VOLUME 1 • ISSUE 2

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Entertainment

Featuring people, news and business issues for the entertainment and media industry.

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Production Delay: Election Year Impasse Clouds Future of Film Tax Incentive

For the last 8 years, the domestic film industry has benefited from a valuable tax incentive which rewarded qualifying film production. In 2004, with an increase in "runaway film production," or production being moved out of the country, Congress created the Section 181 Film Tax Incentive. Section 181 allowed for the deduction of up to $15 million of qualified film or television production costs as expenses in the year the costs were incurred. The deduction made it easier to entice outside investors, and the increase in investment cash flow meant more, better funded opportunities for domestic production. Savvy film producers frequently combined Section 181 with state incentives to attract investors to reduced-risk opportunities. But despite broad support, Section 181 expired on January 1, 2012, leaving film producers to wonder when, and if, it might return.

Although Section 181 expired, it may not be gone for good. Section 181 is currently one of the provisions in the 2012 extender bill package. Unfortunately, with an election on the horizon, Congress isn't in a big hurry to pass new legislation. So what does this mean for the future of Section 181? One of three things could happen: Section 181 could be re-authorized retroactively to January 1, 2012; the incentive could become effective again on January 1, 2013; or Section 181 could be gone for the foreseeable future. In any event, it's unlikely that anything substantive will happen until after the election. So for now, it's "wait and see."

JAMES STEINBERG

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Is your Income Stream Falling Behind?

Catching Up with New Media

By Bennett A. Bigman, Esq., Ilan Haimoff, and Peter Klass*

As traditional media consumption continues to decline, studios and distribution companies are developing new ways to deliver and monetize content. Whether it is through a smartphone or an internet-based television, content providers see more opportunity than ever in what is collectively called "new media." Technology has created consumption convenience for consumers, while decreasing the cost of media delivery for studios. And while consumers enjoy additional convenience, content providers are quickly adjusting revenue models to include digital exploitation of content over the internet. These new revenue models take into account decreased costs of media delivery and a better understanding of the digital-savvy consumer. But are these new models leaving profit participants behind?

NEW MEDIA MEANS NEW INCOME STREAMS

Three successful models for capturing new media revenue are "pay-per-use," "subscription," and "download-to-own."

Pay-Per-Use: Customers select a program to watch during a pre-determined time window. Delivery streams to a device or is downloaded to a hard drive. The viewing is temporary, meaning the program is removed automatically by the provider after the pre-determined time window. Revenue from pay-per-use delivery is generally classified as VOD or Digital Rental. Current prices range from $3 to $5 for movies and from $1 to $3 for TV episodes.

Subscription: Subscribers pay a specific amount for unlimited viewing during a pre-determined time window (usually a month). Video is streamed through a variety of devices. Revenue, whether from advertising or subscription fees, may be classified as Pay TV or Ad-Supported Video Streaming. Prices range from free, ad-supported subscriptions to $12 per month.

Download-to-Own: Customers pay for permanent copies of media, which is downloaded to a device hard drive. In addition to the more established iTunes service, new services such as Ultraviolet have recently been introduced, whereby the download may be stored in the Cloud. Customers can download to multiple locations, such as a mobile device or iPad. Revenue is generally classified as EST, which is often a part of Home Video. Current prices range from $10 to $25 for movies and $2 to $4 for television episodes.

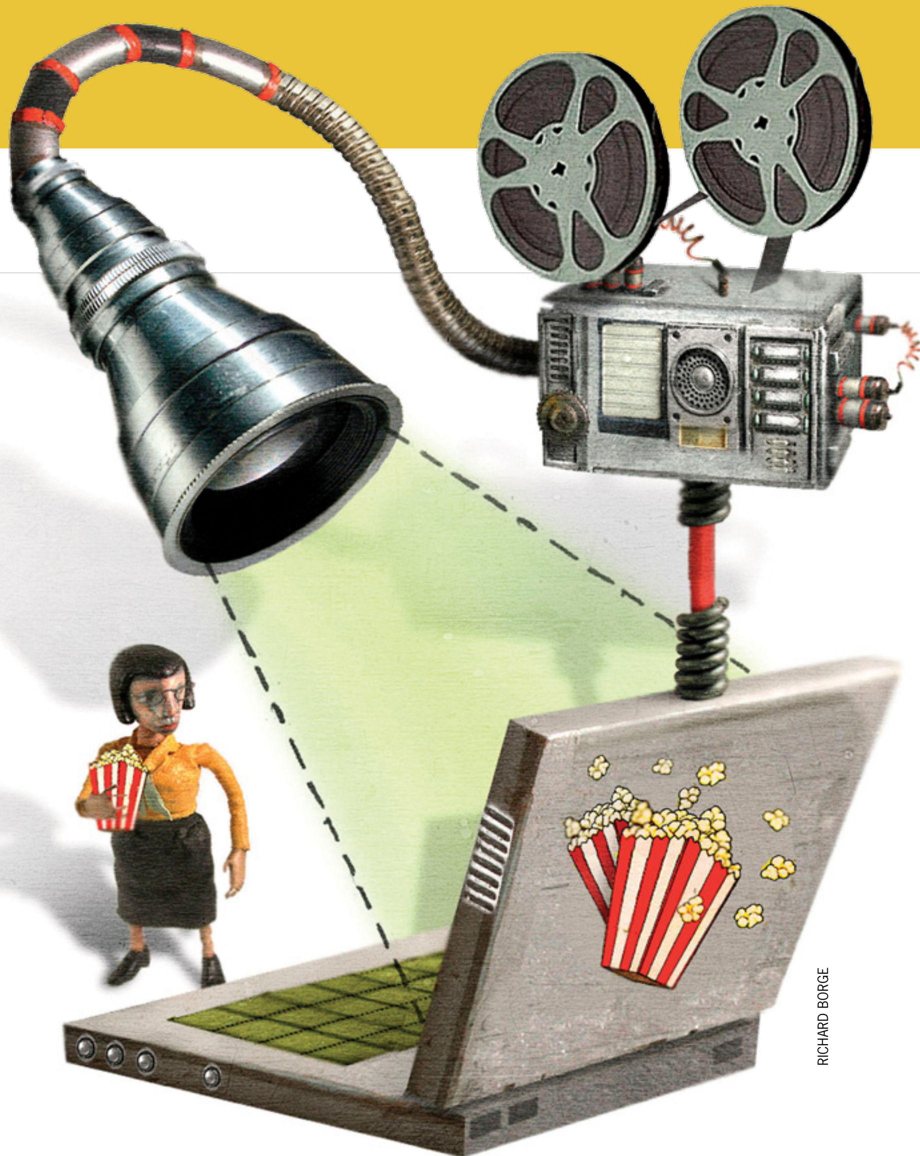
> Studios and content providers are exploring multiple revenue models in search of maximum profit. For profit participants, these new revenue streams provide both opportunities and challenges.

EQUITABLY REPORTING A MOVING TARGET

While the proliferation of web-based media consumption has been adopted rapidly by consumers, it has also forced the industry to re-think revenue models. Consumers not only consume content differently, but pay for content differently.

Studios and content providers are exploring multiple revenue models in search of maximum profit. For profit participants, these new revenue streams provide both opportunities and challenges. What if participation agreements are not written to specifically address new media revenue? What if reporting procedures are outdated and do not capture new media revenues?

Participation agreements and the law in general have yet to catch up with the explosive growth of new media distribution. This has created uncertainty in how new media receipts should be reported to profit participants. The target continues to move and no dominant business model has emerged to fully capture the upside of the latest technologies. Studios are continuously experimenting with distribution windows and pricing – leaving profit participants with less predictable revenues and limited control.



RICHARD BORGE

ADDRESSING CHALLENGES FOR PROFIT PARTICIPANTS

While new media is much less expensive to distribute and a generally profitable venture for studios, profit participants may find difficulty sharing those profits equitably with the studios. The internal reporting processes at studios may not be consistent or effective in capturing new media receipts, potentially resulting in under-reporting of new media revenue to profit participants. For stakeholders, it is critical to monitor and assess the completeness of the new media reporting by the studios.

Profit participants and their representatives should carefully review statements issued by studios to determine if they are receiving the full benefit of new media distribution for their creative efforts. Specifically, the review should consider whether VOD and EST revenues were reported at 100% or at a royalty applicable to home video, commonly 20%. A 20% royalty may not be consistent with the applicable agreement or industry practice.

Profit participants should also consider (1) failure to report advertising-supported streaming revenues, (2) failure to report a broadcasting license fee on airing a television series or picture online, (3) failure to report allocable shares of minimum guarantees paid by Internet distributors, (4) reporting of downloads as “sales” rather than licensing revenue, and (5) overstating the costs associated with online distribution.

THINKING AHEAD PAYS DIVIDENDS

While reviewing reports to ensure proper reporting of new media revenues is critical, considering new media revenues in future contract negotiations may be even more important. As new media revenues are expected to continue to grow and become more complex, it is essential that profit participants consider new media revenue reporting and profit sharing as a critical aspect of future contract negotiations. Addressing these revenues in advance can remove uncertainty and ensure equitable profit sharing and distributions from studios.

**Bennett Bigman is a partner with Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP. Bennett specializes in litigation involving all aspects of the entertainment industry, including contractual disputes and intellectual property matters. He has handled numerous profit participation cases on behalf of artists, writers, directors and producers.*

More information about Bennett and his firm can be found at www.linerlaw.com.

CalCPA Entertainment Industry Conference

JUD GUITTEAU

June 13, 2012
Beverly Hills, CA

Green Hasson Janks' own **Steve Sills** and **Ilan Haimoff** participated in this year's CalCPA Entertainment Industry Conference held at the Beverly Wilshire Hotel, in Beverly Hills. The conference focused on current financial and accounting issues facing the entertainment industry and was attended by accountants who specialize in serving film, music, and production studios, as well as business managers and other industry experts.

Steve Sills moderated a panel discussion entitled "Current Trends in Film", which included leading industry experts John Burke, Esq. of Akin Gump Strauss Hauer & Feld LLP, Joseph Chianese of Entertainment Partners, and Joseph Woolf of OneWest Bank. The panel discussion focused on new and creative sources of funding for both major studio and independent films. The group discussed foreign investments, partnerships with merchandisers and new media companies, maximization of domestic and international production tax incentives, and others emerging funding alternatives. Participants were able to share ideas and experiences, expanding their knowledge and enhancing their ability to identify and facilitate innovative funding alternatives for clients.

Ilan Haimoff led another panel discussion entitled "Path to Fraud Prevention", which included Joseph Flueckiger, who heads loss prevention at City National Bank, as well as Martin Juarez and Carol Mace, special agents with the IRS. Ilan and Joseph discussed the risks associated with internal fraud as well as the ways in which businesses can become susceptible. The panel provided a road map for business managers and other advisors to follow in order to help their clients mitigate the risk of fraud through anti-fraud programs and the enhancement of internal system controls.

Martin and Carol reviewed the Wesley Snipes tax fraud case and its implication to accountants and business managers. They provided an overview of Reporting of Foreign Bank and Financial Accounts (FBAR), which requires the disclosure of foreign financial accounts. FBAR is a tool to help the United States government identify persons who may be using foreign financial accounts to circumvent United States law.

If you are an individual, company stakeholder or the beneficiary of a trust or estate with profit participation rights to movies or television shows, you could be at risk for underpayment. A detailed periodic review of your distributions, such as a profit participation audit, is a great way to ensure equitable treatment.

But when should you consider a profit participation audit? Ilan Haimoff and Peter Klass have created a road map to help you assess your risk as a profit participant. Download it at greenhassonjanks.com/publications

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