business.

From the perspective of a profit participant such as a writer, the important thing is to have his or her agent and attorney negotiate a deal which will get the writer some share of the **backend** even if the picture is not "in profits" overall.

Cross-collateralization: In broad strokes this means applying the *profits* from **one medium of exploitation** (e.g., merchandising, soundtrack) to the *losses* from another (generally to theatrical distribution, since because of the high cost of P&A, theatrical distribution often does not make money). After distribution fees are taken off-the-top from all media of

[16] The **balance sheet** is one of the two primary **financial statements** prepared by a corporation or other form of business entity, the other being the **income statement** or **P&L** (profit and loss statement).
[17] Some of these films that the studios view as higher risk are so-called **vanity projects** which studios agree to make essentially as favors to talent, usually to actors, just to keep up good relations with those actors.

exploitation (theatrical, DVD, merchandising, etc.), all of the revenues are *put into a pot* (sometimes at that point referred to as **adjusted gross receipts**, but that term is used in a number of ways and can become confusing) and then applied to recoup first the P&A and then to the negative cost, as discussed above. By putting all revenues into a pot, they are being **cross-collateralized** or simply "**crossed**," meaning (again) that the profits from one area are being used to cover losses from another.

Uncrossed participation or **uncross-collateralized participation:** This means that a profit participant (someone, such as a writer, who receives a **backend participation**) receives a share of a revenue from a medium of exploitation (e.g., merchandising[18] or soundtrack) before the revenue from that medium of exploitation is put into the pot – i.e., before it is applied against losses from theatrical distribution, and thus before it is **cross-collateralized** with other revenue. One important thing that a writer's agent and entertainment attorney (their respective roles and functions are discussed below) can ask for is for **uncrossed participations** in one or more ancillary media or exploitation. If a picture is anticipated to have strong revenue in merchandising (or even separately from video games), then the agent and attorney should ask that the writer receive an **uncrossed participation** in that revenue stream. If the writer believes that the soundtrack revenue will be strong, he or she should suggest that in the deal negotiation the agent and/or attorney ask for an **uncrossed participation** in soundtrack revenue – again so that the writer receives a percentage of that revenue *before* it is put "into the pot" and possibly applied against (i.e., used to recoup) losses from theatrical distribution.

Writers Guild of America: This is the union representing professional motion picture, television and new media writers. Every three years, the Writers Guilds of America, East and West, negotiates a **collective bargaining agreement** with the **Alliance of Motion Picture and Television Producers (AMPTP**), the entertainment industry's official collective bargaining representative. The contract covers screen, television, and new media writers. This agreement establishes writers' minimum salaries, screenplay purchase prices (as discussed below), benefits, pensions, working conditions, residual payments, and creative rights. This agreement is known as the **Minimum Basic Agreement** (MBA), and covers compensation, fringe benefits (pension plan and health fund), working conditions, residual payments, use of writers' literary material, and the enforcement of contract provisions. Along with the MBA is a Schedule of Minimums for various types of writing services.[19]

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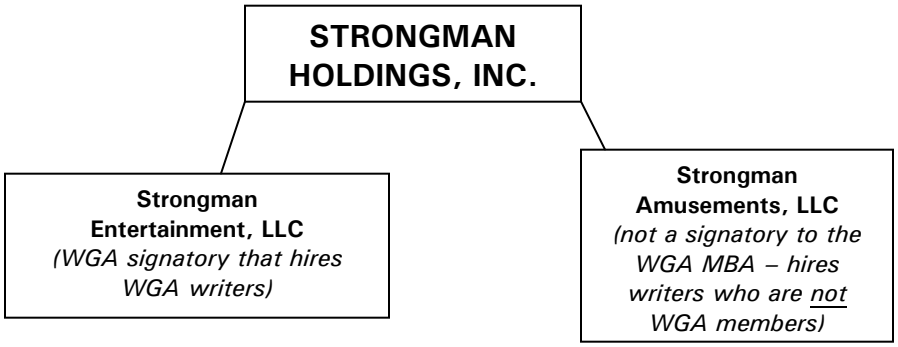
[18] If a writer is a member of the Writers Guild (as discussed below, that writer is entitled to 5% of merchandising according to the following provision: "If the Producer manufactures and sells an object or thing which is first fully described in the writer's literary material, and by such description such material is unique and original, then the writer must be paid 5% of the monies paid by the manufacturer for such merchandise. Therefore, the writer's literary material must physically describe the object or thing being merchandised. For example, if the writer describes a particular kind of communication device in the script with specific physical attributes and if the final product substantially follows that description, the writer may be entitled to money for the sales of the object. The writer may, of course, negotiate for payments for the use of particular characters or objects." Of course the agent for a writer who is not yet a member of the Writers Guild may negotiate to have this same provision included in his or her agreement.

[19] By "minimums" is meant minimum payments for performing writing services. A writer's agent can – and almost invariably does – negotiate with the Producer for the writer to receive more than the minimum payments called for in the MBA – these are known as **over-scale deals**, with the minimums being **scale** deals --,

The responsibility for determining writing credits is one of the most far-reaching services the Guild performs for its members. The rules are spelled out in the Guild's Screen Credits Manual and Television Credits Manual. The MBA provides for a pension plan and a health insurance fund, maintained by employer contributions -- meaning that the Producer pays a percentage (as discussed below) to the WGA on top of what the writer is paid. This applies to writing services and not to option payments or the purchase price of a script. Producers often refer to these payments they are required to pay to unions and guilds as "**pension, health and welfare**," while in film budgets they are sometimes referred to as "**fringes**." There are annual eligibility requirements both for vesting in the pension and for health coverage. One of the benefits due credited writers under the Writers Guild Minimum Basic Agreement is compensation for the reuse of their material. This compensation is called **residuals**.[20] The MBA contains certain provisions that preserve, albeit to a limited extent, writers' creative rights. These provisions have been collectively bargained and are enforceable.

A long-standing concern of increasing importance to writers of original material is the extent to which they and the production companies employing them may exploit their literary material in different media, including but not limited to: the stage (dramatic rights); publication including novelizations; merchandising; and sequels and/or series. This is an area which the WGA calls "**Separation of Rights**" and will be discussed further below.

In order to employ a WGA member, a Producer must be a signatory to the WGA MBA, meaning that the Producer must agree to all the provisions of the MBA and not enter into an agreement with a writer who is not a member of the WGA. One implication of this is that if a Producer who is a signatory to the WGA options a writer's script and then wants to hire that writer to do a rewrite or polish on the script, the writer must then join the WGA. *In reality* some production companies have what is called "double-breasted" structures. Here is an example where the company on top owns the two companies beneath it:



Companies obviously use this setup so that they can pay writers who are not WGA members below the WGA minimum and not pay the pension health & welfare "fringes" to the Guild. At the end of the day all professional feature film and TV writers end up becoming WGA members. The Writers Guild of America East represents writers and does

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but the writer if he is a member of the WGA can never agree to accept *less* than the minimums set forth in the MBA.

[20] For example, every time a TV show is rebroadcast or a film is shown on television or cable, residuals become payable to the writer of the show or film. This can become a significant source of income for the writer over time.

script registration (see below) for writers east of the Mississippi, and the WGA West does the same for writers on the West of the Mississippi.[21]

The WGA also has a separate "Low-budget Agreement" setting forth different (obviously lower) rates for low-budget productions.[22]

Writers Guild of America East & West Script Registration: For a fee of $10 for WGA members and $25 for nonmembers ($17 for students) the WGAE and WGAW provide a service whereby writers may submit a digital copy of screenplays, treatments, and a number of other formats, together with personal identification (SS# or drivers license number) and a password.[23] The WGA will then retain the digital file for ten years. *The only purpose of WGA screenplay registration is for a writer to prove when he or she wrote the screenplay or other uploaded material.* The way this works is that if a writer needs to establish when he or she wrote the material (i.e., because someone else has subsequently written something that steals material from the writer's script), the writer can obtain a digital copy of the file *back from the WGA with a certification of when the writer registered it.* This establishes proof of when the writer wrote the material (screenplay, etc.) The WGA does not get involved in disputes over stealing ideas, plot elements, etc. An important point is that no one has access to the material registered and deposited (filed) digitally with the WGAE or WGAW other than the writer (that is the point of the password and ID system).

Copyright: In the U.S. copyright is now governed by the Copyright Act of 1976. This act changed the law to broaden protection to any "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." The previous law had stated that works could have U.S. copyright protection only when they were published or bore a "copyright notice" such as ©2012 Cristie Strongman. Under the new (and current) law, a work (including literary, dramatic, screenplay, music, etc.) has U.S. copyright protection as soon as it is fixed in tangible form, so even the notice is no longer necessary.[24] Copyright protection gives the copyright holder the *exclusive right* to reproduce the work, to create derivative works, to distribute copies of the work, to perform the work publicly, and to display the work publicly. The *term* (length) of a U.S. copyright is now the life of the author plus an additional fifty years. The copyright holder may transfer copyright (and that is one of the things a writer does when a Producer purchases a screenplay from a writer), but the current U.S. copyright law states that any such transfer must be in writing. **Copyright Registration** (paying a fee and uploading a digital copy of a screenplay or other work to the Copyright Office in the Library of Congress) is not required for copyright production. <u>However</u>, registration <u>*is*</u> required for

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[21] The Mississippi flows through my backyard. I'm not sure where that leaves me.

[22] These are films with budgets beneath those we are concerned with here, specifically under $5,000,000. Information about the WGA Low-budget Agreement is available online.

[23] Yours is the dolls name, first letter capitalized.

[24] A **copyright notice** is still a good idea and, as discussed later, is necessary for copyright **registration**. The best form of a notice is ©2012 Cristie Strongman All rights reserved. In place of the © one may use the word "Copyright" in the copyright notice. The "all rights reserved" is left over from the time when there were two "copyright conventions," the Berne Convention and the Universal Copyright Convention. Those days are essentially passed, but the inclusion of "all rights reserved" is still a good idea.

a copyright holder (e.g., a writer) to sue someone for copyright infringement. **Copyright infringement** means the unauthorized use of any of the copyright holder's exclusive rights as listed above. Enforcement of copyright infringement is the responsibility of the copyright holder. This means that if a writer believes that someone is infringing his or her copyright, he or she must sue the infringing party; another way of stating this is that most copyright infringement of the type we are concerned with here is considered a civil matter rather than a criminal matter. Because copyright is part of federal law, all suits involving copyright take place in federal (not state) court. To sue someone for copyright infringement the copyright holder must prove a number of things, including (a) that his or her work was *created before* the allegedly infringing or derivative work; and (b) that the infringing party *had access to* the writer's work. Example: Writer A registers Screenplay A with the U.S. copyright office by paying the fee ($35) and by depositing (uploading) a digital copy of Screenplay A with the copyright office on January 1, 2010. After that Writer A does not show Screenplay A to anyone. In June, 2012 Writer A reads that Paramount is developing Screenplay B, and on the basis of the synopsis of Screenplay B that he reads in the trades[25] Writer A decides that Screenplay B is substantially similar to his Screenplay, Screenplay A. Writer A goes to federal court and sues Writer B for copyright infringement. Writer A loses. *Why?* Because Writer B had no access to Screenplay A, so Writer B can claim (successfully) that he created Screenplay B entirely independently.[26]

Additional Key Copyright Concepts:

- There is no copyright on an idea. There is only copyright on the *expression of that idea* when it is reduced to tangible form (e.g., written as a treatment or as a screenplay).
- There is no copyright on a *title,* except when that title has acquired what is known in copyright law as **secondary meaning**. Example #1: *Paranormal Activity* was released and became a successful film and **franchise**[27] of films with several films using that title (although they were not "sequels" in the classic sense). If Producer G (unrelated to the producers of the series of films) came out with a film that he called *Paranormal Activity in Brooklyn,* the producers of the "real" *Paranormal Activity* films could sue him. Why? Because the public would be attending Producer's G's *Paranormal Activity in Brooklyn* film under the mistaken assumption that it was related to the other *Paranormal Activity* movies (i.e., that it was made by the same people), which it was not. When the first *Paranormal Activity* film become a success, the title "Paranormal Activity" acquired **secondary meaning** so that it is now protected under copyright and no one else can use a related title without first acquiring the rights to do so from the producers of *Paranormal Activity.* Example #2: Producer J makes a film called *The Lefferts Garden Monster,* he releases it and it is a failure, or more specifically the title *The Lefferts*

[25] Traditionally "the **trades**" (trade papers) are two publications, *Variety* and *The Hollywood Reporter.* Both have recently been bought, and the playing field has also been enlarged dramatically by countless online industry sources and blogs – e.g., IndieWire, Vulture, TheWrap.com, Showbiz Sandbox, cinemablend.com, etc.
[26] Of course if Screenplay B had many sections that were virtually identical to Screenplay A, it would not be very credible for Writer B to assert that he had had no access to Screenplay A.
[27] See further discussion below of the term "franchise" and "branded entertainment."

Garden Monster does not become well known. Ten years later Producer K makes a film called *The Lefferts Garden Monstrosity,* releases the picture, and it becomes a big hit. Could producer J sue producer K for copyright infringement? Answer: Almost certainly not, because in this case the title *The Lefferts Garden Monster* had not acquired secondary meaning, and therefore was not protected under copyright

- There is no copyright on characters per se. This is a somewhat complex area, but it its safe to say that if you write on a piece of paper a character's name and everything about their appearance and personality, but no other elements (no plot, no story, etc.), then that character alone is probably not protected by copyright, even though you have written something down about the character and thus committed it to tangible form. Even if you register that piece of paper with the Copyright Office that may not be enough to give that character copyright protection. Other elements are necessary.

There is a lot of discussion about the advantages and disadvantages of WGA registration versus Copyright registration. With WGA registration the screenplay or treatment is only retained for ten years, and the writer does not gain the legal remedy of being able to go to court to sue for copyright infringement solely by WGA registration. All the writer does is to establish proof of when he or she uploaded the screenplay or treatment to the WGA. On the other hand WGA registration is entirely secret, and the title of the screenplay or treatment is not available to the public, nor may the public access the screenplay or treatment for any purpose. With Copyright registration the title will appear on a copyright search, together with the writer's name, copyright claimants (co-owners of the copyright), and other information. Thus in those ways the screenplay or other work registered for copyright is more "public," so some people prefer not to register their screenplays until much later. However, failure to register a screenplay with the Copyright Office has the consequence that the writer *loses the right to sue* if someone infringes on his copyright. Such infringement could take the form of another writer reading the script and writing something similar, or a producer or studio reading the script, taking ideas and/or characters and/or plot elements from it, and then hiring another writer to write a similar script. Both of these types of infringement happen frequently, so in the final analysis, despite the more "public" nature of Copyright registration, it does provide advantages to the writer over and above WGA registration. The best approach would seem to be to do both WGA and Copyright registration. With the WGA it is easy for the writer to request a digital copy of his screenplay with a WGA certification of when he uploaded it, thus establishing the date of authorship (he must have written it prior to uploading it). With Copyright registration the writer acquires strong legal protection against infringement for his entire life plus fifty years, so both the writer and his assignees, heirs and/or estate benefit.

Copyright search and opinion: When a Producer gets involved with a piece of material (screenplay, book, etc.), they will almost always order a **copyright search and opinion** from a law firm specializing in copyright. Traditionally there were several law firms in Washington, D.C. that specialized in this, since the Copyright Office is part of the Library of Congress in Washington. Of course now all copyright records from some time in the 1980s are searchable online, so the need for someone to provide this service to be in D.C. has been seriously diminished. What the copyright search and opinion tells the producer is if there is any defect in the **chain of title** of the material (see below) and if the person or entity optioning or selling the material to the producer actually owns the rights that they are optioning or selling. Concurrent with the copyright search and opinion the Producer will also order (usually from the same copyright attorneys) a **title search and opinion**, which will tell the Producer whether, in the opinion of the attorneys, the title of the screenplay, book or other material can be used for the proposed film. Reasons why the copyright attorneys might argue that a given title might not be usable would include that there was a previously copyrighted work with the same title whereby that title had acquired

secondary meaning (as discussed above); or that the title of the writers' screenplay or book had been **trademarked** by someone else. What often happens is that when a title search is done the attorneys will come back with a long list of pre-existing copyrighted works that *do* have the same title, and with that list state that *in their opinion* the title has not acquired secondary meaning through the success of any of these previous works, and therefore the title may be used safely – i.e., without fear of litigation on the part of someone who owns the copyright in a pre-existing work with the same title.[28]

Agent: An agent is someone who seeks to procure employment for a writer (and also to make deals for material that the writer has written "on spec," as defined below) *and* to negotiate the deal for the writer, subject (of course) to the writer's approval. Almost always the agent does this for a **commission** of 10%. Very typically the Producer will send checks to the agent, the agent will deduct their 10% commission, and then send a check for the balance to the writer. Agents are governed by state law and most states have licensing provisions for agents. To represent a WGA member writer an agent must be a **signatory** to the WGA, paralleling the situation with producers. Even if a writer is not yet a WGA member it is therefore a good idea to sign with an agent who is a WGA signatory. Agents have a **fiduciary** relationship with their clients (if you don't know the meaning, look it up on Wikipedia), one of the consequences of this being that an agent is *required* to communicate to his client any offer he receives for that client's services. As a result of anti-trust litigation brought by the government in the early 1950s, an agent or an agency *cannot* also be a producer. (This is one reason why some agents go on to become managers.) However agents *can* "**package**" films or television series and receive "**packaging fees**" for this in addition to commissions for their individual clients who do work on or appear in the film or TV series. In reality television packaging is probably the most lucrative thing that agencies do.[29] A good agent will have a "packaging" mentality all the time. For example, he will read a script and think that it would be good for such-and-such a director client, such-and-such a star, etc. This is one reason why it can be an advantage to be represented by a big agency that handles top talent. Of course the agent will try to get a script (or a book) to all the potential buyers (studios, producers with money, production entities, etc.) One thing that agents sometimes do in lieu of or in addition to this is to give the script to a hot producer to take around to the studios, etc. Another reason why an agent would do this is that producers sometimes have deals at studios (sometimes known as "**housekeeping deals**") under which they have "**discretionary development funds**," meaning money that the studio provides for the producer to develop projects. Example: Producer Joe has a deal at Paramount with a discretionary development fund of a million dollars a year. Without asking the studio's approval (or with minimal approvals) he can option and pay for rewrites, etc. on scripts up to that amount.

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[28] Use of **song titles** as titles for screenplays or films can be a complex issue. If someone (a writer or a producer) wishes to base a film on an existing song (i.e.., if the film is a movie adaptation of the lyrics of the song), then the writer or producer must acquire from the copyright holder of the song something called **grand performance rights** for the song. The details of this are beyond the scope of this book.

[29] A couple of years ago a television packaging agency called Broder-Kurland-Webb essentially took over one of Hollywood's top agencies, International Creative Management (now known as "ICM Partners") from Jeff Berg and the Jacobson family, based on how much money they had made in the television packaging business.

The top agencies in the U.S. today are **Creative Artists Agency (CAA)**, **William Morris/Endeavor (WME)**, **ICM Partners** (formerly and sometimes still also known as **International Creative Management**), and **United Talent Agency (UTA).** All of these "big four" agencies represent a wide range of creative and performing artists, as well as speakers, etc. They are all in a good position to package projects and to get screenplays to studios and other production entities. Other agencies that have a fair amount of visibility (but not on the level of the four just mentioned) include **Paradigm Talent Agency** (considered by some people to be a member of a "big five" group of agencies in addition to the "big four" previously mentioned, since they also do quite a bit of packaging) and **Agency for the Performing Arts (APA)**. At any given time there is also a small group of what are sometimes referred to as "**boutique lit (literary) agencies**" which handle primarily screenwriters, television writers, and sometimes also book writers. The list of boutique literary agencies changes all the time. Sometimes these boutique lit agencies also handle a few directors. These agencies are known to handle good writers so studios and producers often go to them when they are looking for interesting material, writers for rewrites, etc.

Entertainment attorney: An entertainment attorney is an attorney who specializes in entertainment law. To be qualified as an entertainment attorney a lawyer must have thorough knowledge of, and in fact specialize in **intellectual property** law (**IP**), including but not limited to copyright law. Entertainment attorneys are quite powerful in the film and television industry, and sometimes go on to become studio executives or even the heads of studios. Also agencies and studios always employ many entertainment attorneys. In former times agents made deals for the clients, negotiated them, "documented" them (put them into writing as contracts), went back and forth with the other party (the studio, for example) negotiating the fine points, and then after the contract was signed, made sure that the other party (studio, etc.) lived up to it. Nowadays many of these functions are performed not by the agent (who still receives his or her 10%), but by the entertainment attorney, whose fee will probably be between $300 and $500 per hour.[30] To cite a typical example, the writer's agent will make the deal with the Producer, email the basic terms to the Producer's attorney, and the rest of the process will be handled between the two lawyers. The agent will only become involved again if (for example) the Producer's attorney believes that the writer's attorney has put into the written draft agreement (contract) provisions that were not negotiated. In every type of contract there are standard terms and provisions called **boilerplate** which change very little from agreement to agreement, but which can still be important.[31] In option-purchase agreements there are also terms that are so standard that the agent doesn't bother to mention them; the writer's entertainment attorney puts them into the draft agreement automatically. Once one of the attorney's has created the first draft agreement (in most cases it will probably be the Producer's and not the writer's attorney who does this), he or she will send the draft to the other attorney (in this case the writer's attorney) and the writer's attorney will then do a **markup** or **redline** of the contract, indicating changes, deletions and additions he wants to make on behalf of the writer. This is a very routine process, a game that is played over and over again by the same players all the time. The writer's attorney will ask for things in

[30] Some entertainment attorneys, including good ones, will work on a contingency or some other negotiated basis so that the writer or other talent will not have to pay them until they are paid by the studio or other party who hires them to write or who buys their script.

[31] Important boilerplate terms for writers are reviewed at the end of this book.

the contract that the Producer will never agree to, and vice versa. Example: The writer will ask for **injunctive relief** if the Producer is in (serious) material breach of the agreement. Injunctive relief means the right to go to court and seek to **enjoin** the production or the distribution of a film in the event (for example) that the Producer fails to pay the writer. **Injunctive relief** is a form of legal **remedy** that the Producer's attorney will almost never agree to, since it could allow the writer to go to court and stop the distribution of a film. Imagine of a studio had spent $100,000,000 on **P&A** to release a film on October 29th, all the theaters were booked, and then the writer's attorney could legally prevent the studio from releasing the picture on that date because the studio had failed to pay the writer $10,000. In any event this is how agreements get negotiated and (eventually) signed.

There are also some pieces of talent (including writers) who are now represented exclusively by entertainment attorneys – i.e., they do not have agents or managers, and the attorneys do everything: submit scripts, get them work, make deals, document the deals (meaning draft and revise agreements), etc.

Business Affairs: This is the designation for the department at the studio or production company that negotiates and documents contracts with talent, including writers. For obvious reason most of the people (other than assistants) in the Business Affairs Dept. are attorneys. Often a studio will have both a Business Affairs and a Legal Department, where the Legal Dept. handles litigation and corporate legal matters and the Business Affairs Dept. handles talent contracts.

Attach: This means to associate a piece of talent with a project, but what such association actually entails can cover a wide range – anything from the director had a casual conversation with (e.g.) a star and the star said he or she was interested to some sort of formal commitment. The more honest people in the business only use the word "attach" when the commitment of the star (director, etc.) is fairly firm, and when it is not they say that the star is "interested," which means nothing.

Offer: An offer is a contractual offer or proposal, almost always in writing (if it is not in writing it is not really an offer) to a piece of talent (usually an actor or director) for his or her services on a film. As mentioned above under the term **Agreement**, an offer and the acceptance of that offer comprise one of the necessary elements for there to be a legally binding contract between two persons or entities. For an offer to be credible it has to be from a financially capable party. Example: Tom Cruise gets $50 million per picture. I can make him an offer but it would not be credible; nor would an offer to him be credible from a small, indie company. As noted above under Agents, an agent is required to show any offer to his client (writer, actor, etc.). In reality this does not actually happen with top talent, who are generally only shown offers that are both pay-or-play (see below) and from big companies (mainly studios).

Pay-or-play offer: This is an offer to a piece of talent where the party making the offer (usually a studio or production entity) states that *even if the talent's services (acting or direcing, for example) are not used – i.e., even if the film is never made --, the party making the offer will pay the talent anyway for his or her services.* Example #1: If Paramount made a a pay-or-play offer to Jack Black star in Picture A for a fee of

$1,000,00, then found that that Tom Cruise was interested and available and decided to use him instead, Paramount would still be obligated to pay Jack Black the $1,000,000.[32] Example #2: Village Roadshow makes a pay-or-play offer to Brad Pitt for $10,000,000 to star in Picture B, and Picture B is never made. In this case, because the offer was pay-or-play, Village Roadshow would still be obligated to pay Brad Pitt the $10,000,000. In actual practice many (most) pay-or-play offers are not really pay-or-play because they include conditions: e.g., the offer is **conditioned on** "completion of financing, "completion bond," "completion of casting," etc. In general, the fewer the conditions, the more likely the agent and the talent he represents are likely to take the offer seriously. One of the most important things in the development process is for the Producer to make offers (preferably pay-or-play offers) to directors and stars. Until offers are made a project is really stagnating, and is very likely in so-called "development hell" (see below). Therefore this is one thing that a writer always wants to encourage the Producer to do: Make offers.

Pay-and-play offer: For the sake of completeness only one should mention this rare variant, in which the offer states not only will the consideration be paid, but that the talent's (actor's or director's) services *will actually be used.*

Manager: A (talent) manager strategizes a writer's career, makes introductions, package projects, and can even produce, but cannot actually negotiate deals. That is the big difference between an agent and a manager. Talent managers are not (generally) licensed by the state and are not signatories to guild agreements. Their commissions are negotiable.

Spec script: A screenplay, generally wholly original (not based on something – e.g.., a book – owned by someone else) that a writer writes speculatively, not knowing if anyone is ever going to buy it. Generally the writer therefore owns the script outright and is the author for copyright purposes.

Spec writing or writing on spec: This is any writing that a writer does without being paid for it. The WGA MBA has quite strict provisions against its writer members doing spec (uncompensated) writing. It is very common for people in the business – agents, managers, producers – to tell writers that they can do something with their screenplays, but only if they rewrite them first.

> On projects where there are several writers, each has to decide what we want to do individually if someone asks us to do additional writing on spec. My position is that if someone – an agent, producer, etc. – requests minor corrections or clarifications before they send a script out to try to sell it, I am perfectly happy to do that work. But I am not going to do any major rewrite work unless someone options or buys a script and pays for us to do a rewrite. These screenplays are quite finished and polished, and if someone is interested in them then they should option them and pay for any rewriting work they would like to have done. Each writer in a team should be free to make her or his own decision in this matter.

[32] What happens to Jack Black's contingent consideration/compensation is an interesting question and is probably set out in some way in the offer made to him.

Source material: An underlying book, film, play, etc., that a Producer acquires and then hires a writer to adapt into a screenplay.

Work for hire or **work made for hire:** When a Producer acquires source material and hires a writer to write a screenplay based on that source material (an "**adaptation**"), the screenplay the writer writes is a "work for hire" or a "work made for hire." The Producer therefore owns the copyright and 100% of the rights in the screenplay the writer writes. In fact the Producer is actually the "author" of the screenplay for copyright purposes. Example: A Producer options a spec script from a writer, then enters into an agreement with that same writer to do a rewrite of his script. This, or course, happens all the time. In this scenario the *rewrite* that the writer does is a *work for hire* which is owned by the Producer even if the Producer never exercises the option in the screenplay.[33]

Literary Option/Purchase Agreement: This is typically the contract that the writer will enter into with the Producer. Many of its provisions (and possible provisions) will be discussed below. An alternative (and of course preferable) is when the Producer buys the script outright rather than optioning it – i.e., when the writer and the producer conclude a **purchase agreement** for the script. This happens typically when there is a lot of competition for a script (or book). In either case (Option/Purchase or straight outright Purchase Agreement) additional moneys may be (and usually are) payable to the writer if the movie is made above and beyond the purchase (exercise) price. Theses moneys will be discussed below. The Option/Purchase Agreement (which may be a document of twenty pages or longer) almost always contains a **Short-form Option** and a **Short-form Assignment** which the writer also signs with the Option/Purchase Agreement is executed. The Short-form Assignment comes into effect when the option is executed (see below) and is a document that assigns (transfers) the rights as specified per the **grant of rights** in the agreement (see below) to the Producer. The Producer may file (register) the Short-form Assignment with the Copyright Office to document that he (the Producer) now owns the rights in the material.

Option: As set forth in the Option/Purchase Agreement, the Producer pays a writer a certain amount (sometimes but by no means always 10% of the purchase of "exercise" price) for the exclusive right to develop a piece of material (screenplay, book, play) for a certain period of time. Again typically the option payment is applicable against the purchase (exercise) price of the material. This means that if the option fee is $50,000 and the purchase price is $500,000, in order to exercise the option (i.e., buy the material), the Producer must pay the writer $450,000. The exclusive rights that the Producer has during the option period are quite broad. Here's an example that is not as inclusive as many are:

> Owner acknowledges that during the Option Period Purchaser may undertake development and pre-production activities in connection with any of the rights to be acquired hereunder including, but not limited to, the preparation and/or submission of teleplays and/or screenplays based on the Property to any parties or entities whatsoever in the entertainment industry or otherwise in the United States and/or Canada, or otherwise; preparation of budgets and breakdowns; preliminary casting

[33] See discussion below as to how the writer can get such a rewrite back from the Producer if the option is not exercised.

> and any other pre-production activities customary in the motion picture, television and theater industries; and the right to announce that the Property is being developed, provided that any such announcements shall specify that _____ is the writer of the original screenplay. *In the event Purchaser does not exercise the Option, Purchaser shall nevertheless retain all right, title and interest in and to the results and proceeds of such development and pre-production activities*. (Emphasis added.)

It is to the writer's advantage that the option period not be too long. Anything longer than eighteen months would be unusual for an option.

Option extension: Again the Option/Purchase agreement may (frequently does) contain a provision that in the vent the Producer wants more time to develop the project beyond the option period, then the Producer may *extend* the option for an additional period of time (e.g., six months or a year) for an additional payment. Almost always the extension payment is *not* applicable against the purchase (exercise) price. This provision penalizes the Producer and benefits the writer. Using the same example we used before, if the option fee is $50,000, the purchase price is $500,000 and the extension fee is also $50,000, and if the Producer decides that he wants to extend the option and then at the end of the extension period exercises the option, the writer will end up receiving $550,000, since the extension payment is not applicable to (not deducted from) the purchase (exercise) price.

Exercise of the option: During the initial option period or the extension period, the Producer may *exercise* the option by paying the **purchase price** as agreed and set forth for in the Option/Purchase Agreement. When the option (or, if the option is extended, the extension) expires (meaning when the term of the option or extension runs out), *all rights* in and to the material (screenplay or book) optioned to the Producer *revert* to the writer or other copyright holder, and the Producer who optioned the material no longer has any rights in the material. That having been said, the Producer *retains* all rights in the results and proceeds of any of his development activities. This includes budgets, research, script notes, etc., and most importantly, *any rewrites or polishes of the material*, whether done by the original writer or by someone else. The topic of possible *reversion* of rights to the writer is discussed further below. Needless to say the Producer cannot exercise the option (pay for and buy the material at the agreed purchase price) after the option (or extension) has expired – unless the Producer enters into a new agreement (contract) with the writer. Many agreements have a provision (and it is a good one as far as the writer is concerned) that if principal photography (defined above) commences on a picture, the purchase (exercise) price automatically becomes payable on that date. Very often the Producer waits until the very last moment to pay the purchase price, so in the event the film project falls through at the last minute he or she will not have paid for the material (screenplay or book). Of course sometimes the Producer pays the purchase price before the option or extension (of there is one) expires. What happens if the option (or extension) period is nearing its end and the Producer wants or needs more time to develop the project? The writer's agent can then either negotiate for an additional extension, almost certainly with the payment for this extension <u>not</u> applicable against (deductible from) the purchase price, <u>or</u> the writer's agent can hold a gun to the Producer's head and insist that the Producer pay the purchase price then, or otherwise the agent will put the script back on the market.

This is brinksmanship a little bit. How the agent handles that situation will depend on how hot the project is.

Grant of rights: Whether the deal is for an outright purchase with the full fixed consideration (purchase price) paid up front when the agreement is signed, or an option-purchase agreement, when the material is purchased the writer grants a very broad range of rights to the Producer. In many (most) cases the purchase or option-purchase agreement even gives the Producer the right to execute documents *on the writer's behalf* in order to ensure that the Producer has the full right and authority own and exploit all the rights granted. To illustrate how extensive the list of rights is that the writer grants to the Producer when the producer purchases the screenplay, here is a sample Grant of Rights paragraph fro an option/purchase agreement. It is old so it does not include anything digital. A current on would be much, much longer:

> **Grant of Rights.** In the event the Option is exercised, Owner thereby irrevocably grants, sells, conveys and assigns to Purchaser, its successors, licensees and assigns exclusively and forever all right of any kind whatsoever in and to the Property (and any and all screenplays or other adaptations thereof whether heretofore or hereafter written by Writer or by any other person), including without limitation, motion picture, theatrical, all forms of television (whether filmed, taped or otherwise recorded, and including without limitation series rights, CATV rights, pay-per-view, all forms of HDTV, and all forms of direct broatcast satellite sattelite rights), cassette, disc and other compact devices including CDI and all forms of interactive media, sequel, remake, legitimate stage rights, radio, live television, publication, novelization and advertising and promotion rights (including the rights to broadcast and/or telecast by television and/or radio or any process analogous thereto, now known or hereafter devised), any part of the Property or any adaptation or version thereof, and announcements or any concerning such version; all rights to exploit, distribute and exhibit any motion picture or other production produced hereunder in all media now known or hereafter devised; all rights to make any and all changes to and adaptations of the Property; merchandising, soundtrack, music publishing and exploitation rights and all other rights customarily obtained in connection with formal literary purchase agreements; to secure copyright and renewal of copyright throughout the world in Purchaser's name or otherwise, in any version of the Property which Purchaser may create hereunder, and in any other dramatic, literary and musical material therein contained, including but not limited to, any recordings or re-recordings of all, or any part, of the soundtrack of the Property and or in any other material based upon the Property created, or caused to be created, pursuant hereto, and to manufacture, distribute, license and/or vend the same throughout the universe, in perpetuity, via any and all means or media, now known or hereafter devised, in the name of and for the benefit of the undersigned; and any actions or causes of action for infringement or violation of copyrights or any other rights in the Property or related thereto and all damages, penalties and other recoveries and all other rights as a result of any such infringement or violation but only insofar as said copyrights pertain to or affect any of the rights, privileges and property herein granted to Purchaser; the right to use the name of the Property, the character or characters contained therein, or any material contained in and/or based upon the Property, created or caused to be created pursuant hereto, for any commercial tie-ups or for merchandising any commodity, product or service.

> All rights, licenses, privileges and property herein granted Purchaser shall be cumulative and Purchaser may exercise or use any or all of said rights, licenses, privileges or property simultaneously with or in connection with or separately and apart from the exercise of any other of said rights, licenses, privileges and property. The rights granted herein are in addition to and shall not be construed to be in derogation of any rights which Purchaser may have as a member of the public. The rights in and to the Property to be granted upon exercise hereof are intangible property rights and do not require that Purchaser keep or hold permanently any of the Property. If subsequent to the exercise hereof Owner or Writer shall make any revision, adaptation, translation, sequel, dramatization or other versions of the Property, then Purchaser shall have and Owner and Writer hereby grant to Purchaser all of the same rights therein as are herein granted to Purchaser.

In broad strokes, once a Purchaser has paid the purchase price, the screenplay belongs to the purchaser, lock, stock and barrel. A significant wrinkle in this generalization is brought about by the concept of Separation of Rights, which will be discussed below under Writers' Deal Points.

Droit moral: This is a French term meaning "moral right," and it refers to a principle under the laws of France and certain other countries under which writers can take legal action if someone alters or modifies their work without their permission. Almost every option/purchase and purchase agreement for literary material (including screenplays) will include a provision whereby the writer waives any protection he or she might have under any legal provision known as *droit moral* or by any similar term. The reason is obvious: The Producer does not want the writer to be able to sue him in France (or elsewhere where such legal principles exist) for changes he (the Producer) has made in his screenplay.

Chain of title: This refers to all documents affecting or documenting the title (ownership) in the material (screenplay, book, etc.) from its inception to the present. The chain of title would include the copyright registration, any options or assignments, any liens against the material (there can be a lien against a script just as there can against any other form of property), etc. etc. If a piece of material has been in existence for a while and has a history (several studios have optioned and developed it, for example), the chain of title documents can amount to hundreds of pages. A studio will never make a deal for a piece of material if there is any problem (a gap, for example) with the chain of title.

Loan-out company. Writers, producers, directors and stars frequently create corporations[34] which "loan out" their services to Producers. When a writer has formed a loan-out company, the Producer enters into an agreement not with the writer personally, but with the writer's loan-out company to provide the writer's services. Example: Writer Pam has formed a loan-out corporation called Pam's Pictures, Inc. Sony Pictures Entertainment

[34] Nowadays limited liability companies are probably also used for this purpose. A **limited liability company** (**LLC**) is a cross between a corporation and partnership. When it files its first tax return, an LLC can elect to be taxed either as a corporation or as a partnership. Usually this election is in favor of being taxed as a partnership. This elections means that the profits or losses of the LLC will be passed on to the "members," the terms for the persons who own the LLC, rather than having the LLC taxed at a corporate rate. LLCs have been very much in vogue for the past fifteen years or so.

wants to employ Pam to do an adaptation of a novel they have optioned called DARKNESS AND ASHES. Sony enters into negotiations with Pam's agent for Pam's Pictures to *loan out* Pam's services to Sony to write the adaptation. In reality Pam is actually *working for her own company.* Sony requires Pam to sign an **inducement letter** personally guaranteeing Sony that she will do the work, even though she will not be working directly for Sony. Almost the entire reason why writers, director, and stars form and use loan-out companies is for their personal tax planning. If a writer has a loan-out company and during one year receives $5,000,000 in fees and in the next two receives only $90,000 each, then the writer's loan-out company can time the payments to the writer to spread them over a number of years because the money is going from the Producer to the loan-out company, not to the writer directly. That way the writer personally can avoid receiving a huge amount (and being taxed in the highest tax bracket) in any one year.

Franchise: An entertainment franchise is an enduring entertainment concept that can be exploited over a long time period, nowadays in a wide range of media and revenue streams: sequels, remakes, toys, games, theme park rides, television, music, spinoffs (see below), etc.

Spinoff: This is really a TV term. It involves starting a new film or series based on one character or plot element from an existing film or series.[35]

Product placement: This is the term for deals that are made to place products in feature films and television programs. These products range from clothes to cars and even to houses, and all the way up and down. Any time a brand or identifiable product is visible on screen in a movie or on TV that is almost always the result of product placement: The Producer (studio or network) is being paid so that that product will appear. Depending on the film, product placement can furnish a significant portion of the film's production budget – never huge, but significant --, thus lowering the total cost of the film. Again this can effect *profit participations,* since the lower the cost of the film, the sooner backend participations will become payable.

Branded entertainment: This is sometimes used as a synonym for product placement, but it can also mean creating a new "brand" that will be recognized by the public. In that way it similar to the idea of a franchise, as discussed above.

Dailies or rushes: This is all of the film that is shot on any given day. Traditionally the director, the producer, the DP, the editor, and sometimes the cast and others gathered at the end of the day to watch the *rushes* for that day. Now, or course, everything is done digitally so such group "screenings" of dailies are now no longer as standard as they used to be.[36]

[35] Types of spinoffs are discussed further below.

[36] Under the WGA MBA WGA writers who are WGA members have the right to attend dailies, as discussed further below. It is also discussed that non-WGA member writers can have their agents negotiate for their clients to have those same rights.

Rough cut: The first edited version of the picture, generally long and without music or special effects.[37]

Remedy: This is a legal right that a person can seek in court against someone who is breach (violation or failure to perform) of a contract with him.

Representations and warranties ("reps and warranties"): These are statements and promises that the writer makes to the Producer as to the originality of his material, that it does not infringe upon anyone else's copyright, etc. Here is a sample representations and warranties section from an option-purchase agreement. Some of these are much longer and more exhaustive than this one:

> **8. Representations and Warranties.** Owner and Writer as individual and collectively hereby represent and warrant (and acknowledge that Purchaser has relied thereon) as follows
>
> (a) Writer is the sole author of the Property and Owner is the sole and exclusive owner and proprietor throughout the world of all rights granted to Purchaser hereunder.
>
> (b) The Story and screenplay are wholly original with Writer.
>
> (c) No incident in the Property or part thereof is taken from, based upon or adapted from any other literary material, dramatic work or motion picture, or on any public domain material, and the full use of the Property or any part thereof, as herein granted, does not in any way violate or infringe upon any copyright (common law or statutory) belonging to any person, firm or corporation, or any other rights of any person, firm or corporation, or otherwise violate or infringe upon any right of confidentiality or to the best of Owner's and Writer's knowledge constitute a libel or defamation or any invasion of the rights of privacy or publicity of any person, firm or corporation.
>
> (d) Owner and Writer individually and collectively have the full right, power and authority to enter into this Agreement and to grant to Purchaser all of the rights herein provided.
>
> (e) The property has not been published, and no motion picture, television, radio, dramatic or other version or adaptation of the Property has heretofore been made, produced, performed, copyrighted or registered for copyright in any country of the world; and the Property is not in the public domain in any country of the world which provides for copyright or similar protection. The Property does and will continue to enjoy either statutory or common law copyright protection in the United States and all countries adhering to the Berne and Universal Copyright Conventions; and the rights granted to Purchaser hereunder are and will be exclusive.
>
> (f) Owner and/or Writer have not assigned or licensed to any other person, firm, or corporation, or in any manner encumbered or hypothecated, any of the rights herein to be granted to Purchaser in the event of the exercise hereof with respect to the Property, or if Owner and/or Writer has entered into such an assignment or license, all such rights have fully reverted to Owner. Owner and/or Writer have not committed any act by which any of said rights could or might be diminished or impaired, and there are no rights, licenses and/or grants of any kind in favor of any person, firm or corporation and no claims, litigation or other proceedings pending or threatened, which could in any way impair, limit, diminish or infringe on the rights to be granted to Purchaser in the event of the exercise hereof.

[37] "Cuts" are discussed further below.

(g) Neither Owner nor Writer will at any time hereafter make any other agreement in conflict herewith or in any way attempt to sell, dispose of, encumber of hypothecate any of the Rights in the Property herein granted to Purchaser, or do or knowingly permit to be done any act or thing by which said rights may be impaired.

Without limiting any other rights Purchaser may have in the matters hereinbefore stated, Owner and Writer hereby agree that if there is any claim and/or litigation presented or commenced by a third party involving any breach or alleged breach of any such representations and warranties of Owner, then Purchaser may, in addition to any other rights and remedies Purchaser may have, rescind this Agreement.

Notice in particular the last sentence above: If the writer (here called the Owner) breaches (breaks, violates, fails to live up to) any of these reps and warranties, in addition to other remedies (e.g., suing the writer), the Producer (here called the Purchaser) can rescind (cancel) the contract.

Indemnification: An indemnity is the agreement of one party to protect and take responsibility for a threat or harm done to another, such as a lawsuit. In the case of the writer it is typical in an option-purchase agreement for the writer to **indemnify** the Producer against any lawsuits brought against the Producer because the writer breached any of his reps and warranties, or in connection with the Producer's exercising his rights in the screenplay or other material. A sample Indemnification paragraph follows:

9. Indemnification. Owner and Writer individually and collectively agree to indemnify, defend and hold harmless Purchaser, its subsidiaries, affiliated companies and its licensees, successors and assigns and the officers, directors, employees and agents of each of them (collectively called "Indemnitees"), from and against any and all claims, damages, losses, liabilities, judgments, and/or costs and expenses (including, but not limited to, reasonable attorney's fees) sustained, suffered, paid or incurred by any or all of the Indemnitees as a result of or in connection with: (i) Any breach of any warranty or representation made or entered into hereunder by Owner and/or Writer; and/or (ii) Purchaser's exercise of the rights granted to it in conformity with the terms of this Agreement. With respect to any material furnished by Purchaser to Owner and/or Writer (unless such furnished material was written or conceived by Writer), Purchaser shall similarly hold Owner and Writer harmless from and against any liability or loss including reasonable counsel fees arising out of the use thereof. Purchaser agrees that Writer shall be covered on the errors and omissions policy in connection with the Picture subject to all of its limitations with the understanding that Purchaser shall have no obligation to obtain such policy.

Errors & Omissions ("E&O") Insurance: This is an insurance policy which the Producer takes out to protect itself from lawsuits along the lines of invasion of privacy, defamation, copyright infringement, etc. Is used to be that a picture would have an E&O policy with limits as low $3,000,000 per incident and $5,000,000 in the aggregate (the total the policy would cover for all incidents), but now those limits are much too low. *It is very important for the writer to be covered, preferably as a named insured, on the E&O policy that the Producer takes out for the picture.*[38] If the writer is not covered in this way, then

[38] The WGA MBA requires that the Producer cover a WGA member writer on its E&O policy, even if the writer uses a **loan-out company**. The WGA MBA also contains a number provisions relating to the writer's warranties and indemifications. For example, the Producer must indemnify WGA member writers against damages and legal expenses resulting from use in screenplays of material supplied to the writer by the Producer; material added to the screenplay by the Producer; and changes in the screenplay which the writer makes at the request of the Producer.

because of the indemnification he has provided to the Producer he can be personally liable, and this could cost him millions of dollars if he is sued and loses.

"deForest Report": This was a company which for many years provided what is also known as **script clearance** which is almost always required in order to obtain **E&O** insurance on a picture. The company was acquired in 1997 by a law firm called Thompson & Thompson, but now several companies provide similar services. What **script clearance** companies do is to go through the screenplay and look for, amongst other things: names of characters, businesses, schools, organizations, product names, and locations; materials that may be protected, such as film clips, books, photographs or artwork; and proposed prop use and/or dialogue that could be problematic. The Producer will then change names, etc., in cases where the **script clearance report** suggests that the use of such names (etc.) might result in claims for invasion of privacy, defamation, or infringement of the rights or any person or entity. Companies providing **script clearance reports** search in professional directories; local phone books covering areas where the script story takes place; newspapers, magazines, books, and trade publications; and patents and trademarks. Of course in the era of the internet all of this is much easier than it used to be.

Coverage: This is a synopsis, typically including an evaluation of a script done by an employee of an agency, management company, Producer, or studio. At the bottom of the coverage (which is generally between two and five pages in total length), the person doing the coverage (known as a **reader**) will usually have boxes to check depending on the format used by the agency or studio. These boxes will either be to recommend the script, pass on the script but follow the writer, or simply pass on the script. Coverage is sometimes written by fulltime employees and sometimes by freelancers. People who write coverage are not highly compensated for their work and often have a great deal of resentment of the position they are in, since if you are a reader in Hollywood you are truly at the bottom of the totem pole. Of course it would look bad for someone to write negative coverage on a screenplay that was later made by another company and went on to become a big hit. But there is very little connection between the reader and anyone else at the agency or the studio. Readers are fairly anonymous, so they are not going to be the ones getting the blame if they (effectively) turn down something great. Coverage is *deadly* and kills many good and interesting screenplays, simply because the reader is stupid or sloppy or didn't understand the script or see its potential. Essentially coverage is a reality of the business and there is nothing that a writer can do about it, except to try to convince the agent or studio executive to read the first ten pages of the script himself before he sends it out for coverage.

The screenplay submission process:

Desney v. Wilder: In the early 1950s a writer named Desney called the office of a well-known director and producer named Billy Wilder (*Some Like It Hot, Sunset Boulevard, etc.)*. Desney did not speak to Wilder, only to his secretary. Desney told Wilder's secretary that he had an idea for a movie based on a then current news story about a mining disaster in Pennsylvania. The secretary later communicated this to Billy Wilder, who went ahead and

developed a script and made a movie about that mining disaster (called either *Ace in the Hole or The Big Carnival)* with his usual writing partner, I.A.L. Diamond. Wilder did not hire Desney or give him any compensation at all. Desney sued, claiming that when he called Wilder's office and suggested the idea, there was *an implied contract that if Wilder made a movie based on his idea* (even though he did not own the idea, since it was a current event and a news story), *Desney would receive compensation.* The California state court agreed with Desney [39]and Wilder lost the case and had to pay Desney. This has since become the most famous and important case in entertainment law, and has had far-reaching implications, especially for writers.

Why? Because whenever a writer suggests, mentions or submits *anything* to a Producer, there is an *implied contract created,* so that if the Producer uses that idea or material in any way, the writer can sue the Producer and win. Notice that Desney was not claiming that Wilder infringed on any copyright he owned. Desney did not own any copyright. He sued solely on the basis of the implied contract between him and Wilder that if he suggested or submitted something to Wilder and Wilder used it, he would receive compensation. Over the years the precedent and principle established by the Desney case has been taken to great extremes: A producer or writer who suggests to a studio that they remake an old movie that the studio owns can (and has) sued the studio, claiming that there was an implied contract created anytime anyone suggests something to a studio, and that the producer or writer *would never have made the suggestion if he had not expected that the studio would pay him for it if they used it.*

The studios have tried to take the position that there is no implied contract when (for example) a writer shows a screenplay to a studio. They argue that if a writer shows a screenplay to a studio and the studio goes ahead and makes something similar without compensating the writer, the writer's only remedy (possible action in court) is to sue the studio for copyright violation (infringement) in federal court. The most recent federal court decision on this matter was in Grosso v. Miramax[40] in which Grosso was a writer who claimed that he had submitted a screenplay to Miramax called "The Shell Game," and that Miramax went on to steal the ideas and themes of his script when they made a film called "Rounders." Basing his argument on Desney V. Wilder, Grosso argued that if Miramax used the ideas contained in his screenplay, then Miramax owed him compensation for the use of those ideas. Miramax argued that Grosso's claim for breach of implied contract was preempted by federal copyright law, and that the case was therefore a federal copyright matter and not a state breach of (implied) contract matter. The federal court decided that federal copyright law does not preempt implied contract claims under state law. *Therefore Grosso v. Miramax reaffirms Desney V Wilder: If a Producer (studio, individual producer, etc.) agrees to look at a piece of material, there is an implied contract that if they make any use of that material, the writer must be compensated.*[41]

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[39] Desney v. Wilder, 46 Cal.2d 715 (1956)

[40] In 2003: 383 F.3d 965

[41] As frequently happens in law cases, even though the Grosso case seems to establish an important precedent, Grosso himself ultimately lost: When the federal courses remanded the case to state court (sent it back), the state court found that the "Rounders" film was not actually sufficiently similar to Grosso's script. So even though an implied contract had been created when Grosso submitted his script to Miramax, and even

This is <u>the most important reason</u> why Producers (studios, etc.) never agree to read screenplays or other material unless it is submitted to them through a known agent or entertainment attorney, *or another producer with whom they have a relationship.* The agent or attorney creates a firewall between the writer and the studio.

Most young writers have no idea about this and assume that it is hard to get people in the business to read their scripts simply because it is a closed business which is not really interested in new ideas or new talent. This is, of course, true in many ways. It is also true that there are so many screenplays being written – literally hundreds of thousands of them – that if the studios were open to submissions from "the public" they would be deluged and there would be no way they could handle all the material being sent to them. Therefore the agencies provide an initial selection process, weeding out at least ninety percent of all screenplays. The studios know that a screenplay submitted to them by WME, CAA, UTA, ICM, Paradigm or one of the boutique literary agencies must have some merit, otherwise the agency would not have agreed to represent it.

Still, at the end of the day, what the studios and production entities fear is being sued on a claim similar to the claims that Desney and Grosso made.

The agent should (but not always does) keep the writer informed of all submissions that he makes and of the responses he receives. A very typical response of a studio or other Producer to a screenplay submission is, "We have something similar in development already." The studio or Producer will say this *even if it is not the case.* Why? Because of (once again) Desney v Wilder. The studio or Producer is telling the agent, "Your client's script is not giving us any new ideas for which we might owe him or her compensation. We have had those ideas already."

Writing sample: Sometimes also called a "show script," this is a screenplay that an agent sends to a studio or other Producer to demonstrate his writer client's writing ability in order to get him or her work on other projects (adaptations or rewrites). Often this is a screenplay which the agent and the writer have mutually decided is a good representation of what the writer can do but for one reason or another is likely never to get made. Sometimes an available script can also serve as a writing sample. For example, an agent submits a screenplay to a Producer who passes on the script but thinks that the writer might be good to adapt a piece of material that he owns, or to rewrite another screenplay that he owns or has under option.

Submission agreement: This is an agreement (which, as previously discussed, means a binding contract) that a producer will give a writer who is *not* represented by an agent or an attorney to **induce** (provide the producer a reason to) read his or her script. Submission agreements are some of the most egregious and obnoxious documents in the entire entertainment industry. And the word "submission" is entirely appropriate: Many of them read as if they had been given by a Dom to a Sub. They are even worse than the contract

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though that implied contract would have guaranteed Gross compensation on that basis, the court decided that Miramax had not in fact used his ideas.

that Christian Grey gave to Anastasia Steele to sign,[42] and there is not even any opportunity for negotiation or "hard or soft limits." Sometimes the submission agreement calls for the writer, in order to induce the producer to accept his submission and consider his screenplay, to give the producer a six month **free option** on the screenplay, during which the producer can do anything the producer wants to do with it. Submission agreements are another good reason why a writer should always be represented by and do submissions to producers through an agent or an entertainment attorney. In any event any submission agreement given to a writer should be reviewed by an entertainment attorney (not just any lawyer) before the writer signs that submission agreement. But far preferable is for submission agreements never to be something that the writer ever has to deal with, because he or she has an agent.

Writers' deal issues and provisions:

A few of these have been mentioned already. In this section we are going to address some others, including provisions that the writer's agent may wish to ask for in negotiating an **option-purchase** (or outright purchase) **agreement** with a Producer. Additional terms and expressions will be introduced and defined as pertinent to this discussion.

Separation of rights: This is an exceedingly complicated area covered by the WGA Minimum Basic Agreement. As discussed further below, an agent for a writer who is *not* (or not yet) a member of the WGA might negotiate for his or her client to have some or all of these provisions, many of which are highly beneficial, in his or her client's contract.

> As the reader will notice, these **separation of rights** provisions are of particular importance to writers who are creating screenplays which embody wholly original "franchise" concepts and characters and/or which could be adapted into books, stage productions, etc. In effect these provisions *limit* the **grant of rights** given by the writer to the Producer (e.g., the studio).

Separated Rights are a group of rights that the WGA MBA provides to writers of original material. They are derived from Copyright, which is a bundle of rights. The WGA negotiated for certain of the copyright rights to be separated out and conveyed instead to the writer. These are the Separated Rights. In order to be entitled to separated rights a writer must be a **Professional Writer** according to the definition of the WGA, which is a writer who has a received a writing credit on a produced motion picture or television credit or who has had at least thirteen weeks prior industry employment, or who has received a credit for produced play or a published novel. *However* a writer may negotiate with a Producer to be treated as a professional writer even if he or she does not quality as a professional writer according to this definition.

[42] This is a humorous reference to the phenomenal international best-seller *Fifty Shades of Grey.*

In order to be entitled to Separated Rights on a theatrical motion picture, a writer must meet the criteria for both "Initial Qualification" and "Final Qualification." A writer is initially qualified for Separated Rights in a theatrical motion picture by writing an original story (or original story and screenplay), including a complete and developed plot and character development. This original story must be written under employment or purchased from a "professional writer." "Original" in this instance means that the material is not based on any material of a story nature that has been previously published or produced. "Final Qualification": If a writer who is initially qualified for Separated Rights in a theatrical motion picture, as described above, receives "Story by", "Written by" (i.e., story and screenplay credit), or "Screen Story by" credit on the motion picture, the writer is entitled to Separated Rights. A writer who has Separated Rights has Separated Rights in the entire screenplay, even those portions written by other writers. The theatrical **Separated Rights** are **publication** and **dramatic stage rights**. Through the MBA, these are licensed back to the writer

Mandatory rewrite rights granted to writers who receive **separation of rights**: The writer who sells or options an original screenplay must be given the opportunity to write the **first rewrite** at not less than WGA minimum. In addition, if no other writer has been employed, and there is a **changed or new element**, such as a new director or star which necessitates an additional revision, the writer with Separated Rights must be offered that first additional revision. This right continues for three years following the writer's services. The writer may waive this right but such waiver must be negotiated as part of the deal rather than appear as part of the boilerplate language in the Producer's form contracts (if such form contracts exist). *The right to do the first rewrite is a very important right which the writer's agent should negotiate for, whether or not the writer is a member of the WGA or a "professional writer" per the WGA's definition.*

Reacquisition rights granted to writers who receive **separation of rights:** If original material (in the case of reacquisitions, material not based on any pre-existing material, such as an original **spec script**) has not been produced within five years, the writer has a two-year **window** (period) within which to buy back the literary material from the Producer, and may do so as long as the material is not then in active development by the Producer. "Active development" includes when a writer is employed on the project and/or when other above-the-line players are employed on a pay-or-play basis. The writer's two-year window starts five years after the completion of the original writer's services or five years from acquisition of the screenplay by the Producer, whichever is later. That time may be extended if the Producer sells or options the material to another Producer. After the two-year period, the writer's right to reacquire expires under the Separation of Rights provisions, and the writer must negotiate directly with the Producer of he wishes to reacquire the material. In order to reacquire the material, generally, the writer must buy it back from the Producer for the amount the writer was paid for the purchase and/or writing services. In addition, the writer must then obligate the "new" buyer to pay the balance of direct literary material costs plus interest on that balance. That amount is due upon commencement of principal photography. Direct literary material costs include those costs directly attributable to the writing such as the first writer's pension and health contributions, costs of other writers, etc. These costs *do not* include overhead or other costs of production. *This is can be an important right which might be negotiated for by*

the agent of a writer who is not a member of the WGA or who is not a "professional writer" according to the definition of the WGA.[43]

Meeting rights granted to writers who receive **separation of rights**: If the Producer contemplates replacing the writer who has Separated Rights, the writer must first be given the opportunity to meet with a senior production executive who has read the material. Prior to replacing the writer, the Producer must discuss with the writer the Producer's view and give the writer a reasonable opportunity to discuss continuing to perform services on the project. (

Publication rights granted to writers who received **separation of rights:** The writer obtains the right to publish the script, or book(s) based on the script, subject to a **holdback** period, meaning a period of time subsequent to the release of the picture. The Producer, however, has the right to cause a novelization to be published in conjunction with the release of the film, for the purpose of marketing the film. If the Producer wishes to cause a novelization to be published, it must first approach the writer(s) who has Separated Rights to see if the writer(s) wants to negotiate with a publisher regarding the rights and services for the novelization. If the writer with Separated Rights does not want to write the novelization or fails to conclude a publishing deal within prescribed timeframes, the Producer may publish the novelization but must pay the writer not less than WGA minimum for the right to publish such a novelization,.

Dramatic stage rights granted to writers who receive **separation of rights**: The writer has the right to produce a stage version of the material after two years following general release of the motion picture if the Producer has not exploited the dramatic stage rights prior to that time. If the material is not produced, the writer may produce a stage version based upon the material five years after the date of the contract with the Producer. There are certain rules regarding the use of the title of the motion picture. If the Producer does exploit the dramatic stage rights, the writer must be paid for such use as provided under the MBA.

Sequel payments granted to writers who receive **separation of rights:** The writer must be paid not less than WGA minimum for theatrical motion picture sequels, television movie sequels, or a television series based on the film. The writer may negotiate in his/her individual contract regarding such payments, but payments cannot be less than the WGA minimum. In addition, the writer with Separated Rights is entitled to a "Based On Characters Created By" credit on any theatrical sequel and may negotiate for a similar credit on other sequels, including television sequels. To be clear, these are payments to the writer *even if the writer does not actually write the screenplay for the sequel.*[44]

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[43] There are several different ways by which a writer can effectively "reacquire" a screenplay that he or she has sold to a Producer. These include **turnaround clauses** and **reversion clauses**.

[44] The WGA MBA states that such sequel payments are "not commissionable," meaning that the agent cannot take a 10% fee on such payments. If a writer is not entitled to **separation of rights** and also does not write the screenplay for a sequel, the standard contract provision is that the writer will receive an amount equal to one half of his or her original fixed consideration.

Other "creative" rights provided under the WGA Minimum Basic Agreement:

As noted above, a writer who is not (yet) a WGA member can ask his or her agent to request that these (or similar) provisions be included in his or her agreement with the Producer. Some of these "rights" are mere formalities and are not particularly meaningful or worth spending lawyers' time (and costs) on. Others are.

- **Producer may not disseminate coverage without the writer's consent**: Unless the Producer has optioned the material, the Producer may not disseminate critiques or coverage of the material without the writer's approval except to a company with which it has a development deal, distribution deal, or production financing deal.
- **Pre-production meeting:** Under the WGA MBA, the writer has a right to have a pre-production meeting with the Producer to give the writer the opportunity to have a "meaningful discussion of the translation of his or her vision to the screen." This meaning should include a discussion of tone, location, cast, choice of director, etc. When the director is chosen the writer will also be afforded the opportunity meet with him or her. The writer will have an opportunity to meet with the director prior to any decision being made to hire another writer for the project.
- **Call sheets:** The name of the writer shall appear on all **call sheets** (lists of individuals who must "show up" on any given day) for the Picture adjacent to the names of the producer and director.
- **Cast readings**: The writer has the right to attend the first **cast reading** of the screenplay, provided that if the writer has any comments, he or she must make those comments to the director in private.
- **Set visits:** The writer has the right to visit the set and bring a reasonable number of guests, with the director retaining the right to approve such visits.
- **Location expenses:** If the Producer requires the writer to travel in connection with work on a Project, the Producer must provide the writer with first-class travel, board and accommodations. The writer's participation in the creative project *other than the actual writing services* which he or she provides is deemed voluntary, and therefore additional compensation for the writer's time in this connection is not mandated by the MBA – *unless,* of course, the writer does additional writing while on location.
- **Right to view dailies:** Although this is not a provision of the WGA Theatrical & Television MBA, it is a provision of the WGA's agreement with PBS, and is something that a writer *might* wish to request.
- **Right to attend/participate in cast/crew events:** This would include, for example, the **wrap party**, which is the ribald and orgiastic social event that generally takes place after the completion of principal photography.[45] The producer is not required

[45] The origin of the tem **wrap party** is based on the sell-known expression *"It's a wrap!"* which is used at the end of a day's shooting. "Wrap" is also a verb. E.g., *"We wrapped at 2:00 a.m. and our call tomorrow morning is at five. Fucking hell!"*

to provide transportation to and from or lodging for purposes of attending such events, but the WGA encourages the writer to negotiate with the Producer to provide these.

- **Right to view cuts:**[46] According to the WGA MBA, the writer has the right to "view a cut"[47] of the film. After the writer has viewed a **cut**, the writer will afforded a "**Writer's Viewing Period**" in sufficient time to allow the writer's suggestions, if approved, to be implemented.
- **Right to attend "sneak previews"**[48]**:** The WGA member writer has the right to attend the first **sneak preview** of the picture, provided that such sneak preview akes place in Los Angeles County.
- **Right to attend the premiere, festival and press junkets:**[49] The WGA member writer has the right to attend the **domestic premiere** of the picture or the **domestic film festival** at which the picture is first shown, *and* to receive first-class transportation and accommodations for two persons if the premiere, festival or junket requires them to travel more than 150 miles. Note here that the term **domestic** means U.S or Canada, so if the first screening the film is at the **Cannes Film Festival**, the writer would not have the right to attend, nor would the producer (studio) be obligated to pay for the writer to attend. This is something that the writer may wish to ask his or her agent to attend – and perhaps also to negotiate guaranteed invitations to all festivals (or major festivals) at which the film is screened.[50]

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[46] A **cut** is any edited version of the picture. As already mentioned above, a "**rough cut**" is a preliminary, not finely tuned edited version generally of the complete picture. The "**final cut**" is the complete film in its ultimate edited version. "**Final cut**" is also an expression used for a rare right that is sometimes given to very powerful directors that their **final cut** will be the version of the picture which is released, and that the Producer (studio) will make no further changes to the picture after the director has made his or her **final cut**.

[47] The MBA does not specify which cut.

[48] A "**sneak preview**" is a screening for the public at a commercial movie theater which the studio or distributor arranges to test the public's reaction to the film. A **"research screening"** (sometimes called a "**test screening**"), by contrast, is a screening generally done by the studio or distributor at a special test theater. After a research screening the audience is asked to fill out forms giving their ratings of and reactions to the picture; also from the audience one or more **focus groups** are selected to discuss the picture as a group with a moderator whose job it is to learn more about the audience's reaction to the picture.

[49] A "**press junket**" is a sort of tour in which the director and/or the cast of a picture visit various cities and give interviews to the press, also sometimes appearing on television, etc.

[50] The major **film festivals** at which important films are premiered are generally considered to be **The Cannes International Film Festival** in May; the **Toronto International Film Festival** in September; the **San Sebastian Film Festival** in Spain, also in September; the **New York Film Festival** in October; the **Tribeca Film Festival**, also in New York; and the **Sundance Film Festival** in Park City, Utah, in January. A few other festivals have occasional importance: The **Locarno Film Festival** in Switzerland; the **Deauville Film Festival** in France, which is an annual event at which American films are shown, and also the **BFI (British Film Institute)/London Film Festival**. There are, of course, literally hundreds of film festivals every year, and most major cities now have a film festival, but at present none of them have the stature or importance as those mentioned here. Of these festivals **Cannes** and **Toronto** also function as **film markets** at which rights are sold and **pre-sold** to foreign and domestic distributors. In addition there are annual events which are purely **film markets.** An example of one of these is the **American Film Market** which takes place in Los Angeles in the autumn. The primary activity at **film markets** is the **pre-sale** of distribution rights to distributors in the foreign market. Film markets are characterized by the wide range of "**product**" (films, film projects, television shows, etc.) being offered for sale or **licensing** (meaning the right to distribute a film in a medium or territory for a given length of time). Few films deals for the foreign market are actual outright *sale* or rights. Most are **licenses** covering only certain

Writer's Deal Points relating to Fixed Consideration:

Option and Purchase (Exercise) Price:

As discussed above, it is sometimes stated that the rule of thumb for the option price is that it is around ten percent of the purchase price, and that the option payment is applicable against the purchase price (i.e., deducted from the purchase price when and if the option is exercised). The WGA MBA memorializes this by stating that *as a minimum,* if a writer is a "**professional writer**" (definition discussed above under **separation of rights**)[51] who is a member of the WGA, the Producer may option the material for up to eighteen months for 10% of the purchase price, and for an additional eighteen months for an additional 10%. But remember that these are *minimums,* and that anyone, WGA member, "professional writer" or not, can negotiate for more money and/or shorter option and extension periods.

The WGA MBA also establishes **minimum payments** due to WGA members who are "professional writers"[52] There are different minimum rates for pictures costing below and above $5,000,000. We will concern ourselves only with the latter. Until 05/01/13 the *minimum* which such a writer is permitted to accept for the "**Sale/Purchase of an Original Screenplay**" is $89,637, and after that it goes up to $91,430.

With respect to WGA minimums in general, it is important to note that "**overscale compensation** (minimum plus overscale) is commissionable but only to the extent the commission does not reduce the writer's compensation to below minimum." In other words the ten percent commission payable to the writer's agent should be *on top of* the minimum called for in the WGA MBA and Rate Book, so that the writer actually receives the minimum payment and the commission does not reduce that payment below the minimum, even if the writer's compensation is "overscale" (above the minimum).

All that having been said, and taking into consideration the *minimums* given in the immediately preceding paragraphs, in the real world both the option and the purchase price are whatever the writer's agent can negotiate. The best scenario is when the agent (sometimes with the complicity of the writer's manager, it he or she has one) can orchestrate a **bidding war** for the material (screenplay or book). There are sometimes cases where potential buyers of a screenplay or novel are told that they must come to the agent's office and read the material there in a closed room. Every once in a while one reads in the trades that a bidding war is going on for a certain script, or that such-and-such a studio has bought a script after a bidding war has taken place. In these situations the deal made for the script was in all likelihood an outright purchase rather than an option-purchase. One should always bear in mind, however, that stories like this are planted in

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rights (e.g., theatrical and DVD) and only for a set period of time (e.g., five or ten years), and with respect to television licenses, only a certain number of showings within that time period.

[51] But remember that the WGA MBA explicitly states that any writer can *negotiate to be treated as a professional writer,* which the agent for the writer, WGA member or not, should most probably do.

[52] See note 38, above.

the trade's by someone's **publicist**[53]**,** whose job it is to create excitement around the screenplay and the project.

Many factors have an impact on what the purchase price of a script (or a book, or a finished film) will be. Obviously the first such element, as mentioned above, is the amount of *competition* for the screenplay. If there is only one buyer interested it is much more difficult to obtain a high price. That having been said, there are other factors which the agent can use to get a better purchase price and a better deal overall, including the backend. Of course if the agent has **packaged** the project with a hot director and/or star cast, then this will drive the deal very strongly. But even if no stars are attached (see definition above), the fact that a screenplay has *roles for star cast* can be a plus. Studios are also looking for **franchise projects**, so if a screenplay has *franchise potential* it is likely to be more attractive to a studio or other buyer than a screenplay which does not. Studios are also looking primarily for films that are **targeted** at certain **demographics**. The most obvious demographic they wish to reach is the audience from early teens through (at the very top end of the range) early thirties, since these are the people who go to see movies in the theaters as opposed to waiting for them show up on DVD or cable. Of course **family films** (which really means films for parents to take their pre-teenage children to) are and always will be something the studios are looking for, particularly if they have franchise potential. **Rom-coms** (**romantic comedies**) are something of a hit-and-miss proposition, the success of any given film being dependant very much on casting. They also go through waives and cycles, one of the most recent being the spate of marriage-themed **rom-coms. Broad late teen/young adult comedies** have done quite well in recent years (e.g., *The Hangover* series). **Horror**, **science-fiction** and **hard action** pictures can all be strong. It is interesting that broad young adult comedies, horror, sci-fi and action are all genres that the studios used to leave to the **B** film companies (American International Pictures, Crown International, and long before those Republic Pictures, etc. etc.) while they (the studios) concentrated on more sophisticated dramas, historical films ("**period pieces**"), "**message**" films (movies, often based on true stories, with some social or political theme or message) and **adult comedies** with A-level casts. Now films in these "quality" genres are becoming relatively rare, with the studios concentrating on genres that used to be the province of the B movie industry.

"Literary rights" as a percentage of the budget: One sometimes hears that the total cost of literary rights – meaning the underlying novel or other book or rights payment (e.g., to a magazine article) or original screenplay, and also all screenwriting services (rewrites and polishes, which are frequently done by a series of different writers) – should amount to a certain **percentage of the budget** of the film. Three percent is a figure that was current at one point, although five percent is occasionally mentioned. This can be an argument which an agent can use when attempting to negotiate a higher price for a screenplay. If a

[53] A **publicist** is a professional whose job it is to create publicity for a piece of talent, a film or a company. There are many publicity firms in Hollywood that do nothing but this (e.g., Rogers & Cowan). Most of the talent agencies employ or have in-house publicists, and of course all of the studios have publicity departments. Some individual writers also have deals with publicists. Every film in production has a **unit publicist** who makes sure that photos and video are taken during the production that can be used for advertising and promotion purposes, including the creation of an **electronic press kit** (**EPK**) for the picture.

studio is going to be spending $100,000,000 to make a film[54], the agent will argue, it is ridiculous to pay the writer $100,000 for his or her script. The studio should pay $3,000,000. What the studio will say is that even if you accept the three percent of the budget theory, the studio is very likely to hire other writers to do rewrites of the screenplay before the film is made. Still it is a good argument, another reason being (as we will see below) that writers' backend deals are traditionally not as lucrative as those of producers, stars or directors.

Budget escalator: This is a deal provision that one sometimes sees to address the issue raised in the last section. In this type of deal the writer will receive, sometimes in the form of a **production bonus** (see below) and sometimes in the form of a **deferment**, an additional amount at a later time based on the **final approved budget of the picture**, so that the writer's total aggregate fixed compensation is brought in line with the budget of the film. Studios do not like this sort of deal, but it is something that an agent can ask for, and for the reasons explained, it makes a lot of sense.

Payments for the writer's Writing Services:[55]

Typical writing services performed by writers to existing screenplays are **rewrites** (which are more extensive)[56] and **polishes**. It is important to remind the writer at this point the importance of insisting that the writer do the **first rewrite**, as he or she would have the right to do under the WGA MBA. Once again it is interesting to look at the WGA *minimums*: Until 05/01/13 the *minimum* payment to the writer for a **rewrite** of a "photoplay" costing over $5,000,000 is $32,600, and after that the *minimum* goes up to $33,252. Until 05/01/13 the *minimum payment* to the writer for a **polish** (a much less extensive type of revision that is more likely to involve dialogue changes rather than any major story work or restructuring) is $16,300, after which it increases to $16,626. Of course the agent is always going to try to negotiate for more.

Payments for rewrites and polishes are generally one half on commencement of the writer's services on the rewrite or the polish, and one half of delivery of the rewrite or the polish to the Producer. The period of time allowed the writer to do a rewrite or a polish is negotiable. For example, the writer may be allowed five weeks to do the rewrite, followed by a four week **reading period** for the Producer, after which the writer will have three weeks to do the polish. It is an issue as to whether the writer should be **exclusive** or **nonexclusive** while writing the rewrite and the polish, meaning whether the writer may also be allowed to be employed doing writing on other projects during those times. It is in the

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[54] A few years ago the budget of the *average* Hollywood studio film was around $70,000,000. Given that rather fewer small films are being made today by the studios, this has probably gone up recently, even though, with the exception of a very few names, star salaries have not been escalating as rapidly as they did in the nineties.

[55] With respect to writing services (for purposes of this book, rewrites and polishes) performed by the writer, the Producer will require the writer to execute a **Certificate of Authorship.** A sample is attached at the end of this book.

[56] One often hears the expression "**page one rewrite**," meaning that the Producer wants for practically everything in the script to be changed. The agent is certainly going to demand far above the WGA minimum for a page one rewrite of a script.

writer's interest that he or she be **nonexclusive** while doing rewrites and polishes. It any writing work is guaranteed to the writer and the Producer *delays* the commencement of the writer's services, many agreements call for the amount payable to the writer to be made even if the writer does not actually commence working on (e.g.) a polish until later.

The current contributions payable by Producers per the WGA MBA when WGA members are employed by signatory companies are 7½% to the PRODUCER-WRITERS GUILD OF AMERICA PENSION PLAN and 8½% to the WRITERS GUILD-INDUSTRY HEALTH FUND, both being above and beyond the writer's salary (which must obviously be at least at WGA minimums) and agent's commission.

Force majeure: This is a French expression which manages to crop up in just about every motion picture agreement. The definition can go on for a couple of pages. A short one includes "acts of God, war, and labor strikes affecting the motion picture, television and theatrical industry." What an **event of force majeure** does is to extend a period of time in an agreement – an option, an extension, the amount of time a writer has to finish a writing assignment, etc. Generally there is a **cap** (limit) on how long a **force majeure** extension may be – six months, for example. Force majeure clauses can be tricky, since force majeure events other than earthquakes, *labor strikes* (e.g., by the WGA, SAG, IATSE or the DGA – the Directors Guild) can go on for many months. Some studio contracts say that if a an event of force majeure goes on for more than a certain period of time, the studio has the right to **abandon** projecta irrespective of any other deal terms or provisions, and also to terminate producers' housekeeping deals. So studios use these events of "force majeure" to clean house of projects and people in whom they have lost interest.

There are also famous (and not-so-famous) writers who are known in the business for their skill (or alleged skill) in doing rewrites who work on weekly deals -- $100,000 per week, for example.

> *Studios and the rewrite process:* It is very customary for a studio to employ of succession of writers on a project. If, for example, a studio buys a script for $100,000 from a writer who has no writing credits, and the projected cost of the film is $100,000,000, the studio will get scared and think that before they make the picture they should hire a more experienced writer to work on it the script. So the studio will pay this more experienced writer $300,000 for a rewrite. If the studio gets the rewrite and it's terrible (as often happens), they may forget how much they liked the original screenplay they bought and abandon the project, or put it into turnaround (see below). *Or* they may hire an even more expensive writer to do *another rewrite*, this time paying $500,000 or more. This process can continue until there is a million dollars or more "against the picture." On the other hand sometimes the studio will get smart, go back and **greenlight** the film based on the original screenplay.
>
> Obviously all of this is the result of a CYA attitude on the part of studio executives: If the picture bombs, the executive can say to his boss, *"Well, we hired three hot writers to fix the script, all of whom have all written big hits."* If the executive had stuck with the original writer, he would not be able to fall back on this. So: Rewrites by other writers are a fact of life. This is another reason why it is so important for a writer to have in his or her deal the right to do the first rewrite of his or her original screenplay.

Writer's Deal Points relating to Contingent Consideration:

Contingent consideration (the **backend** of the deal) is an extremely complex area, with numerous permutations possible to every type of arrangement. For purposes of this analysis we are going to classify any payment to the writer that is not fixed consideration as **contingent consideration**, even though some people think of contingent consideration solely in terms of the writer's **profit participation** – i.e., as payments to the profit participant (in this case the writer) that are contingent (conditioned) on the film's success (i.e., on whether or not the film is profitable).

Negotiable "bonuses" payable to the writer not based on the performance of the Picture:

Production bonus: This is a cash payment made to the writer on commencement of principal photography. The scenario here is that the Producer would have paid the purchase price for the screenplay and then if the film is actually made, an additional amount will become payable when the picture starts shooting. Example: An indie Producer buys a screenplay for what could be considered a relatively low amount given the nature of the material – e.g., $100,000. The writer's agent insists that because the purchase price is so low, the writer should receive more money when the picture goes into principal photography. This amount could be based on the budget of the film, in which case it is like a **budget escalator** as discussed above.

Setup bonus: A **setup bonus** is a good thing to have in a deal where a writer options or sells a screenplay to an indie Producer. Such a setup bonus would apply when the indie producer "**sets the picture up**" (makes a deal for the project, puts the project in development at) a studio, so-called **mini-major** (e.g., Lions Gate), broadcast or cable network[57] Such a **setup bonus** could be payable either during the option or extension period or after the Producer has paid the purchase price. To reiterate: If a writer is optioning or selling a screenplay (or a novel) to anyone other than a studio or other large company, a setup bonus is an excellent provision to include in his deal deal. When the Producer sets the project up he will almost certainly negotiate a **development fee** for himself, payable fifty percent on signature of his **development deal** and fifty percent on **election to proceed** (virtually a synonym for greenlighting) or **abandonment** by the studio of the project. So why should the writer not also receive something when his or her script is set up at a studio? A **setup bonus** guarantees such a payment to the writer in that instance.

Credit bonus: The most important thing to remember about the **credit** which a writer receives on a film is that, as mentioned above and discussed in detail below, this is almost

[57] For purposes of such a **setup bonus** the list of companies would typically be specified. The writer's agent would want the list to be long and to include all significant U.S. and foreign companies – not only the ajor studios, but also Village Roadshow, Studio Canal in France, the larger German production companies, the main UK companies including the BBC, etc. The indie Producer would want to keep the list short, since he will obviously be needing to get the money to pay the writer the **setup bonus** from whichever studio or other company he sets the project up at.

always *determined by the WGA,* even if the Producer of the picture is not a WGA signatory. As an example, here is a **credit clause** from an agreement between a non-WGA writer and a non-WGA Producer:

> **Credit.** Owner is not a member of the WGA and Purchaser is not a signatory. Notwithstanding the foregoing, Writer shall be entitled to receive credit on the screen and in paid advertisements in accordance with the requirements and procedures of the WGA Basic Agreement, which terms are incorporated herein by reference; provided that if Writer commences a credit arbitration and loses, Writer agrees to pay for the cost of said arbitration. No casual or inadvertent failure to comply with the billing requirements shall be a breach of this Agreement. Purchaser shall advise its licensees of the Pictures regarding said credit requirements but the failure of any third party to accord credit shall not be a breach of this Agreement.

The amount of such a **credit bonus** payable to the wrier will depend on two things: (a) the type of credit the writer entitled to receive per the WGA; and (b) whether he receives that credit alone (**sole credit**), or along with one or more other writers (**shared credit**). This would be a convenient place to introduce the WGA's definitions of the types of credit which are applicable to this book:

> **Story by:** The term "story" means all writing covered by the provisions of the MBA representing a contribution "distinct from screenplay and consisting of basic narrative, idea, theme or outline indicating character development and action." It is appropriate to award a "Story by" credit when: 1) the story was written under employment under WGA jurisdiction; 2) the story was purchased by a signatory company from a professional writer, as defined in the MBA; or 3) when the screenplay is based upon a sequel story written under the WGA's jurisdiction. Story credit may not be shared by more than two writers. A story may be written in story form or may be contained within other literary material, such as a treatment or a screenplay, for purposes of receiving a "Story by" credit. In the case of an original screenplay, the first writer shall be entitled to no less than a shared story credit.
>
> **Screenplay by:** A screenplay consists of individual scenes and full dialogue, together with such prior treatment, basic adaptation, continuity, scenario and dialogue as shall be used in, and represent substantial contributions to the final script. A "Screenplay by" credit is appropriate when there is source material of a story nature (with or without a "Screen Story" credit) or when the writer(s) entitled to "Story by" credit is different than the writer(s) entitled to "Screenplay by" credit. Screen credit for screenplay will not be shared by more than two writers, except that in unusual cases, and solely as the result of arbitration, the names of three writers or the names of writers constituting two writing teams may be used. The limitation on the number of writers applies to all feature length photoplays except episodic pictures and revues. Any writer whose work represents a contribution of more than 33% of a screenplay shall be entitled to screenplay credit, except where the screenplay is an original screenplay. In the case of an original screenplay, any subsequent writer or writing team must contribute 50% to the final screenplay.

Written by: The term "Written by" is used when the writer(s) is entitled to both the "Story by" credit and the "Screenplay by" credit. This credit shall not be granted where there is source material of a story nature. However, biographical, newspaper and other factual sources may not necessarily deprive the writer of such credit.

Elements taken into account in determining whether a writer is entitled to screenplay credit are:

- dramatic construction;
- original and different scenes;
- characterization or character relationships; and
- dialogue.

It is possible to consider the writer of a story or treatment as eligible for screenplay credit, but only in those cases where the story or treatment is written in great detail, to an extent far beyond the customary requirements for a story or treatment.[58]

It should be clear from the above that *the writer of an original screenplay* should aspire to receive **sole written by** credit on the picture when it is made. If another writer is brought in to do a rewrite of the screenplay, and if that writer ends up writing at least 50% of the final **shooting script** (the script that is actually filmed), then and only then would **sole story by** credit and **shared screenplay by** credit be appropriate for the writer of an original screenplay.

In the case of an original screenplay which is optioned or purchased outright, it would be appropriate for the writer's agent to negotiate a **credit bonus** which would cover each of these types (levels) of credit, since it is impossible at the point the agreement is made to know what credit the writer will ultimately be entitled to. The highest bonus amount should clearly be payable if the writer receives a **written by credit**, lower for **screenplay by credit,** and lower still for **story by credit.** The Producer may (probably will) attempt to limit the payment of a credit bonus to cases where the writer receives a screenplay by or a written by credit, and not allow for a credit bonus where the writer receives only a sole or shared story by credit. Nevertheless a credit bonus for the writer if he or she receives only a sole or shared **story by** credit is something the agent should ask for in negotiations. The actual cash amount of the bonus is negotiable. The agreement (contract) *must* also state *when the bonus is payable* to the writer. A standard provision would be for the credit bonus to be paid within thirty days of the final determination of credits on the picture. This more than likely will mean that the credit bonus will become payable to the writer before the picture is released. In no event should payment of any credit bonus be contingent on the release of the picture or on any other event, since quite a few picture are made but never releases, or there is a very long delay between their production and their release.

[58] This is certainly a strong argument for a writer never selling a treatment to a studio or other Producer, since if the studio or Producer develops the writer's treatment with other writers, the writer of the treatment is very unlikely to receive any credit on screen when the picture is made.

If is customary for the credit bonus regardless of what type of credit it is based on (story by, screenplay by or written by) to be reduced by fifty percent if the credit the writer receives is **shared** with another writer or writers. Even if there are multiple writers brought in (and as one will see from the above, the WGA takes a strong position against more than two writers receiving writing credit), then the credit bonus payable to the writer of the original screenplay should never be reduced below fifty percent.

Other types of bonuses: Other types of bonuses are occasionally seen in writer's agreements. For example, it is possible for the agent to negotiate a clause whereby the writer receives a bonus for an **Academy Award Nomination** (or even a **Golden Globe Nomination**) for any writing credit on the picture. This type of bonus provision would be relatively rare, one reason being that the nomination or award is so valuable to the writer's career that that bonus amount would be superfluous at that point.

Negotiable Contingent Consideration payable to the writer based on the performance of the picture:

Bonuses or deferments based on box office: This type of deal is quite unusual nowadays, particularly for writers. The basic formula was that when the **domestic box office** (U.S. and Canada) reported in *Daily Variety* reached an **artificial multiple,** sometimes three times the **negative cost,** the profit participant was entitled to receive an additional payment.

Profit participations:

As discussed earlier, almost every picture has a number of definitions of "breakeven" and "profits" running in parallel. The stronger or more powerful the profit participant (star or director), the more favorable the profit definition he or she will have, meaning also that his or her definition of "**breakeven**" will call for the picture to break even *earlier,* so that profits become payable to that participant sooner. A very major star, for example, may have a participation in **gross from first dollar**, which could mean (e.g.) five percent of everything the studio (distributor) receives after it takes its distribution fees off the top. In some cases this participation would be **applicable against** the star's fee (fixed compensation), meaning that the five percent of gross would be used to **recoup** (make back) the star's fee, and when that had been achieved, the star would then begin to receive his or her five percent of gross profit participation. Another important wrinkle in this type of deal is that the distribution fees for the major star can (and usually are) *calculated at a lower level* then they would be for a less powerful profit participant. For example, for purposes of a major star's calculation the studio might calculate a 12.5% theatrical distribution fee and for a less powerful participant a 25% theatrical distribution fee. There would be this same discrepancy for all of the other media of distribution.

As mentioned above, how the **negative cost** (sometimes also called **final cost, final audited cost** or **production cost**) of the picture is calculated makes a big difference in when and at what level a profit participation becomes payable. A major star receiving a participation in which breakeven is a factor would certainly insist that for purposes of his or her definition

the negative cost *exclude* **overhead, contingency,** and **completion bond** charges, and also any **abandonment charges** (charges for unproduced projects). Such a star would also insist that there by no overhead charges taken on the P&A expenditures, also as discussed above. Of course the talent would also insist that the picture not be **cross-collateralized** with any other films, but such cross-collateralization among pictures would be very rare in the case of calculating the backend of an individual piece of talent.[59]

One encounters dozens of deal variations for actors, directors, and various types of producers, but relatively seldom for writers. To briefly mention only a few examples, always using the term "participant" to indicate the piece of talent entitled to the participation under his or her agreement with the Producer (studio, etc.):

- **Gross after breakeven.** In this deal the participant receives a percentage of **gross receipts** but only after the picture breaks even according to the participant's definition. For reasons discussed under the next item, this type of deal is also referred to as **Gross after *initial* breakeven.** Sometimes a powerful participant can negotiate for a deal in which after breakeven no further distribution fees are charged for purposes of calculating his or her share of gross.
- **Gross after rolling breakeven:** The premise of this type of deal is that "breakeven" is not a static point, since with each successive medium of distribution (DVD, cable TV, etc.) there are also new **distribution costs** to be recouped (made back). For this reason a picture might have broken even on February 1 but be unrecouped (not broken even) again on March 15. So in other words, the breakeven point "rolls." In this sort of deal, which is absurdly difficult to calculate but which nevertheless exists, the participant only receives a share of profits during those periods when the picture has actually broken even, rather than **in perpetuity** (forever) after the point at which the picture initially breaks even.
- **Gross after an artificial multiple:** The concept of the **artificial multiple** was introduced above. Under this type of deal the participant would be entitled to receive (for example) 5% of some from of **gross receipts** after the domestic box office receipts as reported in *Daily Variety* have reached 3 or 3.5 times the negative cost of the picture.[60]

[59] The exception would be some producers with multi-picture deals, but that is beyond the scope of this book.

[60] The rationale behind **artificial multiple deals** is that they are based on a hard number (the box office receipts) that is readily available to the public, and thus restrict the studio/distributor's ability to play with the numbers in other ways, primarily by charging expenses against the picture after production. Studios are known for **buying box office,** which means to overspend on P&A in an effort to ensure a very strong opening weekend for a picture. Sometimes this is done for purely corporate reasons. An artificial multiple type of deal obviously takes P&A and any other costs not relating to the production of the film out of the equation, so if the studio overspends on P&A, the studio, not the participant, takes the hit.

Net profits: The standard profit participation for a writer is one based on **net profits.** It needs to be emphasized upfront that this is the worst type of profit participation (backend). A studio can announce that a certain picture is its most successful release of the year, and that picture will not be in net profits. **Net profits definitions** in agreements with studios can go on for many pages. Some general characteristics of net profits definitions are:

- **Negative cost**: Full overhead, contingency, and completion bond[61] are included in the negative cost, plus interest at a high rate, which can be anything – even 125% of what the Producer actually pays in interest. Interest can be charged on overhead and overhead can be charged on interest.
- **Distribution fees**: These will be the highest that the studio (distributor) calculates and again can be anything: As high as 35% for domestic theatrical, even 40% for foreign, etc.
- **Marketing costs and expenses (P&A)**: The distributor is allowed to include almost anything in this, *and* to charge an overhead fee (e.g., 10%) on it. Of course as discussed above there are marketing costs for each medium of distribution, not only for theatrical (distribution of the picture to theaters.
- **Calculation of video revenues based on a "royalty"**: In the early days of video (which of course at that time meant VHS), one of the first important companies to go into the business was Vestron, headed by a man named Austin Furst. At that time no one realized that "home video" was going to be a very important source of revenue – nobody at the studios paid that much attention to it --, so Mr. Furst was able to come up with a scheme whereby instead of taking the costs of marketing and of making the cassettes off the top, charging a distribution fee for his company, and them remitting the balance to the Producer, he decided that he would only pay the Producer a **royalty** of 20% of the wholesale price of each VHS tape he sold. In other words he turned everything around in his favor. If Vestron had instead taken a 20% *distribution fee* (for example) after costs, the Producer would have ended up receiving maybe 60% of wholesale video revenue. But under Vestron's **royalty** system, the studio only ended up with 20%. When shortly thereafter the studios started their own video departments, they adopted this same scheme for purposes of calculating video (VHS, then later DVD and BluRay) revenue for profit participants. So only that 20% of video revenue ends up being included in

[61] To be fair to the studios they seldom actually use completion guarantors when they are doing **in-house productions**, but when they make films **at arm's length** through other entitles, they sometimes do. This is a good place to mention that a separate **production services company**, generally a corporation, is formed for the production of every film and usually (almost always) *dissolved* within a year or so after the film is made. This company is generally owned in some way by the "real" production entity, and is almost always a corporation. It is the production services company which then enters into agreements with the crew, production facilities providers, locations, etc. The reason why Producers form such production services company is to shield themselves from lawsuits in the event (to cite only one example) that someone is hurt or someone's property is damaged during production. The production services company *has no assets*, so if they are sued (and someone *always* sues for something relating to the production of every movie), there is no deep pocket to go after. It would be extremely rare for a writer to be asked to make his or her agreement with a production services company rather than with the Producer itself, but if this were ever to happen, the writer should insist that his or her agreement be **personally guaranteed** by the Producer.

gross receipts for purposes of calculation of net (or other) profit participations. *But it gets worse:* Before the studio (or other distributor) puts that 20% royalty into the pot, it often takes *another distribution fee* on that 20%! The situation is somewhat better now, but during the eighties and nineties this was one of the most egregious rip-offs perpetrated on profit participants. An obvious reason for this is, as discussed previously, many (actually most) films only recoup (make back) their negative cost and P&A after theatrical distribution. One of the very next forms of income that comes in is "home video" (now DVD and BluRay) income, so that revenue is vital for profit participants. If only 20% of that revenue put into the pot (and sometimes with a distribution fee on top of that), it is murder for the net profit participant.

- **Cross-collateralization**: After deduction of the different distribution fees, all revenue from all sources is put into a pot, and profits from one form of distribution are applied against losses from another.

Studios almost never negotiate their net profits definitions, so as far as a writer is concerned he or she is generally told to "take it or leave it."[62] The situation is even worse when the writer is making his or her deal with an independent or other producer and not with a studio or other company that is also a distributor. Here, for example, is a **net profit** backend clause from an agreement between a writer and a company that is not a domestic distribution:

> If Purchaser produces or causes the Picture to be produced, and it is determined, pursuant to the credit provisions of the WGA Basic, which terms are incorporated herein by reference in accordance with Paragraph 13 below, that Writer is entitled to receive sole screenplay by credit, Writer shall be entitled to receive contingent consideration in the amount of five percent (5%) of one hundred percent (100%) of the net profits, if any, derived from the exploitation of the Picture by the U.S. company or distributor co-financing the Picture in all media in all territories in which said U.S. company or distributor shall distribute the Picture, including the United States and all foreign territories in which said U.S. company or distributor shall have distribution rights, with all territories and media cross-collateralized in accordance with the practices of the U.S. company or distributor distributing the Picture; or
>
> (b) If Purchaser produces or causes the Picture to be produced, and it is determined, pursuant to the credit provisions of the WGA Basic Agreement (other than pursuant to Paragraph 7 of Theatrical Schedule "A" thereof), which terms are incorporated herein by reference in accordance with Paragraph 13 below, that Writer is entitled to receive shared screenplay credit with one or more additional writer(s), Writer shall be entitled to receive contingent consideration in the amount of two and one-half percent (2 1/2%) of one hundred percent (%100) of the net profits, if any, derived from the exploitation of the Picture.

[62] There is a slight exception to this: Several of the large entertainment law firs in Los Angeles have negotiated over the course of many deals so-called "**riders**" with some of the studios clarifying and even slightly improving the studio's standard net profits definitions. The writer should ask his entertainment attorney if his or her firm has negotiated a **studio rider** and if inclusion of such a writer in his or her agreement would improve the deal with the studio.

> For purposes of this Agreement, "net profits" shall be defined, computed and paid to Writer in accordance with Purchaser's standard practices, *or those of the U.S. co-financier/distributor of the Picture, at Purchaser's sole election,* allowing for, among other things, deductions from gross receipts of all production costs, distribution fees and distribution costs relating to the Picture, including deductions for overhead and interest, and which definition shall be subject to such changes agreed upon after good faith negotiation within customary parameters provided *Writer acknowledges that Purchaser shall not negotiate with respect to its distribution fees, rate of interest charges, definition of distribution expenses and negative cost*. Revenues from all sources including without limitation from merchandising and the soundtrack shall be computed in the definition of net profits accorded to Writer only to the extent that such revenues are included in net profits by the U.S. distributor of the picture.

This language is actually somewhat "liberal" in that it allows for some possible "good faith negotiation," but *negotiation of <u>what</u>?*

As in the above sample agreement, **5% of 100% of net profits** for sole credit **reducible to 2 ½ % of 100% of net profits** for shared credit is <u>the</u> standard, cookie-cutter profit participation payable to writers. Occasionally one sees 5% of 100% of net profits **"reducible to a floor of 2 ½ % of 100% of net profits by participations payable to any other writers who perform writing services and receive shared 'screenplay by' credit on the Picture."** It is instructive to see where this "of 100% of net profits" language came from and what it means. To do so one must examine the traditional **producer's deal** with a studio. Bear in mind that this is in some ways more of a historical model than something that still applies today, particularly in the case of powerful producers.

The traditional producer's "net deal": This is a deal made between a studio and a producer. It assumes that the producer makes deals with the above-the-line talent (writers, director and stars), and that some (most) of those deals give some form of backend participation to the talent. One hundred percent (100%) of the net profits on the picture is divided 50% to the studio and 50% to the producer, *with the producer paying all of the other third party profit participants (writers, director, stars) out of his 50% share.* The producer's share is often **reducible to a floor**, which may be either a **hard floor** or a **soft floor**. <u>Example</u>: Producer Tom's deal calls for him to receive 50% of 100% of net profits reducible to a soft floor of 20% of 100% of net profits and a hard floor of 10% of 100% of net profits. Tom makes deals with talent in which he "gives away" 30% of 100% of net profits, leaving him with 20%. Then he makes another deal with (e.g.) another star giving that star 5% of 100% of net profits. *That nest* 5% comes 2 ½ % from the producer's 50% share of net profits and 2 ½ % from the studio's 50% share of net profits, so because he has a **soft floor** of 20%, by making that additional deal he has reduced his share to 17.5%, not to 15%. But let's say the producer keeps making deals under which he gives away additional percentages of net profits. The producer and the studio will keep splitting those third party participations *until the producer's share reaches 10%,* and *after that point any and all additional participations in net profits will come out of the studio's share.* That is the meaning of a **hard floor**: No matter how much is given away in profit participations to talent, the producer with a hard floor will never receive less than 10% of 100% of net profits.

Why is this important for a writer? Every day indie producers and production companies (and others) offer talent, including writers, deals under which their participation in profits is stated as *"five percent of producer's net" or "five percent of producer's profits" or "five percent of producer's gross"* – the possibilities are limited only by one's imagination. In these expressions one could substitute *"company's"* for *"producer's."* If these terms mean anything, what they mean is that the writer is being offered a percentage of some arbitrary, undefined amount that the producer may be paid by a third party, meaning the studio or the eventual distributor of the picture. Example: If 100% of net profits amounts to $100, and a writer receives 5% of 100% of that, then the writer obviously gets $5. But if the writer only receives 5% of 20% of 100% (i.e., *"five percent of producer's net profits"),* then he will only receive forty cents. *This is why in any backend deal one of the most important things is to state clearly* ***the percentage of what*** the writer is to receive. In net profits deals it should always be stated ax X% **of 100%** of net profits, and it should be clear that by that is meant net profits at the level of the studio or distributor.

A general rule of thumb is to **move upstream as far as possible** rather than accepting a participation based on an amount from which other parties have already taken their cuts.

Two related questions:

- *Why do I have to know all this stuff?* and
- *Doesn't my agent know all this stuff?*

One answer is that the writer should know all of these things because the agent may not. Agents are often negotiating with Business Affairs people at the studios. They are attorneys whereas most agents are not. Attorneyes know deals better than most agents do.

Another answer is that what the agent is concerned about most is his or her *commission* on the writer's *fixed consideration.* From the agent's perspective the back end of the deal is both hypothetical and also far down the road. The picture may never get made. It may flop. The agent for a young, unproduced writer is mainly concerned to get his or her client any deal they can, and they don't want to risk blowing it by negotiating too hard. Are they wrong about this? Not entirely. Of course in terms of building a writer's career it is important to have a deal, but really only if it is a studio deal or a deal with a well-known production company or producer. It is amazing how many doors open for a writer once he or she has a project in development at (i.e., optioned or purchased by) a major studio. On the other hand if a screenplay is potential big budget blockbuster and a potential **franchise,** the agent should be encouraged to push a little bit on some of these backend terms.

Another frequently heard question:

- *Should a writer (or other talent) give up something on the* ***front end*** *(meaning taking less fixed compensation) in exchange for a better share of the* ***back end****?*

Answer: Very seldom is this a good idea. The reason once again is that the picture may never get made, it may flop, etc.

And yet another question:

- ☞ *Given the industry's resistance to giving writers anything more lucrative than a net deal (participation in net profits), what can a writer do to improve his or her backend (share of profits in the picture)?*

Answer: What some writers do is to have their agents negotiate a parallel deal for them also to be **producers** on pictures which they write. This will seldom be in the form of a "full" producer credit, but could be (for example) an associate producer credit. In the television world when someone on a show receives two credits in this manner (as both a writer and a producer), that person is known as a hyphenate because they become a "writer-producer." So under the writer's deal as a writer he or she may still only get the lousy 5% of 100% of net profits, but under his or her deal as a *producer* he or she may receive a totally separate additional backend based, for example, on adjusted gross receipts. Really anything is possible. And of course it is good for the writer to have a second credit on the picture.[63] The more times the writer's name is up there (and before the public and people in the business) the better.

Development Slate: A Producer's, a studio's or a production company's **slate** consists of the pictures it is working on that are intended for production (i.e., in **active development**) or in the case of finished films, for **release** (distribution in theaters). The term is often used as a verb: E.g.., *"Strongpitts Entertainment's 'DARKNESS & ASHES' is **slated** for release in the Spring."* Or: *"'D&A II: CINDERS IN THE ABYSS' is currently **slated** for production in early Summer of 2014."*[64]

Development-to-production ratio: This is the ratio of films a production company or a studio has in development to those that actually get made. Example: Strongpitts Entertainment's development to production ratio is five to one, meaning that for every five pictures the company has in development, one gets made. What most people not in the industry may not realize is that such a development-to-production ratio would be exceptionally good. Production entities very active in the eighties and nineties such as Castle Rock and imagine were sometimes credited with having an exceptionally low (meaning exceptionally good) development-to-production ratio, but they were probably never as favorite as five-to-one. It would not be uncommon to see a production company

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[63] Of course the writer's (e/g.) associate producer credit and compensation may (probably will) depend on the writer being entitled to writing credit on the film, as discussed above. One interesting thing about a writer having this second form of credit and backend (possibly also frontend) compensation as a producer is the writer's deal as a producer is not subject to WGA rules or restrictions.

[64] The concept of a **slate** leads in to the notion of multi-picture deals. Sometimes a producer (or even a writer) will enter into an agreement with a studio covering a number of films, some of which may not even have been **identified** (specified) at the time the deal is made. The **trades**, particularly *Variety,* historically employed a slang that no one else in the business used, derived from the way agents and producers spoke (or were presumed to have spoken) during the 1930s/1940s. in this slang a deal for a group of films was a "**multi-pic pact**" Other old-fashioned *Variety* slang that still crops up occasionally today are "**ten-percentery**" for agency, "**cave**" for movie theater, and "**boffo**" for successful (particularly in the expression "boffo box office.")

or studio develop (or at least go into development on) twenty or more projects for every film that it actually makes. The reasons for this are many. Among them:

- The Producer sees good potential in a piece of material (anything from a treatment or a magazine article to a book to a finished screenplay), and after the first draft (or in the case of a finished screenplay, the first rewrite of that screenplay) realizes that although the original material has potential, it will be too difficult (take too much time and be too expensive) to develop it into a script that is ready for production.
- The Producer discovers that something similar is in development elsewhere.[65]
- Current events: Politics, war, disasters, changes in the economy, etc., can make a project that seemed attractive to develop in January seem unattractive by June.
- Unavailability of cast and/or director: Sometimes (fairly frequently, actually) a studio develops a project for a particular star or director, in many cases with that director or star (or at least their representatives of development people[66]) involved in the project in some way. When the star or director loses interests, or it becomes apparent that the star or director would not be able to make the picture in the foreseeable future, the studio or production entity will almost always drop the project.
- Cost: Development costs on a project (namely rewrites, but also development fees, etc.) have risen to the point where the studio decides to stop putting good money after bad, and **abandons** the project.
- A project is put into develop in response to a fad, and that fad fades in the public's mind faster than anticipated.[67]
- The studio cools on the producer who brought the project to the studio, or has some dispute with that producer, or the producer's deal with that producer lapses. Alternatively the studio **development executive**, or even the studio **head of production,** who may have had no active involvement with the project, loses his or her job, and the studio **cleans house** of all of that

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[65] This would not necessarily be a matter of copyright infringement. Another studio can develop a similar project without that project necessarily infringing. Example: The fact that there were two films being developed both set in a car wash would not imply that one has infringed on the other.

[66] Many stars have their own production companies (at least on paper) and their own **development people**. Some of these merely screen projects for the stars (read the scripts for the stars when the scripts come in with offers), but other stars' development people actually develop projects, often **co-developing** those projects with a studio. A strategy used sometimes is to take a script that would be good for a certain star directly to the star's development person, rather than first submitting to a production entity, producer or a studio. This is generally only a good strategy if the writer's agent has a good relationship with the star and/or the star's development person. The strategy is to **attach** the star to the project before the project goes to the studio. Of course in this scenario the star's development person is very likely to receive a **producer credit** on the film, and the star's production company (e.g., Nicolas Cage's "Saturn Pictures") will almost certainly receive a credit on the finished picture, sometimes even a **presentation credit above the title** in the **main credits** (opening credits) of the film, and in all **paid advertising**.

[67] In the late 20th/21st Centuries fads seem to be lasting longer than they did forty or fifty years ago. In the 1950s or 1960s or even 1970s, rap would have been a fad. Now it's been around for thirty years.

executive's or production head's projects. In this case the project gets dropped for no fault of the project. It's purely studio politics.[68]

"Development Hell": This expression is used to refer to projects that have been optioned or purchased by a studio or other production company but on which the studio or production company is taking no action: The project (screenplay, for example) is just sitting there, and the studio not only will not **greenlight** the project by setting a **start date**. It won't even **make offers** to directors (if there is no director in place) or to cast; or prepare budgets; or order additional writing services. Whether or not the writer has received the full fixed consideration (purchase price) for the screenplay, he still wants for the picture to get made. Of course sometimes there are delays caused by situations over which the studio has no control, one being waiting for a certain star to become available. But often there is no reason at all. The project simply languishes. Many producers negotiate for their contracts to include **progress to production** language which states that unless after a certain period of time the studio has done something that constitutes active development (ordered a rewrite, made offers, and so forth, as discussed above), the producer then has the right to request that he or she get the project in **turnaround**, a concept to be discussed in the next section. By the way, the writer's agent (and manager, if the writer has one) should closely monitor the development status of his client's project at the studio. One thing that the writer's agent can do is to notify the **production executive** or **creative executive** at the studio of available directors or stars for the project, or do other things to work with the studio to **package** the project, even after the screenplay has been optioned or sold to the studio. A good agent will do this without the writer asking him. Of course the agent also benefits, because it is an opportunity to place more of his agency's clients (director and actors) in the project, and thus earn more commissions.

The concepts of **development slates**, **development-to-production ratios** and **"development hell"** lead very naturally into our next topic: What routes are available to a writer or a producer when his or her project has been dropped, or when it appears to be hopelessly stalled?[69]

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[68] Studio politics are now rather calmer than they used to be in the past, when studio **regime changes** could be frequent and dramatic. For example, in one relatively brief period in the 1990s, three people – David Kirkpatrick, Gary Lucchesi and Sherry Lansing – were successive presidents of Paramount. It is possible that the ownership of studios by large, publicly traded corporate conglomerates, most of which also own television or cable networks, has slowed this process down somewhat, making studio politics rather more stable (and possibly more boring) than they were in the past. In recent years most of the drama has taken place on the agency level, with many takeovers and the rapid consolidation of powers. Other dramatic events have also taken place on the agency level, including the **poaching** of clients of one agency by another, or agents switching agencies, almost always taking many of their clients with them. There is also a certain amount of drama in the realm of **off-balance-sheet financing,** as discussed earlier.

[69] The message in all of this should be clear: For the writer who wishes to build his or her career, "selling" (often optioning) his or her script is not "only half the battle." It is *less than half the battle.* A writer is never considered to be a professional writer (either by the WGA or by nyone else in the business) until that writer has had a film made and received writing credit on that film. Hollywood is filled with stories about people who have been "hot writers" for a year or so, but faded totally from everyone's consciousness because their projects stalled in development and never got made.

Getting your screenplay back if the picture is not made:

First, let's review the provisions in the WGA MBA applicable to writers who are entitled to **Separation of Rights**. Once again, a non-WGA member or a WGA member who is does not meet the WGA's definition of a "professional writer" may still negotiate to receive these benefits under the WGA Separation of Rights Provisions, although the writer's agent may choose to negotiate other provisions instead of these.

A. Writers of original theatrical motion pictures may *buy back* unproduced material five years after the completion of that writer's services on the project, if the material is not then in active development. Under the WGA MBA, the writer's two-year reacquisition window may be commenced at any time in the five years following the five-year period during which the company may produce the literary material.

B. If a writer *options* his or her material to a Producer, that writer may *reacquire rewrites* of the material, even if the option lapses and the company does not acquire the original material (e.g., the writer's original screenplay). The writer has two years to buy the rights to that material at the same price as the regular reacquisition, and may commence that right from one to six years after the option in the underlying material has lapsed.

B is an important right for a writer to want to have because, as discussed above, when a writer options his screenplay to a Producer and the Producer pays the writer to do a **rewrite,** that rewrite written by the author is a **work for hire** and the Producer owns it, and *continues to own it* even after the option lapses (i.e., after the option period is over). Let's say that the writer did not have the right to buy back the rewrite in this manner. If the writer then sells the screenplay (or options it again) to another studio, then the second studio might want or need to buy the rewrite owned by the first studio, who could refuse to sell it, or set an impossibly high price. *Or* the writer could do another rewrite of the original screenplay for the second studio, the picture gets made, and then the first studio could sue the second studio for **copyright infringement**, on the grounds that the rewrite done by the writer for the second studio **infringes** on the rewrite done for (and owned by) the first studio

Apart from these WGA provisions, there are two types of contractual provisions whereby a writer can get his material back if the Producer fails to make the film: **reversion** and **turnaround**.

Reversion: Reversion simply means that the rights **revert** (go back to) the author under certain contractually specified terms and conditions. There is something called a **straight reversion** where the rights (e.g., in a screenplay or a rewrite) simply revert to the author without any compensation becoming payable to the Producer. Needless to say this type of reversion is extremely rare. The other type of reversion is a **reversion with a payback.** This is still not very common, but does exist. In this type of deal the writer may get his or

her material back, but must reimburse the Producer for it on some contractually negotiated basis. The material (e.g., the rewrite) may revert to the writer subject to a **lien**[70] on the material in favor of the producer. Here is an example of a **reversion with a payback** in the form of a **lien** covering a rewrite done by the writer of an original screenplay, but only applicable in the event that the option is not exercised (i.e., that the Producer never actually purchases the screenplay):

> If the Option is not exercised then all rights in and to the Rewrite shall revert to Owner subject to a lien in favor of Purchaser equal to the amount of all sums expended by Purchaser in connection with the Rewrite plus interest at the rate of one hundred twenty-five percent (125%) of the rate charged by Purchaser's bank from time to time on all said costs, payable at the time that Owner enters into an agreement with a third party with respect to the Property.

Other **reversion with a payback** agreements would call for the Producer's costs to be paid in full, with interest, at the time of the reversion; otherwise the reversion would not take place.

Turnaround: Turnaround is a right often negotiated by producers, but sometimes also by writers. A **turnaround right** is the right to attempt to **set up the project** at another studio, provided that the second studio pays back the first studio all of its costs and expenses in connection with the project, plus interest and (often) overhead. To be clear, the writer or producer (whoever gets the turnaround right) *does not get the rights in the project back at any point.* On the other hand, if the writer succeeds in finding another studio that wants to take on the project in development and is willing to pay the first studio back, then the first studio must, during the turnaround period, allow the second studio to buy the project. In almost all cases the second studio has to pay the first studio pack as soon as it takes over the project, not when the film actually goes into production, although rarely one sees deals where the turnaround price is payable partially on commencement of principal photography by the second (the "new") studio.[71]

The agreement between the writer (or producer) and the studio giving the writer (or producer) a turnaround right will specify when the writer (or producer) gets the project **in turnaround**, meaning when the writer (or producer) can **shop** (offer) the project to other studios, production companies and financiers. In any event turnaround only applies to screenplays and other material that have actually been purchased, not to scripts which have only been optioned. The turnaround could be triggered by a number of events. A few examples:

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[70] A **lien**, also called a **security interest**, is a claim against property, rather like a mortgage. As in the sample contract provision shown, this lien typically becomes repayable to the producer (who paid for the rewrite) when the writer **sets up the project** (enters into an agreement for the further development of the project) with another party. Liens should be well-documented by **UCC** and **financing statements** so that those liens are said to be **perfected**. This is mainly to benefit the Producer, but it is also in the writers interest that liens be in good order, since they are part of the **chain of title** of the project.

[71] In this type of deal the first studio (the one that initially purchased and developed the project) will generally specify that the writer or producer may only set the project up at a U.S. major studio, a network, HBO, Showtime, or one of list of other important companies with substantial resources (e.g., Lions Gate, Studio Canal).

- The project could go into turnaround to a writer (or producer) if the picture has not commenced principal photography within (e.g.) three or five years after the date the Producer purchased the screenplay
- The project could go into turnaround if the "first studio" fails to meet some **progress to production** provision in the writer's (or producer's) agreement. For example, doing one of a number of things on a list of actions that would constitute progress to production: making pay-or-play offers to directors or cast, for instance.

Also **turnaround clauses** almost always have a **term**: Whenever the writer (or producer) gets the project in turnaround, that turnaround period may last for one year from that date. To complicate matters still further, sometimes several parties have **shared or alternating turnaround rights** in a project: Example: Writer Joe and Producer Pete have alternating turnarounds in a screenplay that was sold to Paramount. After five years the film has not been made and the project goes into turnaround. Under this contract Pete has the first year to try to set up the project at another studio. If he fails, after one year the turnaround goes to Joe. If he fails to set the project up during his one-year turnaround it goes back to Pete. This can in theory go on forever (**in perpetuity**). A turnaround can also be shared by two people – in this example by Pete and Joe.

Changed elements clause:[72] This is one of the complications (and nightmares) of turnarounds. Almost every turnaround deal (which is part of a writer's or producer's contract with a studio or production company) has a provision saying that (for example) the writer gets the project **in turnaround** if the film has not been made five years after the screenplay rights were purchased by the studio, and the writer brings a **new or changed element** while he has the project in turnaround, then the writer *must go back* to the first studio and allow them to recommence development on the project[73] with that new or changed element. A "new or changed element" can be a star or a director, but as specified in the particular agreement, it can also be many other things: a changed budget, for instance. Example: Pete and Joe share a turnaround right. When they set the project up at Lions Gate it was a smaller movie that was anticipated to have mid-range cast and a budget of $25 million. Pete's and Joe's deals are both in line with a movie at that budget – in other words they are not killer deals. Neither Pete nor Joe has a particularly good backend deal, since they did not have much leverage when the sold the screenplay to Lions Gate. After three years Lions Gate has not set a start date, and Pete and Joe jointly get the project in turnaround. Then they attach Tom Cruise to play the lead, instantly turning the project from a $25 million semi-indie to a $150,000 film. They would like to go to Paramount with the project, but because of the **changed elements clause** they must go back to Lions Gate, which will then have the right to reinstitute development on the project with Tom Cruise. This will annoy Pete and Joe because their deals will be their original, not so good deals. Also Tom Cruise may not want to make a picture for Lions Gate. Still, because of the changed elements clause, they are stuck. If they bring a

[72] For reasons discussed below, these are also called "**changed or new elements clauses**." An **element** is used generically for an actor or director, but sometimes it can apply to other things as well, as described in this section.

[73] After all, the "first studio" still owns the project.

changed element they cannot set up the project at another studio until Lions Gate passes. And of course, Lions Gate will be given a period of time (perhaps sixty days, or even longer) to reconsider the project with the changed element (Tom Cruise), during which time Cruise may cease to be available.

To sum up: Changed elements clauses in turnaround provisions are a nightmare, but are a fact of life. At the end of the day it is better to have a turnaround with a changed elements clause than no turnaround at all.

But actually there is something even more problematic about turnaround provisions than changed elements clauses. This has to do with the inexorably and rapidly mounting cost of projects once they enter development at a studio. It is not unusual for a studio to acquire (purchase) a script for $100,000 and (for example) five years later, if Paramount hasn't made the picture and it goes into turnaround, the costs "**against the project**" can easily be over a million dollars – very possibly much more. As discussed earlier Paramount will very likely have brought in other writers to do rewrites and polishes. Then there are the producers' **development fees** on the project.[74] Then there is the Paramount's **overhead** charged against everything, plus **interest**, often even against the overhead. Studios tend to get very creative when they are charging things against projects going into turnaround. Their goal is obviously to get back as much as possible if another studio puts the project in development, *regardless* of whether the second studio ever makes the picture. Also sometimes (not always, but sometimes) the first studio (in this case Paramount) will retain a **profit participation** in the Picture when it is made by the second studio (e.g., Fox).

Still despite all these issues, projects go into turnaround every day, and pictures which have been in turnaround get made. Another thing that happens, of course, is that on high budget pictures studios sometimes **coproduce** together, so (to return to an earlier example) conceivably Paramount and Lions Gate could conceivably have ended up co-producing Joe and Pete's Tom Cruise Picture.[75]

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[74] Producers' **development fees** are sometimes not very high – they can even be (for example) $20,000 for each producer, payable one half on signature of the producer's agreement and one half on **election to proceed or abandonment** of the project. So when a producer **sets up a project** at a studio, in many cases not very much money becomes payable to him at that time. The development fee would typically be **applicable against** the producer's fixed consideration (producing fee),which would generally be payable according to the following schedule: 20% on commencement of formal pre-production; 60% (probably in weekly installments) during principal photography; 10% on **dubbing and scoring** (dubbing being replacement of dialogue by the actors and scoring being recording of the music score); and 10% on delivery of the **answer print** of the picture, which would be the producer's approved version of the finished film. This payment schedule would also be applicable to a writer whose agent negotiated a producer credit for him or for her. With respect to development fees, of course for a powerful producer with the power to bring strong elements – Scott Rudin or Joel Silver, for example – these fees can be much higher than those stated here.

[75] Discussing individual studios, production companies and producers is beyond the scope of this book. Lions Gate (*The Hunger Games, House in the Woods*) is an unusual phenomenon: It is a cash-rich company that has *generally* made (relatively) smaller films. In the normal world it would be a candidate for acquisition, as in the 1990s Miramax was for Disney and New Line Cinema was for Warner Bros. The problem with Lions Gate as an acquisition is that they have so much cash that they would be too expensive to buy. Lions Gate itself has, over the course of the past fifteen years or so, acquired a number of other formerly well-known companies, including Trimark Pictures, Artisan Entertainment, and most notably, Summit Entertainment, producer of the *Twilight Saga* pictures. Until 2010 Lions Gate had a financing deal with Relativity Media, a company which

The writer's goal is always to get the picture made at the appropriate budget[76] and with the best (most commercial) possible director or cast, *and then* for the picture to go on to be financial success. As far as getting the picture made is concerned, unless the project is incredibly hot with top **elements** attached, or is already part of an active **franchise** so that the public is eagerly awaiting the next sequel, the studio is very likely to proceed slowly. The project will probably not even be on the radar of the heads of the studio or even that of the head of production until it is much farther along. For this reason everyone involved in the project, including very much the writer's and other talents' agents and attorneys, must constantly do everything they can to push the project along – by proposing directors and cast, for example. But very often more forceful tactics are appropriate and *necessary.* **Reversion** and **turnaround** provisions and (especially) **progress to productions** clauses are a way to "hold a gun to the studio's head" and force them either to move forward with the project by greenlighting it (or at least making meaningful, unconditional pay-or-play offers to significant elements), *or* to let the writer (or perhaps more frequently the producer) get the project back so that he or she can attempt to set it up elsewhere. There is nothing a studio executive fears more than letting a project go (e.g., by not exercising the option or by allowing it go into turnaround), and then seeing that project made by another studio and become a hit. That executive's job will very likely be in jeopardy if it is discovered – and it will be discovered – that he or she has made such a significant error. There is a very strong element of fear in the entertainment industry. This is not solely based on fear of failure; it is also based on fear that someone else will succeed with a project that you had access to and passed on.[77]

Passive payments for Subsequent Productions:

This appears to be a rather boring part of every writer's deal, but it is not one that a writer should neglect or ignore. What it covers are payments the writer will receive (a) *if* the picture is made; (b) *if* the writer receives a certain credit on the picture (as discussed in the next section); and (c) *if* other motion pictures, films made-for-television, television series, productions made for specifically for online viewing, are made subsequent to the production of the picture. These will be referred to here as **subsequent productions**. To be clear, these payments become payable to the writer of the picture if he or she does not perform writing services on such subsequent productions.[78] If the writer does perform writing services on any subsequent production, that deal would need to be negotiated separately.

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bears a tangential similarity to the earlier-discussed Legendary Pictures in that Relativity has been very active in raising capital from Wall Street sources. Unlike Legendary Relativity is also a distributor.

[76] The appropriate budget for a picture is not always the highest one. Being associated in any capacity, including as a writer, with a big-budget flop can be damaging for one's career.

[77] To **pass on** a project – a screenplay or book submission to a studio, for example – is obvious to turn it down.

[78] These passive payments should be thought of as **royalties** and are definitely distinct (for example) from any **residuals** payable under the WGA MBA if a writer is a WGA member.

- Sometimes a writer with a great deal of clout will be able to negotiate for the right of **first negotiation** or a **right of first negotiation and last refusal** to write a subsequent production. Here we are not talking about passive payments to the writer, but rather the writer actually performing writing services on a subsequent production. If a Producer agrees to such a right and it is included in the writer's agreement, and then later the Producer determines that it is going to develop a **subsequent production,** the studio is obligated to **offer** the writing job on the subsequent production *first* to the writer of the original screenplay who has this provision in his deal. That is the **right of first negotiation**. In the event that the agreement also includes a **right of last refusal,** if the Producer reaches a general understanding with another writer and is prepared to make a deal with that writer, before the Producer makes that deal the Producer must *go back to the first writer* (the writer of the original screenplay) and ask him if he would accept to write the subsequent production on those terms. If and only if the writer of the original screenplay refuses to write the screenplay on those terms may the Producer conclude the agreement with the second writer to write the subsequent production. Example: Tony writes the original screenplay "Darkness & Ashes" and sells it to Universal. Tony's agent includes a right of first negotiation and last refusal for Tony to write the first sequel[79] or remake in Tony's deal. "Darkness & Ashes" is a huge hit and Universal wants to develop a sequel. Universal goes to Tony's agent and offers $500,000 for Tony to write the screenplay for the sequel, "D&A II – Cinders in the Abyss." Tony's agent balks at this, saying that after "D&A I" Tony's **quote**[80] to write an original screenplay is now $750,000. This strikes Universal as outrageous – after all, Tony's quote prior to the success of "D&A" was only $300,000. So Universal then goes to another agency and makes an offer to another hot writer, Bruce, to write the sequel to "D&A." Bruce's quote is $600,000, and that is what Universal offers him. Bruce's agent decides to use this hot project to try to raise Bruce's quote, so he tells Universal that Bruce is interested but will only write the sequel if he is paid $650,000 instead of $600,000. At this point Universal must *go back to Tony's agent and ask him or her if Tony would agree to write the screenplay for "D&A II – Cinders in the Abyss" for $650,000.* Why? Because Tony had not only a right of first negotiation, but also a **right of last refusal** to write the sequel. At this point Tony can either agree

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[79] This could, of course, also be the right to write any and all sequels – or to executive produce a television any television series based on the screenplay. A wide range of rights is possible. A very powerful writer could also negotiate some of these things – the right to executive produce a television or cable series if one is developed based on his or her original screenplay, with the fee either set in the original agreement or subject to good faith negotiations – and have those included as provisions in his original agreement, not merely as **rights of first negotiation** or **rights of first negotiation and last refusal**.

[80] A **quote** is the fee that a piece of talent (actor, writer or director) is going after at any given moment for his or her services. It is typically based on what the talent has received on his or her immediately preceding deal. Sometimes agents will give quotes for talent they represent, but often they will not. Producers and indie production company executives spend a great deal of time and effort trying to get quotes for talent so that they can know what to offer them. The way this is done is to call the **business affairs** departments of studios and production companies and ask them (e.g.) *"What did Angelina Jolie get on her last picture?"* Sometimes if a producer is friendly with the business affairs executive or is known in the business they business affairs exec. will provide the quote. However very frequently the business affairs department will say that the talent's deal on their last picture was a "**no-quote deal**," which sends the person asking the question back to square one.

to accept the $650,000 or not. If he accepts, then he will get the job and write the sequel. If, on the other hand, Tony *refuses* to write the sequel for $650,000, Universal will be able to conclude the deal with Bruce's agent for Bruce to write it at that fee, and will have no further obligations to Tony on the sequel except with regard to **passive payment and contingent consideration** due to him with respect to the sequel as discussed elsewhere in this section.

All rights of first negotiation and last refusal (not only those connected with this particular instance) are complicated and cumbersome for some of the same reasons mentioned in our earlier discussion of **changed or new elements clauses**. Such clauses always (or should always) include a *period of time* during which the each of the evens called for in those clauses may happen. For example, in the example above, Tony would be allowed a certain period, which would be included in his first screenplay deal, to negotiate to do the rewrite. Then if Bruce says "yes" at the lower fee (again as in the example above) and Universal has to go back to Tony, Tony would have a set period of time to decide whether of not to write the script for the sequel at the lower price. These time elements can definitely slow down the deal-making process.

Specific Subsequent Productions for which the writer should receive Passive Payments:

Again these are fixed cash payments *and contingent profit participations* payable automatically to the writer dependant on the **screen credit** the writer received on the picture (i.e., on the initial production) if the writer does not actually perform writing services on the subsequent production. What level of screen credit triggers these **passive payments** is subject to negotiation between the writer's agent and the producer. Obviously the best deal for the writer would be for him or her to receive 100% of such passive payments if he or she receives *sole or shared written by, screenplay by or story by credit.* In the real world this is probably going to be very difficult to achieve, and the writer may only receive these passive payments if he or she is entitled to receive **written by or screenplay credit**, and not story by credit. The Producer (e.g., a studio) will only want the writer to be entitled to receive these passive payments if the writer is entitled to *sole* written by or screenplay credit. The writer's agent should definitely resist this and insist that the passive payments should be payable regardless of whether the credit is sole or shared. A compromise (and one that is seen frequently) would be for the writer to receive 100% of the passive payment if he or she receives sole credit and 50% of such passive payment if he or she receives shared credit.

- **Passive payments for sequels:** The writer[81] will receive one half of the original cash compensation payable upon commencement of principal photography *for each sequel.* By original cash compensation what is meant is either the **purchase price** of the screenplay as paid under the terms of the writer's option/purchase or purchase agreement, or the writing fee the writer received for writing the screenplay. The writer will also be entitled to receive one half of the applicable percentage of

[81] As a reminder in this section we are always referring to the writer of the screenplay for the original production, which would have always have already been produced at the time these payments become payable.

contingent consideration he received for the first picture. Example: Writer Tony received 5% of 100% of net profits[82] on the first picture. When the sequel is made and released he will receive 2 ½ % of net profits on the sequel.[83]

- **Passive payments for remakes:** The same as for sequels, only for "one half" substitute "one third."

- **Passive payments Movies of the week, mini-series and so-called television one-shots:** The writer will receive a negotiate fee per each hour of programming, generally payable forty-five days after commencement of principal photography. There could be different fees payable (e.g.) for production by different networks, or different fees for production by U.S. and foreign networks. Also sometimes there is a **cap** (limit) on the total amount payable to the writer under this section: Example: The writer could be entitled to a passive payment of $10,000 per hour with a cap of $60,000. (A less important writer might get half that.)

- **Passive payments for television series *other than* mini-series:** Different passive payment amounts are generally specified for programs thirty minutes and under; for programs thirty to sixty minutes; and for programs sixty to ninety minutes. Again different royalties might be negotiated for foreign and domestic productions, etc. For example, one familiar variant would be for the passive payments royalties to be reduced by fifty percent for series produced other than for U.S. prime time, or other than U.S. network.

    - **Reruns:** In addition to the above, a typical provision for television series would call for the writer also to receive an additional sum equal to twenty percent of the per program royalty with respect to each of the first five (5) reruns. Again these rerun royalties could be reduced by one half for non-U.S. prime time or non-U.S. network broadcast. A **rerun** is any broadcast of a series episode subsequent to that episode's initial broadcast.

- **Passive payments for generic spin-offs:** A **spin-off series** is a new and different series using one or more of the characters of an established series. **A generic spin-off** is a new series using continuing characters from the first series. Example: "Frasier" was generic spin-off of "Cheers," since the character of Frasier was a regular character on that earlier series. For a generic spin-off series the writer

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[82] We should mention here that, very confusingly, "net profits" are called "**net proceeds**" in certain deals, the reason being that some business affairs executives have decided that the word "profits" carries with it certain implications that they wish to avoid in contracts. For example if "net profits" are paid on a film, that would seem to imply that the film was "profitable" or "made a profit," and this could be used by someone else (e.g. a financier or other profit participant) in a claim against the studio: *"If the film paid 'net profits,' why didn't I get any money."* Thus the use in some contracts of the expression **net proceeds.** Unless there one sees an obvious reason to take this term differently, an assumption can be made in almost all cases that it means the same thing as **net profits**.

[83] An interesting question arises as to *what definition of net profits will apply to writer Tony on the sequel?* The logical answer would be: the same definition of net that he got on the first picture. But for various reasons that definition may not apply to the sequel. As noted several places in this book, many different, "incompatible" definitions of "profits," "negative cost," "gross receipts," etc. are running in parallel on most pictures.

would typically be entitled to receive passive payments (royalties) of 50% of what the writer receives for a "television series other than a mini-series" as discussed above.

- **Passive payments for planted spin-offs:** A **planted spin-off series** is commonly understood to be a new series in which the main character(s) of the new series is not a regular character on the first series, but is introduced in the original series for the specific purpose of creating a new series with that character. Example: "Melrose Place" was a planted spin-off of "Beverly Hills 20210," as the characters in the new series were introduced in the original series specifically to spin-off into a new series. The a planted-spinoff series the writer would typically be entitled to receive passive payments (royalties) of 25% of what the writer receives for a "television series other than a mini-series" as discussed above.

Further issues and deal points regarding Credit:

An important thing to bear in mind isthat after money, the single most hotly negotiated aspect the deal for most pieces of talent (actors, directors, producers, and even production designers, etc) is **credit**, both as to how such credit is to appear **on screen** and **in paid advertising** and as to its size and positioning relative to other credits. In a certain way this credit war is made easier by the fact that the WGA determines screen credit for writers. Nevertheless the writer should be aware of credit issue in order to preserve his or her rights.

WGA credit determination procedure: As mentioned above, it is the WGA and not the Producer, financier, or any other party or entity which makes the final determination of writing credits on almost ever film made in the United States, regardless of whether the Producer is a signatory to the WGA Minimum Basic Agreement. It is useful for the writer to know in a bit more detail what the WGA's provisions for final determination of credit are:

Producer will send to each participant (as defined below), or to the current agent of a participating writer if that participant so elects, and to the WGA concurrently a **Notice of Tentative Writing Credits** ("Notice"). Producer also is required to provide each participating writer (or designated agent) a copy of the final shooting script (or if such script is not available, the latest revised script). A participant is defined as a writer who has participated in the writing of the screenplay, or a writer who has been employed by Producer on the story and/or screenplay, or a "professional writer" who has sold or licensed literary material subject to the Minimum Basic Agreement. In addition, in the case of a remake, any writer who received writing credit under any WGA Basic Agreement in connection with a prior produced version shall also be a participant. If a participating writer is deceased or unavailable to participate in the credit determination process, such writer may participate through an appropriate representative. As a participant, the writer shall be entitled to participate in the procedure for determination of writing credits. Although it is Producer's responsibility to send the Notice properly in accordance with the MBA provisions, it is in the best interest of each participating writer to make sure the WGA and Producer always have current address information to ensure proper and timely

delivery. If a writer contractually designates an agent or other representative to receive Notices then the writer should periodically remind such representative to forward all Notices in a timely manner so important deadlines are not missed. If a participating writer intends to be away from his/her residence, or for any other reason will not be able to receive materials at his/her customary mailing address, the writer should give prompt written notice to Producer to send the **Notice of Tentative Writing Credits** and the **Final Shooting Script** to a specified representative.

1. If the writer agrees with the tentative writing credits proposed by Producer, the writer does nothing, signifying acquiescence by failure to protest.
2. If after reading the final script, the writer wishes to discuss the credits with the other participating writers involved before deciding whether or not to protest the tentative writing credits, the writer may call the WGA and the WGA will make reasonable efforts to arrange for such discussion.
3. If after reading the final script the writer wishes to protest the tentative writing credits as proposed by Producer, the writer sends the following written protest both to Producer and to the WGA:

> "HAVE READ FINAL SCRIPT AND HEREBY PROTEST TENTATIVE WRITING CREDITS ON (NAME OF PRODUCTION) AND CONSIDER CREDIT SHOULD BE _____ ."

Such written protest must be received by Producer and the WGA within the time specified at the bottom of the Notice of Tentative Writing Credits, but in no event shall this time be less than that specified in the Minimum Basic Agreement which states, "Producer will keep the final determination of screen credits open until a time specified in the notice by Producer, but such time will not be earlier than 6:00 p.m. of the tenth business day following the next day after the dispatch of the notice above specified (12 business days); provided, however, that if in the good faith judgment of Producer there is an emergency requiring earlier determination and Producer so states in its notice, such time may be no earlier than 6:00 p.m. of the fifth business day following the next day after the dispatch of the notice above specified (7 business days)." No writer should request credit or ask for an arbitration without first having read the final script.

Every writer should monitor this process closely to ensure that the Producer is following it to the letter. But even more important than that, if a writer is ever "promised" a certain writing credit, the writer should immediately "smell a rat." Either this is not a professional producer and has no idea what he or she is doing, or else there is something tricky going on. On the other side of the coin, the writer should be aware that the WGA prohibits the a writer who is a WGA member to claim "screen authorship" until the final WGA credit determination has been made. Of course every day there are items in the trades about the sale of screenplays and about writers being hired to work on projects. But note that none of those media stories state that a writer is to receive any particular credit on a picture.

Writers' Credits On Screen:

These are obviously those credits which appear on the screen as part of the picture itself. The WGA has very specific rules governing how these titles shall appear and be positioned. It would be a good idea for a writer who is not (yet) a WGA member to ask his agent to have the WGA's curren on screen credit rules included in the writer's deal by reference. Briefly stated, these rules are:

Writing credits as finally determined hereunder shall appear on the screen. If the writing credits appear in the main titles, they shall appear on a title card immediately preceding the card on which appears credit to the director of the motion picture, provided such writing credits shall not be more than the second personal credit prior to the beginning of the motion picture. If there are no personal names or portions of personal names whatsoever in the main titles, except as part of the the motion picture, then the writing credits as finally determined hereunder may appear as the first credit in the end titles or immediately following the card on which appears the credit to the director and the writing credits may not appear in a position later than the second credit in the end titles after the body of the motion picture. Notwithstanding the foregoing, if the director is also the only person receiving "Produced by" credit on the motion picture, the credit to the director may be combined in the form "Produced and Directed by" or "Directed and Produced by" on a single card. Writing credit shall appear on a separate card, except that when the sole credited writer of the screenplay is also the author of the source material, the source material credit may appear on the same card immediately below the "Screenplay by" credit.

Source material credits (if they appear on the screen) and writing credits finally determined hereunder shall, subject to the foregoing, appear only in the following manner:

a. On one (1) title card on which there appear only writing and source material credits.

b. On separate title cards on each of which there may appear any one (1) or more of such credits, and no other credits.

c. On the main title card of the motion picture on which there may appear any one (1) or more of such credits together with other credits.

Screen credit for the writer of the screenplay shall be accorded in the same style and size of type as that used to accord screen credit to the individual producer or director of the motion picture, whichever is larger.

Whenever source material credit appears on the same title card as the "Screenplay by" credit as described above, the screenplay credit must be the initial credit and must occupy not less than fifty percent (50%) of the credit card in type at least as large in all respects as that accorded the source material credit.

Whenever story credit, but no source material credit, appears on the same title card as the screenplay credit, the story credit and screenplay credit shall be in the same size type, the screenplay credit shall be the initial credit and shall occupy the top fifty percent (50%) of the card, and the story credit shall occupy the bottom fifty percent (50%) of the card, except that the requirements of this sentence shall not apply when there is a contrary contractual commitment entered into prior to March 2, 1977. The Company shall have the right to place the source material credit on another card so long as such other card is not inserted between the screenplay credit and the director's credit. The foregoing provisions of this subparagraph and the preceding subparagraph shall not be applicable to contract commitments entered into prior to December 13, 1963 which contain terms contrary thereto.

With regard to on-screen credits, the words "Written by," "Screenplay by," "Story by," "Adaptation by" or "Screen Story by" shall be at least one-half of the size of type used for the name(s) of the writer(s).

Writer's Credits in Paid Advertising:

Once again the WGA has specific rules regarding the writer's right to have his or her name appear in paid advertising for the picture. And also once again the agent for a writer who is not (yet) a WGA member may (and probably should) to have these provisions included in his or her writer client's agreement by reference, as to have the writer's name appear (for example) in newspaper advertisements, online advertisements, etc. is valuable for the writers' career.

Screenplay or screenplay and story credit in accordance with the final determination of such credit will be given on any paid advertising issued anywhere in the world, provided such advertising is prepared by the Company in the continental United States and is controlled by the Company when such advertisement is used; it being understood that in such advertising prepared prior to final determination of screenplay and story credits, the Company shall include such screenplay or screenplay and story credit as the Company may in good faith believe to be a fair and truthful statement of authorship. After final determination of credits, the Company shall not prepare for issuance any advertising which shall state screenplay or screenplay and story authorship contrary to such final determination.

When there is only a single writer on a project and if a paid advertisement is issued in which that writer would have received credit hereunder had there been a final determination of credit at that time, then such writer shall be given credit in such advertisement in accordance with the credit requirements of this Schedule A.

In forms of advertising covered hereunder, the names of the individual writers accorded screenplay or screenplay and story credit for the motion picture will appear in the same size and style of type as that in which the name of either the individual producer or the director of the motion picture shall appear in such advertising, whichever is larger. Provided, however, that:

(1) If three (3) or more writers share screenplay credit, then the Company shall not be required to use, for the advertising credit to which such three (3) or more writers are entitled, an area in excess of the minimum area that would be occupied by the names of the first two (2) of such writers, if only such first two (2) writers were entitled to share screenplay credit; it being understood that for such purpose, the Company may diminish height of the type in which the names of the three (3) or more writers appear in addition to narrowing from side to side the names of such three (3) or more writers; it being further understood that for the purpose of determining which of the writers are the first two (2), the order in which such writers appear in the notification of the Guild's determination reached in its credit arbitration proceedings shall control; and

(2) When a writer entitled to screenplay credit is also entitled to credit as the director and/or producer of the motion picture, then the name of such writer need only be mentioned once in such advertising, provided, however, that he/she receives credit as a writer; provided further, that the order of credit as between writer, producer and director shall be the same as the order with respect to which such credits are given on the screen; and

(3) In giving such credit on twenty-four (24) sheets, the names of the individual writers shall in no event appear in type less than three and one-half (3½) inches in height, or if the screenplay or story credit is shared by more than two (2), in type less than two and one-half (2½) inches in height; and

(4) In giving such credit in forms of advertising covered hereunder, other than on twenty-four (24) sheets, the names of the individual writers shall in no event appear in type of a height less than fifteen percent (15%) of the height of type used for the title of the motion picture, or if there are two (2) titles of the motion picture, the larger title. The Company may seek a waiver of the double billing provision, in particular cases such as the *"Beau Geste"* ads and the Guild will not unreasonably withhold such waivers.

(5) Writing credits shall be given as provided herein in advertising which features a quotation(s) from a review(s) of the motion picture if the name of an individual producer or director appears in any of the quotations; provided, however, if the name of individual producer or director in the quotation(s) shall be in the same size and style of type as the remainder of the quotation(s), then the writing credit need not conform in size or style of type to the name in the quotation, but shall otherwise conform in size and style of type as provided in this Paragraph 22.

In all cases, the location of the credit accorded to any writer under this Paragraph 22 shall be discretionary with the Company.

The foregoing obligation to accord credit in paid advertising shall be limited to story, screenplay, or screen story, adaptation and written by credits and shall not apply:

(1) To so-called "teaser" advertising, except that if a "Produced by" or "Directed by" credit is included, the writing credit shall also be included.

(2) To advertisements less than four (4) column inches in size, but if such advertising contains a "Produced by" or "Directed by" credit, the writing credit shall also be included.

(3) To radio or the audio portion of television advertising.

(4) When credit is given neither to the individual producer nor director of the motion picture.

(5) To special advertising relating only to the source material on which the picture is based, or author thereof, any member or members of the cast, the director, individual producer, or other personnel concerned in its production, or similar matters.

In any case in which there would be an obligation to accord an advertising credit to a writer if credit were given to the producer or the director, such obligation shall also exist if credit is given to the executive producer as an individual.

WGA rules severely limiting writing credits for "production executives":

There are two things that the WGA strongly dislikes:

- Any form of **possessory credit**, an example being "A film by Anthony Strong" where Anthony Strong is the director of the film, and particularly when film was written by one or more writers other than Mr. Strong.
- Any writing credit being given to **production executives** on a picture, with "production executives" being defined as includes individuals who receive credit as the director or in any producer capacity."[84]

Hollywood in general has a longstanding prejudice against studio executives and other "non-creative" people in the industry who wish to become writers or directors, and the WGA's policy fits right in with that prejudice. In the development process, whether at an independent company, with a sole independent producer, or at a studio, the producer or

[84] This would doubtless not apply to a writer whose agent had negotiated some type of producer credit for him or her.

development executive makes many "suggestions" to the writer about changes he or she desires in the story and in the script. Sometimes these proposed (meaning *ordered)* changes are trivial, but often they involve major restructuring of the plot: adding or eliminating characters, and even changing the tone or entire genre of the screenplay. Some films that get made by the studios bear only a slight resemblance to the first draft original screenplays on which they were based. Of course in line with the discussion above if the changes were effectuated *by other writers,* it is likely that one or more of these writers will end up receiving shared "screenplay by" or even shared "screenplay by" and shared "story by" credit. At the end of the process, unless the writer agrees to all of the changes the studio demands and incorporates those changes himself in the screenplay, it is quite likely that the writer may be reduced to a shared "story by" credit, which, depending on his deal, may deprive him of any contingent consideration (profit participation) on the picture, even though he was the writer of the original script. That having been said, if the changes in the script *were actually made by (rather than under the direction of) the director of the production executive,* the WGA makes it very difficult for the director or production executive making those changes to receive a writing credit. Here are the WGA's main provisions regarding what happens if the Producer's **Notice of Tentative Writing Credits** submitted to the WGA includes credit for a "production executive" as defined above:

- **Automatic Arbitration.** Unless the story and/or screenplay writing is done entirely without any other writer, no designation of tentative story or screenplay credit to a production executive shall become final or effective unless approved by a credit arbitration as herein provided, in accordance with the Guild rules for determination of such credit.
- **Notice Requirements**. If a production executive intends to claim credit as a team on any literary material with a writer(s) who is not a production executive, he/she must, at the time when such team writing begins, have signified such claim in writing to the Guild and to the writer(s) with whom he/she claims to have worked as a team. Failure to comply with the above will preclude such production executive from claiming co-authorship of the literary material in question, and such literary material shall be attributed to the other writer.
- **Writing Percentage Requirements**: At the time of the credit arbitration, the production executive or production executive team must assume the burden of proving that he/she/ they had, in fact, worked on the script as a writer and had assumed full share of the writing. In the case of original screenplays, if the production executive or production executive team is the second writer he/she/ they must have contributed more than 50% of the final script to receive screenplay credit. His/her/their contribution must consist of dramatic construction; original and different scenes; characterization or character relationships; and dialogue. As in all cases, decisions of Arbitration Committees are based upon literary material. Therefore, production executives, as well as other writers, should keep dated copies of all literary material written by them and submitted to the Company.

WGA Arbitrarion: The details of this process and the procedures are involved lie beyond the scope of this book. Suffice it to say that WGA Arbitration of screen credit of done by a committee made up entirely of WGA members. Identities of the arbiters are secret, so

concerned parties have no way to object to the qualifications or possible biases of their judges. Also, any explanation of the decision itself is secret, even from the parties to the dispute, so they have no way to know why they lost or won credit. Secret rationales make an appeal impossible, and define no precedent for future disputes. There is an appeal panel, but it only concerns itself with technical details as to whether the decision followed the rules. WGA members have criticized the way the process handles existing material, such as a book, that is adapted to film. Generally, the first writer to work on such a project naturally appropriates the most cinematic elements of the story. Assuming that the screenplay is an adaptation rather than an original, other writers or teams of writers that subsequently work on the script, however, may base their work on the original text rather than that first draft. Barry Levinson, the director of Wag the Dog and a disputant over screenwriting credit for the film (which was adapted from a novel), says: "If a writer creates an idea from scratch, that's one thing. Even if the script is given to other writers and rewritten, that first writer created the seeds of that idea and he or she should get some regard. But for a script from a book, it's different." Even if little of the initial efforts remain in the final script, the original writer is often awarded credit because he or she was first on the scene. *However,* this statement applies more to a WGA member who went into the process as a "**professional writer**" per the WGA's definition than to a first-time screenwriter who, at the time he or she wrote his or her screenplay, was not a member of the WGA.

Other clauses typically found in writer's agreements:

Here we are talking about the "**boilerplate**" of the contract rather, for the most part, than substantive deal points. All the same, there are "good" versions of most of these clauses (meaning versions that are more protective of/favorable to the writer) and "bad" versions (meaning versions that are less protective of/favorable to the writer). Assuming that, as is generally the case, it is the Producer (i.e., the studio, network or production company) that drafts (and redrafts and revises) the agreement and not the writer's attorney or agent, it is important that the writer's attorney not simply skip over this boilerplate, most of which appears at the end of any given contract. The following is *not* an exhaustive list of all of all clauses (paragraphs) which may appear in a writer's option/purchase agreement or agreement for a writer's services:

- **Travel & accommodations**: If not dealt with in previous paragraphs, there might be a separate paragraph stating under what circumstances the Producer will be obligated to pay for the writer to travel, and what the travel and accommodations arrangements should be. Needless so say, first class is always preferable. It is also quite normal for the writer to request (and receive) first class air fair and accommodations for two persons.
- **Further instruments**: The writer agrees to execute additional documents as requested by the Producer to effectuate the Producer's rights in the material, including (e.g.) the **short-form option** and the **short-form assignment** of the screenplay or other material.
- **Failure to execute documents**: If the writer fails to execute a document which he is request to sign by the Producer with a certain amount of time (the Producer will want this to be very brief – three days, for example --, whereas

the writer would want it to be longer), then the Producer may execute such document "as writer's attorney-in-fact with respect to the material."

- **Right of assignment**: This can be an important paragraph, as this is the one that gives the producer the right to assign (sell, transfer) the rights (option and/or copyright) which he is acquiring under the agreement to a third party (e.g., studio or other production company). It is typical, and highly desirable for the writer, that the Producer *not be relieved of its obligations* under the agreement unless the assignment (sale or transfer of rights) is to a "**financially responsible party**." But even that term is highly ambiguous. Many agreements that are thoroughly negotiated and more favorable to and protective of the writer will state that the producer will not be relieved of its obligations (e.g., obligation to pay the write his fixed and contingent consideration, etc) unless such assignment is to one of a specific list of companies. Such a list would typically include the major studios, strong and durable independents (e.g., Lions Gate), and the major U.S. broadcast and cable networks. The effect of this provision is that it prevents the Producer from assigning the rights in the writer's screenplay to some dubious company which will then cheat the writer, leaving the writer with no recourse against the Producer. *Assignment of rights to bogus companies is one of the main ways that producers cheat writers out of money and credit,* so this **right of assignment** clause is always one that deserves close scrutiny. Overall restricting the right of assignment to a list of companies that are truly "financially responsible" is probably a very good idea

- **No obligation to produce**: The Producer and the writer agree that the Producer has no obligation to actually make the Picture. This paragraph appears in almost every writer's contract.

- **Notices**. This paragraph simply states to whom and how "notices" must be sent. This could become very important for a number of reasons: for example, if the Producer has the right to sign something (in effect) on the writer's behalf if he has not responded to a notice in a short period of time; or in the event of a **first negotiation/last refusal** situation as discussed above. The writer can request that notices go to him, his agent, and his attorney; and that all notices shall be sent both by email and certified mail or Fedex. Why not?

- **Section headings**: This simply states that the names of paragraphs are for convenience only and to not affect (limit or modify) how those paragraphs are to be construed or interpreted.

- **Gender and number**: This clause simply states that the masculine includes the feminine and vice versa, so if the writer is a woman and the contracts refers to the writer as "he" in some section or another, that section is still valid.

- **Applicable law**: This can be a tricky paragraph and one which the writer's attorney should not ignore. A clause typically found in "Hollywood" agreements might be: "This Agreement shall be construed according to and governed by the laws of the State of California applicable to agreements entered into and to be performed within said State. In interpreting this Agreement, the language hereof shall be given its fair and reasonable meaning and shall not be construed against either party hereto." If the Producer

happens to be domiciled in some other jurisdiction, the Producer may state that the applicable law is (for example) Nevada (where many corporations are still formed for tax reasons), or Delaware, or the United Kingdom, or some off-shore "tax haven" (the Nevis, the Cayman Islands, etc.) This could become a nightmare for the writer in the event that a dispute arises between him and the Producer, since then the writer would be forced to obtain legal counsel in one of these jurisdictions, some of which have very different laws relating to contracts than California or New York. In general California law is probably good, since California at least has a sound tradition of intellectual property (including entertainment law) precedents, and the courts in California know what is going on.[85]

- **Entire agreement or "integration clause"**[86]: This paragraph states that the agreement, meaning the written contract that both parties are signing, "contains the full and complete understanding and agreement between the parties with respect to the Property, and supersedes all other agreements between the parties whether written or oral relating thereto." This clause can cut both ways for the writer. By the time that the agreement is documented (meaning that the contract is drafted), the writer, and writer's agent, and possibly also the writer's manager (if he or she has one) and entertainment attorney will all have had discussions with the Producer (the other part to the contract), and in all likelihood also the Producer's agent, attorney, etc. Many things will have been discussed. Perhaps many promises, assurances, "representations and warranties" will have been made, orally (by speech) or even in writing (in emails or memos). The Producer may have told the writer that he is developing the project for Angelina Jolie, or that even though the agreement is with the Producer directly the picture will ultimately be made with Paramount, or that the picture is fully financed, or that the writer will also receive some sort of producing credit on the picture, or that the Producer is also going to purchase one of the writer's other scripts or do a **multi-picture deal** with the writer, or get the writer a multi-picture deal at a studio, or let the writer sleep with his wife, girlfriend, mistress or secretary – or with the female (or male) star of the picture.[87] The important thing for the writer to bear in mind is that if the agreement (contract) that is actually signed contains an **integration clause,** *only the provisions that appear in the signed contract will be applicable and enforceable.* The writer will not be able to go to court and say *"The Producer promised me this or that and didn't make good on those promises."* This is why the writer him or herself must read the contract carefully before it is signed. Don't leave everything to the agent or the attorney.

  All that having been said, *sometimes* the courts have found that integration

[85] If a dispute involves parties in different states and it is for more than $75,000, a party has the right to have the case heard in federal rather than in state court, which could conceivably be an advantage if the applicable law under an agreement was that of some unusual state. This, however, would be for the writer's entertainment attorney and also litigation legal team to decide.

[86] This is sometimes also referred to as a "**merger clause**."

[87] Don't laugh. Producers say many things to talent (including writers) to induce them to make deals.

clauses constitute only a **rebuttable presumption** -- i.e. that there was not also agreement on matters other than as written in the contract. But the writer should certainly not rely on this.

Reliance: Now that the word "rely" has come up, and before we close our discussion of contract provisions, it would a good idea to mention just briefly this legal concept which comes up all the time in **contract law**. When one makes an agreement with someone, one **relies on** what the other party tells you. What the **integration clause** (mentioned immediately previously) does is to limit what one can rely on in terms of what the Producer and/or his agents have written or said. When there is an integration clause in the agreement, the writer can never go to court and say that he or she relied on the Producer's assurance that he or she would receive an associate producer credit on the picture *unless* that assurance was contained in writing in the contract (agreement). When a party relies on something a promise made by another party then acts on that promise and *is harmed by it*, that is called **detrimental reliance**. The integration clause in the agreement can wipe out a wide range of possible detrimental reliance claims that a writer could make: E.g., *"I would never have signed the contract of the Producer had not told me that he had a five-picture deal at Fox, and that my screenplay was going to be one of those pictures. Now I find out that the Producer doesn't have deal at all, and that he's bankrupt."*[88] Anything along those should somehow find its way into the signed agreement, even if it only takes the form of a **best efforts** clause.

Brief lists of other factors in contract law:

Again this is beyond the scope or intent this book. Nevertheless the writer should be aware of (a) the **defenses against contract formation**, meaning (in broad strokes) the legal arguments the wrier can make that there was no valid contract to begin with; and (b) what the legally acceptable **excuses for non-performance are**, meaning (again in broad strokes) the things that the writer or the Producer can argue to legally excuse him or herself from performing under the contract (agreement:

Defenses against contract formation:

- **Lack of capacity**
- **Duress**
- **Undue influence**
- **Illusory promise**

[88] Arguably the writer might still have a fraud/misrepresentation/unfair business practices claim against the Producer, but that discussion is beyond the scope of this book. (e.g., a claim for "**fraud in the inducement**.") The important thing for the writer to focus on is: *If it's not in the written contract, you can't rely on it. "Of course I'll take you to Cannes!"* is not enforceable unless it's in writing in the agreement the writer signs. Neither is *"Of course I'll hire a writer to type your script for you!" or even, "Of course I'll pay for your research expenses while you're doing the rewrite!"* Any such "promises" or assurances should – in fact must – be in the contract. And if there is an **integration clause**, even if they are in previous correspondence – e.g., emails – that may not help the writer in asserting his claim that the Producer broke his promise and therefore breached this or her agreement with the writer.

- **Statute of frauds** (as discussed above)
- **Non est factum** (i.e., a claim that a party signed a contract by mistake, without knowledge of its meaning, however not out of negligence. Or that the signature was not really that of the signers.)

Excuses for non-performance:

- **Mistake**
- **Misrepresentation**
- **Imposibility**
- **Impracticability**
- **Illegality**
- **Unclean hands**
- **Unconscionability**
- **Accord and satisfaction**

SAMPLE CERTIFICATE OF AUTHORSHIP

Charles Winthrop ("Writer") does hereby acknowledge, certify and agree that all material, suggestions, ideas of every kind writer or submitted at any time to date or hereafter (said "Material" by Writer in connection with the motion picture tentatively entitled "DARKNESS & ASHES" (1) was written or submitted by Writer as the employee-for-hire of Strongpitts Entertainment, Inc. ("Producer") or its assignee within the scope of Writer's employment or if not was specially ordered or (2) shall in any case be considered to be a work-made-for-hire for Producer, which shall be deemed the author thereof, and which, accordingly, shall and does own all right, title and interest therein, including without limitation the entire copyright therein throughout the universe in perpetuity with, among other things, the right to make any and all changes therein.

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Writer waives all rights of "Droit Moral" or "Moral Rights of Authors" or any similar rights or principles of law which Writer may now or later have in the Material. Writer agrees to execute any documents and do any other act as may be reasonably required by Producer, its assignees or licensees to further evidence or effectuate Producer's rights as set forth in this Certificate of Authorship. Upon Writer's failure to do so within five (5) days after written notice to Writer, Writer hereby appoints Producer my attorney in fact for such purposes (it being acknowledged that such appointment is irrevocable and coupled with an interest) with full power of substitution and delegation.

Writer further acknowledges that (i) in the event of any breach hereunder by Producer, Writer will be limited to this remedy at law for damages, if any, and will not have the right to terminate or rescind this Certificate or to enjoin the distribution, advertising or exploitation of any picture; (ii) nothing herein shall obligate Producer to use Writer's services or the results and proceeds thereof in any Picture or to produce, advertise or

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Executed as of_____, 1992

_____
CHARLES WINTHROP

ACKNOWLEDGED AND AGREED:

STRONGPITTS ENTERTAINMENT, INC.

By:_____
Authorized Signer