

*A Fistful of Dynamite:*¹
How Independent Film's Cowboy
Culture Creates Unstable Sales
Agency Agreements

By Grace Clements*

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*J.D. Southwestern 2013. I would like to thank the following people who provided helpful comments and encouragement: Alexandra D'Italia, Michael Epstein, B. James Gladstone, Steve Krone, Maggie Megaw, Steve Monas, and John Tehranian.

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Introduction: *Death Rides a Horse*²

Sam A.³ has had a good run. In ten years, he has built his sales agency, Silver Dollar Cinema (“SDC”), from the proverbial desk, chair, and telephone into an entertainment powerhouse, selling international rights to \$20–50 million motion pictures territory by territory. Major and smaller distributors around the world depend on him as a source of theatrical-level product.⁴ Producers admire the size of the minimum guarantees he is able to extract from territories they barely knew existed (“They want my film in Bulgaria? Why?”), although some resent the 10–15% fees that SDC takes off the top.

Sam hates the title “sales agent” because he does so much more for his films. He puts together investors and guides his projects creatively to increase their international value. Sam has decided to shed his “sales agent” label and direct, develop, and produce his own pictures. That way, when they hit big—as many of his projects have done over the years—he and SDC will be able to keep much more than a 15%

2. *DEATH RIDES A HORSE* (United Artists 1967).

3. Sam A. is purely fictional. This hypothetical was suggested by Steve Monas. Interview with Steve Monas, Entm't Attorney & CEO of Bus. Affairs, Inc. (“BAI”), in L.A., Cal. (Feb. 17, 2013). BAI is a transactional law firm based in Santa Monica, California that represents filmmakers, sales agents, distributors, financiers, and others involved in the making of independent film. “Before founding BAI, Steve served as Executive Vice President and Head of Business Affairs for MDP Worldwide, President of Vision International, Vice President of Business Affairs with Vestron Pictures, and as an associate with New York law firms Frankfurt Garbus Klein & Selz, Pavia and Harcourt, and Brown & Wood.” BUS. AFF. INC., <http://www.bizaffairs.com/attorneys.html> (last visited Mar. 8, 2013).

4. *Compare* “Distributor: The owner or licensee of motion picture rights that licenses such rights to third parties,” SCHUYLER MOORE, *THE BIZ: THE BASIC BUSINESS, LEGAL AND FINANCIAL ASPECTS OF THE FILM INDUSTRY* 6 (4th ed. 2011), with “Sales Agent: A party that acts as agent for the owner of the rights in arranging for distribution or [e]xploitation of a motion picture.” *Id.* at 9; see also, *infra* Part I.C.

sales agency fee. To transform into a production company, Sam will need a credit line.⁵

The good news is that over the past ten years, SDC has built a substantial library of films. The sales agency agreements that SDC enters into with producers typically have terms of fifteen to twenty-five years, and the distribution agreements that SDC then secures with territorial distributors are typically also for fifteen to twenty-five years, with exceptions for some major territories. When the initial distribution agreements expire, as some have already, SDC is in a position to re-license the films for yet more minimum guarantees. In the interim, digital rights of various kinds—TVOD, SVOD, AVOD and more—have actually become worth something,⁶ so there are additional rights to sell on existing pictures, especially internationally.⁷ Sam figures SDC's share of the digital rights must be worth at least \$50 million. This is more than enough to support the credit line he is looking for, so he calls his friendly banker to start the paperwork.

But it turns out Sam has a problem: SDC doesn't own any of the distribution rights in its library. Worse than that, the bank's lawyers say those fifteen to twenty-five-year sales agency agreements that Sam has spent so much time and money negotiating could be terminated by the producers on the other side at any time. Why? Because SDC is merely an agent, a frail legal creature that exists at the pleasure of its principals under common law and statutes in many states—including California, where SDC and the vast majority of its sales

5. What may be financed, and by whom, is in constant evolution. Interview with Steve Monas, Entm't Attorney & CEO of BAI, in L.A., Cal. (Jun. 16, 2013). Most credit lines cover production, and although less common, development may be funded in this way as well. Interview with Steve Krone, Dir. Biederman Entm't and Media Law Inst., Sw. Law Sch., in L.A., Cal. (May 22, 2013). Overhead is sometimes covered by a development fund but rarely by a production fund, except as a fee on a "go movie," as opposed to ongoing funding of overhead as it is incurred. *Id.*

6. The ever-expanding Video on Demand (VOD) platforms currently include TVOD: Transactional Video on Demand, formerly known as pay per view; SVOD: Subscription Video on Demand, such as Amazon and Hulu and emerging "TV Everywhere" platforms; and AVOD (Ad Supported/Free to User Video on Demand), such as YouTube. Wendy Bernfeld, *Brave New World: Digital Distribution Beyond the Old World*, SUNDANCE INSTITUTE (Apr. 23, 2012, 9:04 PM), <http://www.sundance.org/artist-services/distribution/article/brave-new-world-digital-distribution-beyond-the-old-world/>.

7. SVOD (Subscription Video on Demand) has been financially negligible on the domestic front except for libraries, because studios are not able to license pictures until after the second pay window, some eight years out. Ken Ziffren, Co-Founder and Partner of Ziffren Brittenham LLP, Presentation at the Beverly Hills Bar Association Entertainment Law Section: "Features and TV 5.0—Developments and Trends for Entertainment Lawyers, Fifth Edition" (Aug. 21, 2013). Internationally, studios have been able to pick up extra money with one to two-year licenses for SVOD, and these short term deals give the studios more leverage and bargaining position against basic cable or pay TV, with whom the subscription services compete. *Id.*

agency cohort do business. SDC's library, according to the bank lawyers, is a mirage that could disappear tomorrow; certainly not something on which the bank should take a \$50 million risk.

How did this happen? Sam found out the hard way that sales agency agreements may be revocable, even if they include a provision purporting to make them "irrevocable."⁸ This is because in California, as in many other states, "[u]nless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by . . . [i]ts revocation by the principal."⁹ Although "a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract,"¹⁰ the remedy is limited to money damages, which may be too speculative to support a full recovery.¹¹ Further, whether agents may successfully sue for a breached term on individual pictures is beside the point for poor Sam, who, regardless of any small individual victories he may win only after lengthy and costly litigation, is unable to obtain credit now, when he needs it, because of a cloud on a film library that he believed to be marketable.

As the international appetite for independent film grows, both in mainstream consumption¹² and within niche markets,¹³ potentially unstable sales agency agreements may threaten a critical component of a multi-billion dollar industry.¹⁴ Because most sales agency disputes are arbitrated instead of litigated,¹⁵ the number of actual sales agents cur-

8. Agency agreements are always revocable at will unless there is a "power coupled with an interest." Thus the principal retains the *power* to revoke, even when she has otherwise contracted away her *right*. CAL. CIV. CODE § 2356(a)(1) (West 1985 & Supp. 2013). See also, *infra* Parts II.B, IV.

9. CAL. CIV. CODE § 2356(a)(1).

10. Roth v. Moeller, 185 Cal. 415, 197 P. 62, 63–64 (1921).

11. See *infra* Part IV.

12. Evidence of independent film's infiltration of the mainstream includes the seven Oscars won by independent filmmakers at the 85th Annual Academy Awards. *Independent Films Take Home 7 Oscars at the 85th Annual Academy Awards*, IFTA (Feb. 24, 2013), available at <http://www.ifta-online.org/independent-films-take-home-7-oscars-85th-annual-academy-awards>.

13. See, e.g., Gregg Goldstein, *Streaming Brings Boost to Berlin*, VARIETY (Feb. 2, 2013, 4:00 AM), available at <http://variety.com/2013/film/news/streaming-brings-boost-to-berlin-1118065470/>.

14. IFTA's members generate more than \$4 billion in sales revenues annually. *What is an Independent?*, IFTA, <http://www.ifta-online.org/what-independent> (last visited Jan. 25, 2014). IFTA also presides over the annual American Film Market in Santa Monica, a premier market for sales agents that generates \$800 million in sales a year. *About the AFM*, AFM, <http://www.americanfilmmarket.com/about-afm> (last visited Jan 25, 2014).

15. See Linda Bartlett, *Lights, Camera, Action! Arbitration in the Entertainment Industry*, DISP. RESOL. J., 42, 47 & n.18. (Nov. 2006–Jan. 2007) (citing Eric Ervin, *Arbitration in the Independent Film Distribution Contract: An Independent Filmmaker's Tool to Battle Large Litigation Budgets*, 3 CARDOZO ONLINE J. CONFL. RESOL. 2 (May 2002).

rently facing revocation by producers is unknown.¹⁶ Yet, the legal and practical components of this issue are sneakily volatile, and they have spontaneously combusted for other industries, to great impact.¹⁷ This article identifies the potential dangers, and helps defuse them *before* they explode in possible revocation or litigation.

The sales agent plays a key role in the film industry's future.¹⁸ Because the strength of an industry is built on its contracts, and the strength of a contract is built on its stability, potential fissures in the sales agency agreement must be sealed in order for the industry to advance.¹⁹ Part I begins with a current snapshot of the independent film business—with its increased focus on foreign markets, new media, and digital distribution channels—and highlights the sales agent's contributions toward this new frontier.²⁰ We then travel back to the original frontier of American independent film, when the pioneering sales agent laid the foundation for many of the practices employed today.²¹ Part I concludes by exploring the difference between an "agent" as defined by agency law and a "sales agent" according to the film business; dispelling in the process the prevalent confusion about the seemingly similar, but fundamentally different roles of "sales agent" and "distributor."²²

Part II asks the question: Is an agency revocable at will even when it contractually claims to be irrevocable? The answer, to the chagrin of agents, is *yes*; unless the agency creates a "power coupled with an interest."²³ Unfortunately, what this term means and how to achieve the critical coupling has stymied lawyers for two hundred years, since Chief Justice Marshall first coined it in the 1800s.²⁴

16. However, the Independent Film and Television Alliance [hereinafter IFTA], a trade organization devoted to the production, distribution and finance of independent film and television, provides arbitration services to its members, and lists on its website empirical data by year about the types of awards granted. In 2010, there were nine awards involving sales agents. *Arbitration Award Summaries*, IFTA, available at http://www.ifta-online.org/sites/default/files/2010%20Arbitral%20Award%20Summaries_final%20posted_0.pdf (last visited Jan. 25, 2014). In 2011, there were three awards. *Arbitration Award Summaries*, IFTA available at http://www.ifta-online.org/sites/default/files/2011%20Arbitral%20Award%20Summaries_entire%20year%20final.pdf (last visited Jan. 25, 2014).

17. The hotel industry was the subject of tumultuous litigation in the 1990s, when, to everyone's surprise, multi-million dollar hotel management (agency) contracts were permitted to be revoked because there was no "power coupled with an interest." See *infra* Part III.

18. See *infra* Part I.

19. See *infra* Part III (for an example of an industry that did not address its contractual flaws until after it experienced loss).

20. See *infra* Part I.

21. See *infra* Part I.A.

22. See *infra* Part I.B–C.

23. See *infra* Part II.

24. See *infra* Part II.B.

Clues to resolve this conundrum may be found in Part III, in case law from the hotel industry, where large management companies were shocked to find their agency agreements revoked by hotel owners.²⁵ Part IV explains why foreign sales agents, should they find themselves in the unfortunate position of their hotel management counterparts, will likely discover that the remedies available for their revoked agreements may be inadequate. Finally, Part V proposes potential business solutions to the foreign sales agent in contemporary practice.²⁶ Armed with the knowledge of his profession's history, and with lessons learned from a neighboring industry, Sam and his fellow sales agents may confidently ride into the future of foreign film distribution.

I. *Great Treasure Hunt*:²⁷ Fortunes in Foreign

Domestic box office used to be all that mattered.²⁸ But since the foreign box office first pulled ahead of domestic theatrical revenues in 1994,²⁹ the global market has dramatically increased in importance.³⁰ The foreign marketplace for theatrical motion pictures is now more than triple that of the U.S. domestic market, at \$34.7 billion in 2012, compared to \$10.8 billion domestically.³¹ Foreign distribution has become integral to the success of the movie business, and the extent of that success for independent films hinges on the sales agent.³²

The economic downturn has led to a shrinking studio slate, that in turn has created additional opportunities for independently financed

25. See *infra* Part III.

26. See *infra* Part V.

27. GREAT TREASURE HUNT (Continental Industrial Producine 1972). Mark Damon, who starred in this film, was later to help create the template for foreign sales agents. Discussed *infra* Part I.A.

28. BILL DANIELS, DAVID LEEDY & STEVEN D. SILLS, MOVIE MONEY: UNDERSTANDING HOLLYWOOD'S (CREATIVE) ACCOUNTING PRACTICES 49 (2d. ed. 2006).

29. *Id.*

30. *Id.*

31. See 2012 *Theatrical Market Statistics*, MPAA, <http://www.mpa.org/Resources/3037b7a4-58a2-4109-8012-58fca3abdf1b.pdf> (last visited Jan. 25, 2014). While the MPAA's report does not further break down global box office by U.S. and non-U.S. product, a glance at weekly box office reports in any of the U.S. trades will tell a similar tale. See, e.g., *Box Office Results: Worldwide Weekend Estimates*, DEADLINE/HOLLYWOOD, <http://www.deadline.com/box-office-results/> (last visited Jan. 25, 2014).

32. DANIELS ET AL., *supra* note 28, at 52 ("As go-betweens, sales agents fulfill an invaluable role, since a producer will seldom maintain relationships with distributors in any of the several hundred national marketplaces that make up the various foreign territories."). Sales agents can broker domestic deals as well as international, but these deals tend to be less complex, as the U.S. is considered one territory and does not require the same web of specialized relationships as foreign. Interview with Steve Monas, *supra* note 5.

movies, and therefore, for the sales agents who broker those deals.³³ New sales agencies have been quick to capitalize on the changing landscape and attract bigger stars and better material than were previously available to the indies.³⁴ Many of these companies have evolved with the times and diversified their offerings, becoming more than “mere sales agents,” yet, in some cases, retaining the “sales agent” moniker.³⁵ While sales agents have always participated in the financing and distribution, and even the creative guidance of their pictures,³⁶ these hybrid entities have become the norm.³⁷ The modern focus on foreign box office, combined with the new need for more independent product to fill the holes left by the majors, and the emerging viability of VOD and other digital distribution channels, puts the sales agent at the center of the vortex.

Contrary to popular belief, what makes a film “independent” is not its creative sensibility or the size of its budget,³⁸ but how the film is

33. See Dave McNary, *FilmNation: Art, Commerce, and Staying Alive*, VARIETY (May 13, 2013, 8:00 AM), available at <http://www.variety.com/2013/film/features/filmnation-at-5-1200465888/#1/aaron-ryder/> (“[T]he movie business has undergone deep changes, with Hollywood majors focusing more on tentpoles, opening up screen doors to the indie sector, which has seen a steady growth in sales-financing-producing shingles.”).

34. *Id.* (“Those outfits have also seen a greater ability to nab stars and material—once the domain of the studios—and to finance, make and sell serious worldwide hits such as ‘The Hunger Games,’ ‘The Best Exotic Marigold Hotel,’ ‘Taken’ and, of course, the ‘Twilight’ films.”).

35. *Id.* (explaining how FilmNation, like many burgeoning new “super agencies” “can now board a project as a producer, financier, sales agent, international distributor or marketer and at any stage, including development.”).

36. Telephone Interview with Alison Cohen, EVP Bus. & Legal Affairs, FilmNation Entm’t (Mar. 14, 2013). “Alison runs the business and legal affairs department for FilmNation. She works on . . . distribution agreements and bank financings for FilmNation’s international sales division, and development, production and financing agreements for the company’s production division. Prior to joining FilmNation, Alison . . . work[ed] in private practice, representing producers, production companies and film financiers and provid[ed] the production legal on more than 80 movies.” FILMNATION, <http://www.wearefilmnation.com/the-citizens/alison-cohen.html> (last visited Sept. 10, 2013). See also Telephone Interview with Robbie Little, Co-President, The Little Film Co. (Mar 18, 2013). Robbie and Ellen Little co-founded Overseas Media Group in 1980, then First Look Media, and remain shareholders of First Look Studio. Founding members of IFTA, the Littles represented Oscar winning films *TSOTSI* (Miramax Films 2005) and *ANTONIA’S LINE* (First Look International 1995), and have represented, as sales agent, distributor, or executive producer, many other prestigious films. LITTLE FILM Co., <http://www.thelittlefilmcompany.com/About.aspx> (last visited Mar. 24, 2013).

37. See, e.g., Dave McNary & Rachel Abrams, *Indies Prep for Big Landing in Cannes*, VARIETY (Mar. 9, 2013, 4:00 AM), available at <http://www.variety.com/2013/film/international/indies-prep-for-big-landing-in-cannes-1200005926/> (“The indie sector has become populated with success stories such as IM Global, FilmNation, Exclusive Media and Sierra/Affinity, which have all greatly expanded far beyond the role of traditional sales agents and into production and financing.”).

38. Kim Voynar, *Monday Morning Poll: What Makes a Film a Real “Indie” Film*, MOVIEPHONE (Jan. 7, 2008, 11:02 AM), <http://blog.moviephone.com/2008/01/07/monday->

financed and distributed.³⁹ “Films that are *not* independently financed . . . are generally produced by a movie studio”⁴⁰ that finances the film and owns the “worldwide distribution rights to the film in all media.”⁴¹ Therefore, “financing done by means other than *total* studio financing of a motion picture”⁴² is generally referred to as “independent financing,” even when there is *partial* studio involvement.⁴³ While studios have the internal infrastructure to distribute their motion pictures internationally, the independent film business does not, so it relies on foreign distribution deals that are largely brokered by sales agents.⁴⁴

While sales agents may sell films after completion with no foreign pre-sales, typically a sales agent helps a production obtain financing before the picture is made, by pre-selling territories to foreign distributors.⁴⁵ In fact, independent films are financed primarily, and at times, exclusively,⁴⁶ by this process of “banking pre-sales.”⁴⁷ Once the sales agents enter into agreements with foreign distributors on behalf of their producer principals, they assign these agreements to the bank as collateral for the bank’s loan of funding to produce the film.⁴⁸ Because the bank will not be repaid until the distributors’ payments are triggered, usually by delivery of the film to these foreign territories, the bank requires the producer to obtain a completion bond to ensure that the film is delivered on-time, on-budget and to delivery specifications.⁴⁹

Today’s market requires ever more complicated financing deals, including “gap” and “bridge” loans.⁵⁰ Now that pre-sales are generally not covering the entire amount needed for production, a “gap loan,”

morning-poll-what-makes-a-film-a-real-indie-film/ (reporting that many people believe that an “indie” film must be low budget); *but see Film Submission Information 2013, FILM INDEPENDENT SPIRIT AWARDS 4*, <https://s3.amazonaws.com/SpiritAwards/2013+Spirit+Awards+Rules+%26+Regs.pdf> (considering films with budgets as high as \$20 million dollars for eligibility to receive the only national award exclusively meant for “independent” films).

39. DANIELS ET AL., *supra* note 28, at 51–52.

40. Arnold Kopelson, *One Producer's Inside View of Foreign and Domestic Pre-Sales in the Independent Financing of Motion Pictures*, 12 *LOY. L.A. ENT. L. REV.* 1, 5 (1992), available at <http://digitalcommons.lmu.edu/elr/vol12/iss1/2>.

41. *Id.*

42. *Id.*

43. *Id.*

44. DANIELS ET AL., *supra* note 28, at 51–52.

45. MOORE, *supra* note 4, at 23.

46. *Id.* (noting that at the time of publication in 2011, “the level of average worldwide pre-sales has shrunk from about 100% of a film’s budget in the heyday to less than 70% today[.]”).

47. *Id.*

48. *Id.*

49. *Id.* at 81.

50. See McNary & Abrams, *supra* note 37.

where available, will fund the difference of the amount of money pledged in the distribution agreements, and the amount of money needed to fund production. The only basis for this loan is what the sales agent estimates the not-yet-secured future sales to be on the picture.⁵¹ The sales agent's reputation and relationship with the lenders is therefore of utmost importance.⁵² "Since gap loans are more risky than pre-sale loans, the costs go up, typically with up-front fees equal to 10–12% of the loan and interest at three to five points over LIBOR."⁵³

Because these funds don't kick in until close to the start of production, and preproduction funding is often needed to secure talent and pay for other expenses before the start of production, a "bridge" loan may also be required.⁵⁴ These loans are extremely risky, as they are only predicated on "being paid off by the pre-sale or gap lender when the completion bond closes."⁵⁵ To compensate for the risk, these loans charge the highest up-front fees.⁵⁶ This house of cards is all built on Sam's secured agreements, his estimates, his good name, and his relationships with the distributors and lenders, not to mention the producer. Sam and his sales agent cohort are members of a rare breed that is of critical importance to the success of the independent film business.

A. *Pistol Packin' Preacher*:⁵⁷ The Sales Agent Comes to Town

Dino De Laurentiis, "the early wizard of independent film production,"⁵⁸ and Mark Damon, the "nearly legendary international sales agent,"⁵⁹ have both been credited with inventing the pre-sale model.⁶⁰

51. MOORE, *supra* note 4, at 24.

52. Adam Dawtrey, *Superheroes of Sales to the Rescue: Dealmakers Impact Report 2012*, VARIETY (Dec. 10, 2012, 2:00 PM), available at <http://www.variety.com/2012/scene/news/superheroes-of-sales-to-the-rescue-1118063167> ("For the sales companies, the key is to prove they can be trusted to deliver on their promises—to the talent, the buyers, the banks and the equity players.")

53. MOORE, *supra* note 4, at 24. Keep in mind that financing and interest rates are constantly changing. Mr. Moore's report reflects the time of the book's publication in 2011.

54. *Id.*

55. *Id.*

56. *Id.* (typically charging 10% of the loan and interest as high as 1% each week, as of 2011).

57. PISTOL PACKIN' PREACHER (Agata Films 1971).

58. Kopelson, *supra* note 40, at 5.

59. Sydney Levine, *Our Daily ISA (International Sales Agent): Foresight*, INDIEWIRE (Nov. 1, 2010, 3:30 AM), http://blogs.indiewire.com/sydneylevine/our_daily_isa_international_sales_agent_foresight.

60. *Membership*, IFTA, <http://www.ifta-online.org/mark-damon> (last visited Mar. 10, 2013) ("Mark Damon . . . invented the foreign sales business and [is] considered one of the world's leading authorities on international distribution[.]"); *Italian Film Producer Dino De Laurentiis Dies*, THE GLOBE AND MAIL, available at <http://www.theglobeandmail.com/arts/film/italian-film-producer-dino-de-laurentiis-dies/article1241669> (last updated Aug. 23, 2012) [hereinafter THE GLOBE AND MAIL] ("De Laurentiis was one of the first producers to understand the box-office potential of foreign audiences,

Well before their “international financing innovations,”⁶¹ they were already industry cowboys. De Laurentiis, who was a “pivotal figure in postwar Italian New Wave cinema,”⁶² built his business from nothing:

After the war, there was no industry. We lost the war. We had our whole city destroyed. No money. No studio. No film. No camera. No equipment. We would shoot in the street. We had no actors. Nothing But we wanted to do movies. And we did the best movies in the world.⁶³

When his studio, Dinocitta, went bankrupt in the 1970s,⁶⁴ De Laurentiis headed to the United States.⁶⁵ There, he started over, breaking new ground with his American productions.⁶⁶

While De Laurentiis was creating the Italian New Wave in the 1950s, Mark Damon was busy staking his claim on Hollywood.⁶⁷ After he won the Golden Globe for “New Star of the Year”⁶⁸ in Roger Corman’s *House of Usher*,⁶⁹ Damon was lured to Italy by the promise of a role that he did not ultimately attain.⁷⁰ But by the

and helped invent international co-productions, raising money by pre-selling distribution rights outside North America.”).

61. Richard Natale, *Dino De Laurentiis Dies at 91*, VARIETY (Nov. 11, 2010, 5:48 AM), available at <http://www.variety.com/2010/film/news/dino-de-laurentiis-dies-at-91-1118027321/>.

62. THE GLOBE AND MAIL, *supra* note 60. De Laurentiis’s Italian films include BITTER RICE (Lux Film Corp. 1949), LA STRADA (Trans Lux 1954), for which he received an Oscar, and NIGHTS OF CABIRIA (Lopert Pictures Corp. 1957). *Dino De Laurentiis*, IMDb, <http://www.imdb.com/name/nm0209569/> (last visited Jan. 25, 2014).

63. Natale, *supra* note 61.

64. *See id.*

65. *See* THE GLOBE AND MAIL, *supra* note 60.

66. De Laurentiis’s American films include SERPICO (Paramount Pictures 1973); THREE DAYS OF THE CONDOR (Paramount Pictures 1975); KING KONG (Paramount Pictures 1976); CONAN THE BARBARIAN (Universal Pictures 1982); DUNE (Universal Pictures 1984); and U-571 (Universal Pictures 2000).

67. *See* LINDA SCHREYER WITH MARK DAMON, FROM COWBOY TO MOGUL TO MONSTER: THE NEVERENDING STORY OF FILM PIONEER MARK DAMON 42 (2008) [hereinafter COWBOY] (describing how Groucho Marx discovered Mark Damon in an amusement park on La Cienega in 1949. Groucho referred the sixteen-year-old Damon to his brother Gummo, who by then had left the Marx Brothers act and become a talent agent.). Damon’s work in television includes *Alfred Hitchcock Presents* (1956), *National Velvet* (1960) and *Zorro* (1959–61); his American films include HOUSE OF USHER (American International Pictures 1960) for which he received a Golden Globe Award, and BEAUTY AND THE BEAST (United Artists 1962). Damon and De Laurentiis briefly crossed paths when De Laurentiis cast Damon in WAR AND PEACE (Paramount Pictures 1956), before the director nixed his choice. *See* COWBOY, at 105–06.

68. *Mark Damon*, HOLLYWOOD FOREIGN PRESS ASS’N, <http://www.hfpa.org/browse/?param=/member/29647> (last visited Jan. 9, 2014).

69. HOUSE OF USHER (American International Pictures 1960).

70. The director Luchino Visconti summoned Damon to play the lead in BOCCACCIO ’70 (Embassy Pictures 1962), but it was rumored that Visconti’s offer was actually motivated by Damon’s resemblance to the director’s ex, Alain Delon. *See* COWBOY, *supra* note 67, at 273–79.

1970s, Damon had become a bona fide “Spaghetti Western” star in Italy.⁷¹ When the roles dried up,⁷² Damon “knew [he] had to do something serious in order to keep [his wife] in the style to which [he] knew she wanted to become accustomed.”⁷³ So he became a distributor.⁷⁴

Like the cowboys of the American and the Spaghetti Westerns, Damon and De Laurentiis reinvented themselves after each adversity they faced. Perhaps because of the literal borders they crossed, they were able to build “a bridge between [the] old school film business and today’s version of the film business.”⁷⁵ Damon saw that “[i]n the 1970s the most popular films in Europe were American[,] [b]ut the only American films that were available to independent overseas distributors . . . were ‘B’ or ‘C’ movies[,]” since “[a]ll the ‘A’ American movies, the biggest money makers, went to distribution wings of major studio chains”⁷⁶ Yet, in spite of this monopoly, the studios failed to maximize foreign profit, because their marketing campaigns were homogenous and irreflective of their audience’s cultural diversity.⁷⁷ Furthermore, “the majors had a certain power in what they called the key cities, but the independents went all through the provinces as well . . . They got a movie to show up *everywhere*, while the majors never bothered with the provinces, giving up about a third of their potential revenues.”⁷⁸

Damon’s plan to nab “A” movies for his bosses first took flight with *One Flew Over the Cuckoo’s Nest*,⁷⁹ a sure thing, he thought, since he and Jack Nicholson were friends and former roommates.⁸⁰ Sadly, his

71. Damon’s Italian films include *JOHNNY ORO* (MGM 1966); *JOHNNY YUMA* (Atlantic Releasing Corp. 1966); *DEATH DOES NOT COUNT THE DOLLARS* (a.k.a. *DEATH AT OWELL ROCK and NO KILLING WITHOUT DOLLARS*) (Koch Media 1967), *PISTOL PACKIN’ PREACHER* (Agata Films 1971); and *GREAT TREASURE HUNT* (Continental Industrial Produzione 1972). Sergio Corbucci’s classic film, *DJANGO* (Horse Man 1966), was written for Damon, but when Damon was held up by another film, Corbucci “cast a guy with piercing blue eyes, whom they discovered working at a gas station His name was Franco Nero.” *COWBOY*, *supra* note 67, at 361.

72. *Id.* at 403.

73. *Id.* at 407.

74. *Id.* at 404 (“Years later, Mark would tell the *New York Times*, ‘after I produced a film that wasn’t even distributed I decided to become a distributor. And that was so fascinating I left acting.’ In reality, it was not quite so easy.”) *Cf.* Telephone Interview with Mark Damon, CEO and Chairman, Foresight Unlimited (Mar. 20, 2013) (describing his position after he left acting as more of a sales agent than a distributor).

75. Levine, *supra* note 59.

76. *COWBOY*, *supra* note 67, at 407.

77. Telephone Interview with Mark Damon, *supra* note 74; *cf.* Telephone Interview with Robbie Little, *supra* note 36 (arguing that the the modern Internet age has led to *less* finely tuned campaigns, because the film’s title and look and feel are now expected to be the same across global markets).

78. *COWBOY*, *supra* note 67, at 410 (emphasis added).

79. *Id.* at 411.

80. *Id.*

hopes were grounded when the producer, Saul Zaentz, revoked their oral agreement “[b]ecause I thought about it and doubted I’d ever see a dime from a small foreign distributor that I don’t know. While if I sell the foreign rights to a major studio at least I’ll see my money.”⁸¹ This failure provided the impetus for Damon to organize a network of independent distributors, with a plan: “Next time we’ll buy in force. We’ll make an offer that represents six, seven, eight different countries and I’ll assure Hollywood producers that we all know how to report like the studios.”⁸²

Like Damon, De Laurentiis also “established a network of independent film distributors in every country,”⁸³ but to a different end. De Laurentiis wanted to *pre-sell* “to these distributors the rights to distribute *his* films in their territories. This enabled him to assemble a package of contracts from distributors in foreign territories, from which he gained cash to make his films.”⁸⁴ De Laurentiis’s marketing savvy was a key component in his successful sales strategy.⁸⁵ He appealed to the cultural differences of each territory, and created excitement “by wooing the press, throwing splashy events at international festivals such as Cannes, and relentlessly beating the PR drum.”⁸⁶

The trails blazed by Damon and De Laurentiis are still followed by modern sales agents worldwide to secure billions of dollars annually.⁸⁷ Although neither man was technically a sales agent at the time of his innovations,⁸⁸ both men made major contributions to the way independent films are marketed and sold.⁸⁹ Sales agents may still at times be “regarded as a bunch of renegades dragging a suitcase of garish posters from one market to the next.”⁹⁰ Yet in part because of this dynamic duo,

81. *Id.*

82. *Id.* at 413.

83. Kopelson, *supra* note 40, at 5.

84. *Id.*

85. Natale, *supra* note 61.

86. *Id.*

87. Telephone Interview with Roman Kopelevich, CEO and Founder, Red Sea Media (Mar. 14, 2013) (confirming the influence that both men continue to have on sales agents and the industry). Prior to founding Red Sea Media, Roman worked with Mark Damon as Director of Distributor Services at Media 8 Entertainment. *Id.* Roman was also “Director of International Sales at Morgan Creek . . . , SVP of Worldwide Sales[,] and oversaw Bleiberg Entertainment’s international sales slate and film library” RED SEA MEDIA, <http://www.redseamediainc.com/romansbio.aspx> (last visited Jan. 8, 2014); *see also* *What is an Independent?*, IFTA, <http://www.ifta-online.org/what-independent> (last visited Mar. 24, 2013) (estimating the revenue from independent film sales at \$4 billion a year).

88. *Cf.* Telephone Interview with Mark Damon, *supra* note 74 (describing his first position in distribution as more of a sales agent than a distributor).

89. Interview with Steve Monas, *supra* note 3; Telephone Interview with Roman Kopelevich, *supra* note 87.

90. Dawtrey, *supra* note 52; *accord* Telephone Interview with Mark Damon, *supra* note 74; Telephone Interview with Roman Kopelevich, *supra* note 87; Telephone

sales agents are increasingly viewed as “production powerbrokers, with the right combination of creative skills, financial ingenuity and international relationships to make serious movies happen.”⁹¹ The sales agent has evolved into a “foreign sales mogul.”⁹²

*B. They Call Him Veritas:*⁹³ The Agent as Fiduciary

As renegade as the Sales Agent may otherwise be,⁹⁴ if he is acting as an agent as that term is meant under agency law,⁹⁵ then he is also a fiduciary.⁹⁶ Under agency law, “the fiduciary relationship . . . arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”⁹⁷ Justice Cardozo most memorably defined the fiduciary duty, in language that could itself be dialogue from a spaghetti western: “[N]ot honesty alone, but the *punctilio* of an honor the most sensitive.”⁹⁸

In California, every contract contains an implied duty of good faith and fair dealing,⁹⁹ but this contractual duty does not require Cardozo’s “*punctilio* of honor.”¹⁰⁰ A fiduciary relationship exists only “between parties to a transaction wherein one of the parties is in duty bound to act with the *utmost* good faith for the benefit of the other party.”¹⁰¹

Interview with Robbie Little, *supra* note 36. However, the “renegade” Mark Damon famously needed only one such poster to pre-sell WILD ORCHID (Triumph Releasing Corp. 1989) in Cannes, after conceiving the concept for the film, writing a three-page synopsis and securing a commitment from Mickey Rourke, all within 48 hours. *See COWBOY*, *supra* note 67, at 453–54.

91. Dawtrey, *supra* note 52.

92. *See id.* (“As the major studios focus on making fewer, bigger tentpoles, thus reducing their title output, *foreign sales moguls* are moving into the void and playing an increasingly central role in Hollywood dealmaking.”) (emphasis added).

93. *THEY CALL HIM VERITAS* (Medusa Distribuzione 1972).

94. Dawtrey, *supra* note 52.

95. *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003) (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)); *accord United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010).

96. *Wolf v. Super. Ct.*, 130 Cal. Rptr. 2d 860, 863 (2003) (“Traditional examples of fiduciary relationships in the commercial context include . . . agent/principal.”).

97. *Batzel* at 1035; *accord Bonds* at 506. *See also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (“(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. (2) The one for whom action is to be taken is the principal. (3) The one who is to act is the agent.”).

98. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (emphasis added).

99. *See Wolf*, 130 Cal. Rptr. 2d at 864 (citing, *e.g.*, *Nelson v. Abraham*, 177 P.2d 931, 934 (Cal. 1947)).

100. *See id.* at 864 (quoting *Meinhard*, 164 N.E. at 546 (emphasis added)).

101. *See id.* at 863 (quoting *Herbert v. Lankershim*, 71 P.2d 220, 257 (Cal. 1937)).

While agents owe a fiduciary duty to their principals,¹⁰² parties to a contract without an agency relationship owe no such heightened duty to each other.¹⁰³

The fiduciary relationship was further examined in the context of the film business in *Wolf v. Superior Court*.¹⁰⁴ There, the writer of the underlying novel for *Who Framed Roger Rabbit*¹⁰⁵ unsuccessfully sued Disney for breach of an alleged fiduciary duty to him to account for merchandising royalties.¹⁰⁶ The court held that neither contingent compensation nor distribution agreements give rise to a fiduciary relationship, but are instead merely examples of contractual relations.¹⁰⁷ Although the claim was not based on an agency theory, the court's definition of the fiduciary relation in the context of the film industry is applicable to the sales agent:

[A] "fiduciary relation" in law is ordinarily synonymous with a "confidential relation." It is founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed.¹⁰⁸

Wolf further clarified that "[t]raditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal."¹⁰⁹ Therefore, by *Wolf*'s definition, sales agents hold traditional fiduciary duties.

However, in a recent unpublished decision by the California Court of Appeals,¹¹⁰ the question of whether a sales agent is actually an agent according to agency law, or a unique industry term sharing none of the legal qualities of its name, appears to be far from settled: "In the film industry, the term 'sales agent' typically describes an entity that sells movies to distributors. It does not mean that the entity operates as an actual agent."¹¹¹ This case did not deal with fiduciary

102. *See id.* at 863.

103. *See id.* at 866.

104. 130 Cal. Rptr. 2d 860 (2003).

105. WHO FRAMED ROGER RABBIT (Touchstone Pictures 1988).

106. *Wolf*, 130 Cal. Rptr. 2d at 864 ("The contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship where one would not otherwise exist.").

107. *See id.* at 866.

108. *Id.* at 863 (citation omitted).

109. *Id.* (citations omitted).

110. E1 Films Can. Inc. v. Syndicate Films Int'l, No. B236146, 2013 WL 153347 (Cal. Ct. App. Jan. 15, 2013).

111. *Id.* at *1.

duties,¹¹² but it follows that a sales agent in film who is not an “actual agent” would also not be a fiduciary. While this case holds no precedential value because it is unpublished, it nevertheless provides insight into the ongoing confusion about the indiscriminate manner in which this term is used, and the problems this use may cause. After all, if “an entity that sells movies to distributors”¹¹³ is doing so on the principal’s behalf and subject to the principal’s control, it *is* still an agent under agency law.¹¹⁴

C. *Face to Face*:¹¹⁵ Sales Agent vs. Distributor

When a sales agent is not an agent, it may be a distributor. “It is important to distinguish between a distributor and a foreign sales agent. If a . . . company is granted the *rights* to the film for the foreign markets, that company is the distributor.”¹¹⁶ The distributor owns the copyright for a specified period, in the territories and media conveyed in the exclusive license or distribution agreement.¹¹⁷ What it means to own the copyright is that the distributor actually owns one or more of the exclusive rights in the Copyright Act’s divisible bundle of rights.¹¹⁸

112. This was a breach of contract claim, in which the sales agent, Syndicate Films (SFI), was unable to disclaim liability for a contractually owed refund by claiming that it was signing as an agent of a disclosed principal. *Id.* at *1, *4–5. The determination that the appellant was not an agent and thus was principally liable on the contract was due to many factors, including the interpretation of the term “sales agent” as it relates to film, as well as evidence of multiple corporate fictions that were erected to avoid liability, and parol evidence showing that the appellant did not intend to enter into the agreements as an agent. *Id.*

113. *Id.* at *1.

114. *Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir. 2003) (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)); *accord* *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010); *see also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (“(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. (2) The one for whom action is to be taken is the principal. (3) The one who is to act is the agent.”).

115. *FACE TO FACE* (Explosive-Media 1967).

116. Louise Levinson, *FILMMAKERS AND FINANCING: BUSINESS PLANS FOR INDEPENDENTS* 184 (4th ed. 2004).

117. 17 U.S.C. § 101 (“Copyright owner,” with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.”)

118. 17 U.S.C. § 106 (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the

The advantages of copyright ownership are many. First, there is a presumption of copyright validity, when the copyright is properly registered with the Copyright Office.¹¹⁹ Second, when the action is copyright-based, and not merely an action for a breach of contract, the copyright holder may bring suit in federal court.¹²⁰ The availability of statutory damages for copyright infringement is another major benefit¹²¹ because actual damages are often too speculative to recover on breaches of contract for future sales.¹²² Finally, as Sam discovered when he tried to obtain a credit line, banks lend to copyright owners because the banks can perfect a security interest against the copyright to hold as collateral for the loan.¹²³

Sam may have been a victim of the prevailing confusion about the difference between sales agents and distributors.¹²⁴ The Independent Film and Television Alliance (“IFTA”) strongly warns its members that “the IFTA Sales Agency Forms are representation agreements for a sales agency of a Picture and are not distribution agreements, nor do they grant or convey any ownership in and to the Picture.”¹²⁵ Yet others, in an attempt to simplify the concepts, conflate the terms.¹²⁶ For example, one online resource for independent filmmakers advises its members that typical sales agents are “more like intermediary distrib-

copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

119. 17 U.S.C. § 410(c) (“[R]egistration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright. . . .”).

120. See *Scholastic Entm’t, Inc. v. Fox Entm’t Grp., Inc.*, 336 F.3d 982, 985–89 (9th Cir. 2003).

121. 17 U.S.C. § 504(c) (\$750–\$30,000 per infringement, or up to \$150,000 per willful infringement). However, statutory damages are only available if the copyright is timely registered. See John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L. J. 1397–1457 (2009), available at <http://ssrn.com/abstract=1558981>.

122. See *infra* Part IV.B.

123. See MOORE, *supra* note 4, at 74 (“A security interest gives the secured party a claim to specific property . . . in order to enforce a contractual obligation of another party. Security interests are not just for loans—any contractual obligation can be secured.”); see also *In re Peregrine Entm’t, Ltd.*, 116 B.R. 194, 198–99 (Bankr. C.D. Cal. 1990) (requiring recordation with the Copyright Office to perfect a security interest in copyright, and preempting any state recordation system under the Copyright Act).

124. See, e.g., Orly Ravid, *One Key Point on Film Sales*, THE FILM COLLABORATIVE (Nov. 13, 2012), <http://www.thefilmcollaborative.org/blog/2012/11/one-key-point-on-film-sales/>; MARK LITWAK, RISKY BUSINESS: FINANCING & DISTRIBUTING INDEPENDENT FILMS 187 (2004).

125. Guide to IFTA Model Sales Agency Agreements 3 (emphasis omitted).

126. See, e.g., Ravid, *supra* note 124; LITWAK, *supra* note 124, at 187.

utors”¹²⁷ that “license all the rights”¹²⁸ themselves “and then re-license them per territory or in a worldwide deal.”¹²⁹ An IFTA arbitrator and expert¹³⁰ further commented that “[a] foreign sales agent is essentially a distributor that licenses a picture to other distributors.”¹³¹ Another California decision¹³² mixed the terms when it discussed one entity granting another “the exclusive *right to distribute* the film under an ‘International Sales Agency Agreement.’”¹³³

Contributing to the unclarity, the issue of ownership or distributorship versus agency is not necessarily binary.¹³⁴ A party can have dual roles, owning part of a project but also acting as a sales agent with respect to that project.¹³⁵ However, there are several distinctions that can be drawn between sales agents and distributors, and between different types of sales agents. The first distinction involves rights. The classic “middleman” sales agent has contractual rights, which are not *ownership* rights, but are rights nonetheless.¹³⁶ On the other hand, the distributor has more substantial rights, including copyright protection.¹³⁷

The economic structure of the relationship also creates a distinction. A party may choose to just take a fee, which is closer to the strict “agent” model, with no rights in the picture. Or, a party may take an “equity” stake in the film—which may be true copyright ownership, as with a distributor, or a contractual right, as with an agent.¹³⁸ “The indie sector has become populated with success stories”¹³⁹ about a supposedly¹⁴⁰ new breed of sales agent that has “greatly expanded be-

127. Ravid, *supra* note 124.

128. *Id.*

129. *Id.*

130. See *Biography: Mark Litwak*, IFTA, available at <http://ifta-online.org/sites/default/files/Litwak.pdf> (last visited Jan. 25, 2014).

131. LITWAK, *supra* note 124, at 187. This statement was clearly an oversimplification intended for non-lawyer filmmakers, but it exemplifies the existing confusion.

132. Confidential Report, LLC v. Paragon Film Grp., No. B215101, 2010 WL 1510105 (Cal. Ct. App. Apr. 16, 2010).

133. *Id.* at *1 (emphasis added).

134. Interview with Steve Krone, *supra* note 5.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See McNary & Abrams, *supra* note 37.

140. Telephone Interview with Alison Cohen, *supra* note 36 (explaining that ownership is nothing new); accord FILMNATION, <http://www.wearefilmnation.com/the-nation> (last visited Sept. 10, 2013) (“FilmNation can board a project in a myriad of ways (as a producer, financier, sales agent, international distributor, or marketer) and at any stage in a film’s lifespan including development.”); see also Telephone Interview with Michael Meyer, EVP Bus. & Legal Affairs, Lions Gate Films, Inc. (Mar. 14,

yond the role of traditional sales agents and into production and financing.”¹⁴¹ It is more desirable to many sales agents to “invest and help producers make their projects”¹⁴² than to just “get[] a fee,”¹⁴³ because of the perception that sales agents “don’t have any *rights*.”¹⁴⁴

Although “[o]wning a slice of the production pie”¹⁴⁵ may be “key to surviving today’s tough film market[,]”¹⁴⁶ ownership interest goes against the traditional definition of agency.¹⁴⁷ This is because an owner has the ability to control one’s ownership interests directly,¹⁴⁸ no longer “on the principal’s behalf and subject to the principal’s control.”¹⁴⁹ The determination in *E1 Films Canada*—that Syndicate Films acted on its own behalf—led in part to the conclusion that it must not have acted as an “agent” under agency law.¹⁵⁰

Finally, some people use the term “distributor” to mean someone who has actual “on the ground” distribution capability.¹⁵¹ Others who own rights but must sub-distribute to those with actual distribution capability can be thought of as “rights traders.”¹⁵² These rights traders are distributors and not sales agents in the sense that they own the rights. However, they are sales agents (though not technically) and not distributors, in the sense that they have to resell to effect actual distribution.¹⁵³

2013); accord *Key Lines of Business*, LIONSGATE, <http://www.lionsgate.com/corporate/> (“Lionsgate is a leading global entertainment company with a strong and diversified presence in motion picture production and distribution, television programming and syndication, home entertainment, family entertainment, digital distribution, new channel platforms and international distribution and sales.”) (last visited Mar. 14, 2013). Lionsgate also acts as a sales agent to some projects. Telephone Interview with Michael Meyer, EVP Bus. & Legal Affairs, Lions Gate Films, Inc. (Mar. 14, 2013).

141. McNary & Adams, *supra* note 37.

142. Martin Dale, *International Sales Agents Steer the Market*, VARIETY (May 19, 2012, 4:00 AM), available at <http://www.variety.com/2012/film/news/int-l-sales-agents-steer-the-market-1118053826/>.

143. Andrew Horn, *Sales Panel Pushes Pix Stakes: Ownership Has Its Benefits, Agents Say*, VARIETY (Feb. 12, 2011, 2:15 PM), available at <http://www.variety.com/article/VR1118032122?refcatid=3534> (“Panelists included Glen Basner of FilmNation, Irina Ignatiew of Telepool, Paul Brett of Prescience, Alex Walton of Exclusive Film, and Ben Roberts of Protagonist Pictures”).

144. *Id.* (emphasis added).

145. *Id.*

146. *Id.*

147. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (2006) (“A purchaser is not ‘acting on behalf of’ a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent.”).

148. *See id.*

149. *Id.*

150. *E1 Films Can. Inc. v. Syndicate Films Int’l*, No. B236146, 2013 WL 153347, at *5 (Cal. Ct. App. Jan. 15, 2013).

151. Interview with Steve Krone, *supra* note 5.

152. *Id.*

153. *Id.*

Ownership/distribution may confer privileges,¹⁵⁴ but it also creates obligations.¹⁵⁵ For example, under the Digital Millennium Copyright Act (“DMCA”),¹⁵⁶ distributors and licensees are responsible for assuming residuals payments for films under collective bargaining agreements such as the Screen Actors Guild, while sales agents are not.¹⁵⁷ Further, the Copyright Act requires transfers of copyright ownership, or exclusive licenses, to be in writing,¹⁵⁸ but it does not require the transfer to include any “magic words.”¹⁵⁹ The result is that an agreement may be titled a “Sales Agency Agreement” but still contain language that sounds like a grant of rights,¹⁶⁰ and thus require compliance with the DMCA.¹⁶¹ This type of hybrid agreement may also have tax consequences, because the *agent’s* citizenship will not be considered for purposes of complying with a foreign tax treaty, but a *distributor’s* will.¹⁶²

Professional preferences go both ways.¹⁶³ Some people that are known as sales agents prefer to take rights to the films that they rep-

154. Distributors with copyright ownership hold exclusive licenses. See 17 U.S.C. § 101 (“A ‘transfer of copyright ownership’ is an assignment, mortgage, *exclusive license*, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, *but not including a nonexclusive license.*”) (emphasis added). Distributors are copyright owners of one or more of the exclusive rights comprised in a copyright. See *id.* at §§ 101, 106.

155. See 28 U.S.C. § 4001(a)(1).

156. *Id.*

157. *Id.* (“In the case of a transfer of copyright ownership . . . in a motion picture . . . that is produced subject to 1 or more collective bargaining agreements . . . the transfer instrument shall be deemed to incorporate the assumption agreements applicable to the copyright ownership being transferred that are required by the applicable collective bargaining agreement, and the transferee shall be subject to the obligations under each such assumption agreement to make residual payments . . .”).

158. 17 U.S.C. § 204(a) (“A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”).

159. Radio Television Espanola S.A. v. New World Entm’t, Ltd., 183 F.3d 922, 927 (9th Cir. 1999).

160. See Confidential Report, LLC v. Paragon Film Grp., No. B215101, 2010 WL 1510105 (Cal. Ct. App. Apr. 16, 2010).

161. See 17 U.S.C. § 4001.

162. Interview with Maggie Megaw, EVP, Bus. Affairs, Inc. & President of Indie-Works, in L.A., Cal. (Feb. 24, 2013). “Maggie has negotiated and closed hundreds of domestic and foreign distribution agreements for Grindstone Entertainment Group, Wrekin Hill Entertainment, The Little Film Company, Franchise Pictures, Signature Pictures International, and Inferno Distribution. Under her supervision, the Indie-Works team reviews and makes delivery of over 50 titles per year to Lions Gate Entertainment, Sony, Paramount, Fox and others.” BUS. AFF. INC., <http://www.bizaffairs.com/staff.html> (last visited Feb. 24, 2013).

163. Telephone Interview with Mark Damon, *supra* note 74 (prefers distributor); Telephone Interview with Robbie Little, *supra* note 36 (no preference, depends on

resent, and therefore actually act as distributors.¹⁶⁴ Others prefer *not* to take rights, because these rights may come with added responsibilities, such as residuals assumptions, minimum guarantee payments to the filmmaker (“MGs”), and increased exposure to liability from potential claims involving the film.¹⁶⁵ Some sales agents have operated as distributors in the past and are now technically sales agents without rights in their films, yet consider themselves “Distr-Agents,” because they perform functions for their films that might have previously been the provenance of the distributor, such as organizing theatrical release, festival participation, and direct contact with the audience.¹⁶⁶ Many operations offer both distribution *and* sales agency deals.¹⁶⁷ And others, aware that they are “middlemen who could be cut out at any time,”¹⁶⁸ are moving toward more ownership of their projects.¹⁶⁹

II. *The Big Gundown*:¹⁷⁰ Irrevocable or Revocable at Will?

Sam discovered that he is indeed a middleman that can be cut out at any time. Even an agency agreement that purports to be irrevocable is nevertheless revocable at the will of the principal, if the the agent does not have a power coupled with an interest in the agency to protect it from revocation.¹⁷¹ While performance clauses specify what is expected of Sam under the agreement and set forth events that would trigger the principal’s legal *right* to terminate,¹⁷² the principal retains the *power* to terminate the contract for any reason whatsoever.¹⁷³ Sam

the project); Telephone Interview with Michael Meyer, *supra* note 140 (mostly distribution deals, but sometimes prefers agency relationship); Telephone Interview with Roman Kopelevich, *supra* note 87 (currently mostly agent, but prefers ownership interest); Telephone Interview with Alison Cohen, *supra* note 36 (prefers to be an agent and not take rights as a licensor).

164. Telephone Interview with Mark Damon, *supra* note 74.

165. Telephone Interview with Alison Cohen, *supra* note 36. While residuals assumptions are typically contracted back to the producer, the ultimate duty remains with the distributor, per the DMCA, should the producer default or go bankrupt. Interview with Steve Monas, *supra* note 3. In addition, sales agencies sometimes pay MGs, though this is relatively rare; and distributors sometimes do not, though they more commonly do. Interview with Steve Krone, *supra* note 5.

166. Telephone Interview with Robbie Little, *supra* note 36.

167. Telephone Interview with Michael Meyer, *supra* note 140.

168. Telephone Interview with Roman Kopelevich, *supra* note 87.

169. *Id.*

170. *THE BIG GUNDOWN* (Box Office Spectaculars (II) 1966).

171. *See, e.g.,* Hunt v. Rousmanier’s Adm’rs, 21 U.S. 174, 174 (1823); Elevator Operators & Starters’ Union Local 117 v. Newman, 186 P.2d 1, 5 (Cal. 1947); CAL. CIV. CODE § 2356(a)(1) (West 1985 & Supp. 2013).

172. Telephone Interview with Alison Cohen, *supra* note 36; *accord* Telephone Interview with Robbie Little, *supra* note 36.

173. Roth v. Moeller, 197 P. 62, 63–64 (Cal. 1921).

may attempt to sue his principal for breach of contract if she revokes against an irrevocable provision, but remedies are likely to be inadequate.¹⁷⁴ Sam may not, however, stop his principal from terminating or revoking their ostensibly irrevocable agreement.

*A. Once Upon a Time in the West:*¹⁷⁵ Custom and Practice

The entertainment industry is notorious for invoking “custom and practice” when confronted with a legal or contractual dilemma.¹⁷⁶ But “just because studios and networks follow certain practices does not make those practices legal.”¹⁷⁷ Business practices that have not been defined and tested in the courts may face surprising results once they do enter the fray. For example, as recently as 1997, a California District Court questioned the validity of the “negative pickup agreement,”¹⁷⁸ one of the more common types of distribution deals available to independent film, because the parties were unable to “cite any *case authority* recognizing or discussing such an arrangement.”¹⁷⁹

This tension between business and legal practice plays out in foreign sales agency agreements. In the early days, when Dino De Laurentiis and Mark Damon were creating a new model for film distribution and sales, they were mostly just “making it up as we went along.”¹⁸⁰ At that time, there were no lawyers involved with structuring these agreements.¹⁸¹ The involvement of lawyers is a more recent development, and possibly more American.¹⁸² According to one international “Distr-Agent,”¹⁸³ the United States is still more “lawyered-up”

174. See, e.g., *Hunt*, 21 U.S. at 174; *Elevator Operators*, 186 P.2d at 5; CAL. CIV. CODE § 2356(a)(1).

175. ONCE UPON A TIME IN THE WEST (Paramount Pictures 1968).

176. See Roman M. Silberfeld & Bernice Conn, *The Red and the Black: Studios Have Suffered Recent Court Setbacks in Their Efforts to Defend Hollywood Accounting*, L.A. LAW, May 2011, at n.15 (“Industry custom and practice is one of the primary defenses asserted by studios and networks in profit participation cases.”).

177. *Id.* (citing *Ladd v. Warner Bros. Entm’t, Inc.*, 110 Cal. Rptr. 3d 74, 82 (2010)).

178. See MOORE, *supra* note 4, at 8 (defining a negative pickup as “[a]n agreement whereby a studio acquires substantial rights (typically, at least Domestic Rights) in a motion picture in consideration for a fixed payment due upon Delivery plus Royalties.”). The “bank loans to a special-purpose entity formed to produce the film, and the studio commits to pay the cost of the film on delivery, repaying the bank.” *Id.* at 70.

179. *LeFlore v. Grass Harp Prods., Inc.*, 67 Cal. Rptr. 2d 340, 344 (1997) (emphasis added).

180. Telephone Interview with Mark Damon, *supra* note 74; accord Telephone Interview with Robbie Little, *supra* note 36.

181. Telephone Interview with Mark Damon, *supra* note 74; accord Telephone Interview with Robbie Little, *supra* note 36.

182. Telephone Interview with Robbie Little, *supra* note 36.

183. *Id.* (explaining his coined term as encompassing the full range of what he believes that sales agents do today).

than Europe.¹⁸⁴ The common perception is that while lawyers may provide “finesse” to an agreement,¹⁸⁵ “if you listen to your lawyer, you’ll never do a deal.”¹⁸⁶ This attitude epitomizes Judge Kozinski’s characterization of the film business in *Effects Associates*,¹⁸⁷ that “Moviemakers do lunch, not contracts.”¹⁸⁸

The custom and practice of an industry may help determine the meaning of its contracts, but it does not override the law.¹⁸⁹ Contracts are important in business dealings, but the freedom to contract is subject to regulation.¹⁹⁰ A contractual provision to which both parties freely agreed is nevertheless invalid “if legislation provides that it is unenforceable.”¹⁹¹ One example of such legislation, California Civil Code Section 2356, states that “[u]nless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by. . . [i]ts revocation by the principal.”¹⁹² Therefore, in California, an agency agreement’s “irrevocable” term is made unenforceable by statute¹⁹³ as well as proscribed by common law.¹⁹⁴ While the principal retains the *power* to revoke at will, if the parties have agreed to an irrevocable contract, then the contractual *right* to revoke has been waived:

Save in the case of an agency coupled with an interest, a principal has the *power* to revoke an agent’s authority at any time before the agent has completed performance. A principal may, however, curtail his *right* of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he still retains the *power* to terminate the agency, and the termination

184. *Id.*

185. Telephone Interview with Mark Damon, *supra* note 74.

186. Telephone Interview with Robbie Little, *supra* note 36.

187. *Effects Associates, Inc., v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990).

188. *Id.*

189. *Boehm v. Spreckels*, 191 P. 5, 7 (Cal. 1920) (“The allegation that it was the custom and usage of the publishers . . . amounts to nothing more than a statement that it was the opinion of such publishers” But “[t]he question . . . is to be determined by the principles of law and not by the opinions or customs of persons who deal with such matters.”).

190. *See Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911) (“[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.”); *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (“This right of contract . . . is . . . subject to certain limitations which the state may lawfully impose in the exercise of its police powers.”).

191. RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

192. CAL. CIV. CODE § 2356(a)(1) (West 1985 & Supp. 2013).

193. *Id.*

194. *See, e.g., Roth v. Moeller*, 197 P. 62, 63–64 (Cal. 1921). The Supreme Court created binding national precedent. *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174 (1823).

cannot be prevented by the agent, but a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal *right* of the agent, just as in the case of any other breach of contract.¹⁹⁵

Therefore, unless the agency is a power coupled with an interest, the *power* to revoke remains with the principal, regardless of whether the *right* to revoke has been waived by a contractual clause designating the agreement as irrevocable.¹⁹⁶ Since specific performance is not available for personal services contracts such as agency agreements, a breach of this contractual right is only recoverable in monetary damages.¹⁹⁷ At times, sales agency damages may be easily ascertainable, and at others, they may be subject to acceptable uncertainty.¹⁹⁸ However, damages stemming from projected sales may also be deemed too speculative to award.¹⁹⁹ Ironically, because most sales agents are careful to *not* promote reliance on their projected estimates in case of shortfalls,²⁰⁰ this self-protection may preclude them from recovering on the basis of those same vague figures.²⁰¹

B. *Compañeros*:²⁰² Power Coupled With an Interest

“The problem of what constitutes a ‘power coupled with an interest’”²⁰³ has plagued lawyers for almost 200 years, since Chief Justice Marshall first attempted to define the term in the landmark Supreme Court decision *Hunt v. Rousmanier’s Administrators*.²⁰⁴ One hundred years later, the courts were *still* trying to decipher his meaning:²⁰⁵

It is most difficult to frame an all embracing definition of a power coupled with an interest. Most of the authorities on the subject

195. *Roth*, 197 P. at 63–64 (emphasis added) (citations omitted).

196. *Id.*

197. See *infra* Part IV.A.

198. Interview with Steve Krone, *supra* note 5.

199. See *infra* Part IV.B.

200. Jeffrey Sipe, *Indies Embrace Small World: Sales Agents Face Environment that Rewards Volume, Expertise*, VARIETY (Feb. 7, 2011, 4:00 AM), available at <http://www.variety.com/article/VR1118031223?refcatid=3534> (“If you give big numbers before going to market and then don’t reach them, it leaves you with some very unhappy producers.”); accord Complaint ¶ 14, *Mime Investments, LLC v. GK Films, LLC*, No. BC494891 (L.A. Cnty. Super. Ct. Oct. 31, 2012) (alleging that defendant sales agents fraudulently misrepresented projected estimates).

201. Projections remain speculative even when the sales agent is specific about the estimates. See *infra* IV.B.

202. *COMPÑEROS* (GSF 1970).

203. Note, *Powers Coupled with an Interest*, 39 YALE L.J. 110, 111 (1929–30) [hereinafter *Yale Note*].

204. *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174 (1823).

205. See *Lane Mortg. Co. v. Crenshaw*, 269 P. 672, 679 (Cal. 1928).

seem to conclude that such a power is recognized by the law, and when found to exist in any given case it is not revocable at the will of any principal and even survives his death. The question ever present is as to *when* such a power exists, and what conditions must be shown to manifest its existence. Many of the authorities approach the subject as though it were a thesis, and treat it in such an academic way as to be confusing. Much is said concerning what is *not* a power coupled with an interest, with little attempt at exactness concerning what actually constitutes the same.²⁰⁶

Fast forward another hundred years to the present day, and lawyers are *still* confused.²⁰⁷ If lawyers do not understand what it means to have a power coupled with an interest, what hope is there for Sam, or for film-makers with whom he contracts?²⁰⁸

Justice Marshall, in *Hunt*,²⁰⁹ the first case known to deal with the power coupled with an interest conundrum, described “the interest which can protect a power”²¹⁰ as “an interest in the thing itself . . . the power must be engrafted on an estate in the thing.”²¹¹ Perhaps sensing his reader’s deepening puzzlement, he further explained that “a power to A. to sell *for his own benefit*, would be a power coupled with an interest; but a power to A. to sell *for the benefit of B.*, would be a naked power.”²¹² In the case at hand, the naked power was an agency that was given to secure a loan.²¹³ The plaintiff purposefully “waived taking a mortgage or bill of sale.”²¹⁴ Apparently, this would have given him a power coupled with an interest, but he wanted to to avoid the necessary paperwork.²¹⁵ In spite of clear proof that the parties *intended* to create an irrevocable agency,²¹⁶ Justice Marshall was unforgiving: “It was the fault of the plaintiff . . . and no maxim of equity is better established than this, ‘that no man is entitled to the aid of a Court of equity, when the necessity of resorting to that court is created by his own fault.’”²¹⁷

206. *Id.* at 679 (emphasis added).

207. Interview with Maggie Megaw, *supra* note 16.

208. *See id.*

209. *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174 (1823).

210. *Id.* at 204.

211. *Id.*

212. *Id.* at 205 (emphasis added).

213. *Id.* at 177.

214. *Id.* at 190.

215. *Id.* at 176.

216. *Id.* at 185 (“the power was unquestionably *intended* by the parties to be irrevocable for ever, and to transfer an interest in the thing itself”) (emphasis added).

217. *Id.* at 190.

Where *Hunt* was criticized for its formalistic approach to contract,²¹⁸ later decisions were more lenient.²¹⁹ Although still bound by Justice Marshall's ruling, courts took advantage of its unclarity.²²⁰ Agreements were often enforced where there was evidence of *intent* on which the agent relied, even where the agreements lacked what Justice Marshall would require as a formal power coupled with an interest.²²¹ By construing the term "interest" more liberally,²²² these courts managed to follow precedent while disregarding its rationale.²²³ Their looser interpretation of interest reflected the parties' *intention* to create security, instead of requiring an *actual* security as the Chief Justice had done.²²⁴ Differing interpretations of the phrase "power coupled with an interest" were "to be expected, inasmuch as the variable in the formula, the word 'interest,' has no precise meaning."²²⁵

III. *My Name is Trinity*:²²⁶ The Hotel Industry's Terrible Three

In the 1990s, after centuries of confusion, a trio of decisions shed much-needed light on this elusive interest with which a power must be coupled in order for an agency to be irrevocable.²²⁷ These decisions forced change on an unsuspecting hotel industry.²²⁸ Hotel owners

218. See Note, *Powers Coupled With an Interest: Annihilation by Definition*, 37 HARV. L. REV. 253, 254 (1923–24) [hereinafter Harvard Note] ("[T]he rule of *Hunt v. Rousmanier* works obvious injustice.").

219. Yale Note, *supra* note 203, at 115 (citing, e.g., *Walker v. Brown*, 165 U.S. 654 (1897)).

220. *Id.* at 111.

221. Harvard Note, *supra* note 218, at 253 ("where the agent has entered into an obligation in reliance on his agency").

222. *Id.* at 254–55 & nn.11–13 ("legal lien was enough to constitute an interest") (citing *Knapp v. Alvord*, 1843 WL 4801 (N.Y. Ch. Apr. 4, 1843)); ("power to collect rents, given as security for money advances is 'coupled with an interest'" (citing *Stevens v. Sessa*, 64 N.Y.S. 28 (App. Div. 1900)); ("power to pay out money to be received by the agent in [sic] behalf of the principal is 'coupled with an interest,' if in reliance on the power the agent has entered contractual obligations as to the money with the principal's consent.") (citing *Mulloney v. Black*, 138 N.E. 584 (Mass. 1923)).

223. *Compare Lane Mortg. Co. v. Crenshaw*, 269 P. 672, 679 (Cal. 1928) ("[A] power is said to be coupled with an interest when the power forms part of a contract, and is a security for money or for the performance of any act which is deemed valuable . . ."), with *Hunt v. Rousmanier's Adm'rs*, 21 U.S. 174, 180 (1823) ("There is an essential difference between a contract to perform a particular thing, and the actual performance of that thing").

224. See *Hunt*, 21 U.S. at 176, 185, 190.

225. Yale Note, *supra* note 203, at 111.

226. MY NAME IS TRINITY (AVCO Embassy Pictures 1970).

227. See *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (1991); *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555 (1993); *Gov't Guarantee Fund of Fin. v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996).

228. See K.C. McDaniel, *How Hotel Projects Go Wrong and What to Do About the Management Contracts*, in 2 COMMERCIAL REAL ESTATE FINANCING 2009: HOW THE

were permitted to revoke their agreements with companies that held long-term contracts to manage their hotels.²²⁹ The management companies were agents to the hotel owners, and the parties had contractually agreed that the agency would be irrevocable.²³⁰ The managers were in for a rude surprise when they discovered that they did *not* possess a power coupled with an interest to effect their intentions.²³¹ Sam and his friends in independent film would do well to learn from their mistakes.

A. *The Mercenary*:²³² Ballad of the Hotel Manager

Like the foreign sales agent,²³³ the role of the hotel management company has evolved over time.²³⁴ Hotel chains were once “largely owned by insurance companies, pension funds and other institutional investors, and were disallowed by their industries’ regulators to participate in the risk of operating hotels.”²³⁵ As a result, the owners leased the hotels to management companies that assumed both the risk *and* the reward, and paid the owners a percentage of the bottom line.²³⁶ This arrangement resembled the distributor relationship in independent film, with the management company in the role of the distributor, and the hotel owner cast as filmmaker.²³⁷

WORLD CHANGED 415 (PLI Real Estate Law & Practice, Course Handbook Ser. No. N-564, 2009), available at http://www.pli.edu/emktg/toolbox/hotel_mgmtcont19.doc (last visited Feb. 12, 2013).

229. See *Woolley*, 278 Cal. Rptr. at 721, 725, 728 (revoking the agreements for nine out of seventeen hotels managed by Embassy Suites); *Pac. Landmark Hotel*, 23 Cal. Rptr. 2d at 557, 563 (terminating Marriott’s contract for a sixty-year management term); *Gov’t Guarantee Fund*, 95 F.3d at 295 (revoking Hyatt’s thirty-year management agreement).

230. See *Woolley*, 278 Cal. Rptr. at 725–26; *Pac. Landmark Hotel*, 23 Cal. Rptr. 2d at 557, 563; *Gov’t Guarantee Fund*, 95 F.3d at 295.

231. See *Woolley*, 278 Cal. Rptr. at 726; *Pac. Landmark Hotel*, 23 Cal. Rptr. 2d at 559–60; *Gov’t Guarantee Fund*, 95 F.3d at 307.

232. THE MERCENARY (a.k.a. A PROFESSIONAL GUN) (United Artists 1968).

233. See *supra* Part I.A.; see also Telephone Interview with Mark Damon, *supra* note 74 (discussing the changing face of film sales, as driven by digital media, which eradicates the need for “prints” and therefore lowers costs (no more “P&A”—prints and advertising—now just “A”); theatrical admissions shrinking, video and rental sell-through shrinking, while VOD (Video on Demand), PPV (Pay Per View) and piracy are growing).

234. See McDaniel, *supra* note 228, at 415; Charles S. Hale, Note, *Market Impact in the Information Age: Protecting Hotel Owners from Hotel Management Companies*, 108 W. VA. L. REV. 573, 583 (2005–06).

235. See Hale, *supra* note 234, at 583.

236. *Id.* at 583–84; McDaniel, *supra* note 228, at 415.

237. The investment structure for both hotels and film projects is also the same: Lenders in both industries require borrowers (the hotel owner and the film producer) to maintain a Single Purpose Entity (“SPE”), to separate and limit the risks of each project. See McDaniel, *supra* note 228, at 13; MOORE, *supra* note 4, at 70.

Eventually, in an attempt to capture more profit, the hotel owners chose to assume the risk of operating the hotels themselves.²³⁸ Under this new arrangement, the *owner* bore both risk and reward, and compensated the *manager* with a percentage of the proceeds.²³⁹ The hotel manager was thus recast in the role of the *sales agent* in independent film.²⁴⁰ Like Sam and other foreign sales agents, the manager was “able to operate for this percentage of revenues without bearing the risk of loss.”²⁴¹

This shared ability of hotel managers and sales agents to operate without bearing loss was ripe for conflicts of interest.²⁴² Once absolved of responsibility, “management companies would want to manage as many properties as possible, spreading the name and reputation of their company as widely as possible, without regard for the bottom line profitability of the hotel owners.”²⁴³ The managers under this model received a share of the profits, so reduced profits would have affected their take. Yet the managers appeared content to make up in volume what they lost on the profitability for each individual hotel. Although multiple representation, such as that undertaken by the hotel managers, is not proscribed by agency law unless the principals’ interests are adverse to each other,²⁴⁴ focusing on one principal to the detriment of another often *does* create an adverse interest.²⁴⁵ Similar conflict accusations are routinely levied against all manner of agents in the entertainment industry,²⁴⁶ including the foreign sales agent in independent film.²⁴⁷

In the 1990s, hotel “owners and lenders repeatedly and successfully enforced their rights under agency law to be protected against [such] conflicts of interest.”²⁴⁸ Sales agents do not foresee a comparable

238. Hale, *supra* note 234, at 583–84.

239. *Id.* at 584.

240. *Id.*; see also *supra* Part I.B.

241. Hale, *supra* note 234, at 584.

242. *Id.*; see also McDaniel, *supra* note 228, at 415.

243. See Hale, *supra* note 234, at 584.

244. See *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 548 (E.D. Mich. 1984), *aff’d in part, remanded in part*, 767 F.2d 919 (6th Cir. 1985).

245. *Id.*

246. See, e.g., *Laplante v. Estano*, No. 3:04CV322, 2007 WL 1168676 (D. Conn. Apr. 19, 2007) (talent agents); *Forbes v. Eagleson*, 19 F. Supp. 2d 352, 363–64 (E.D. Pa. 1998), *aff’d on other grounds*, 228 F.3d 471 (3d Cir. 2000) (sports agents); *Parrish v. Nat’l Football League Players Ass’n*, No. C 07-00943, 2008 WL 1925208 (N.D. Cal. Apr. 29, 2008) (league acting in its capacity as marketing agent for players).

247. Interview with Steve Monas, *supra* note 3.

248. See McDaniel, *supra* note 228, at 21 & n.7 (citing Gov’t Guarantee Fund of Fin. v. Hyatt Corp., 95 F.3d 291 (3d Cir. 1996)) (“The court held that non-disturbance was not enforceable against a principle [sic], but suggested that failure by the principle [sic] to perform the covenant by terminating without cause might be relevant to dam-

stampede to revoke sales agency agreements in the film industry.²⁴⁹ These agents posit that when a film is selling, the principal is happy, and when sales are lacking, the agent is happy to cut it loose.²⁵⁰ While that is the ideal scenario, there are many reasons filmmakers may wish to revoke their sales agency agreements, including conflicts of interest.²⁵¹ The producer may also believe that another agent may better represent her film, or may want to enter into deals directly. Lack of sales is not the only motivator—a film's *success* may also drive a producer to attempt a better deal.²⁵² For example, initial theatrical performance of the film *Platoon*²⁵³ led its producers to terminate its home video deal with Vestron Video in favor of HBO.²⁵⁴ Vestron successfully sued, but by then the damage had been done—the video had already been out for several years.²⁵⁵ As is often the case with litigation, even when you win, you lose.

B. *Four of the Apocalypse*:²⁵⁶ Lessons From Fallen Agents

The legal implications from the hotel industry apply to all industries in which there are agency relationships.²⁵⁷ Although the practical ramifications for the film industry remain untested, the same is true about much of what appears in entertainment contracts.²⁵⁸ Yet these untested

ages. Upon remand, the trial court found cause for the termination of Hyatt and did not award it any damages. The case was settled before a decision on the damages to be awarded against Hyatt.”).

249. Telephone Interview with Alison Cohen, *supra* note 36; *accord* Telephone Interview with Michael Meyer *supra* note 140; Telephone Interview with Mark Damon, *supra* note 74.

250. Telephone Interview with Alison Cohen, *supra* note 36; *accord* Telephone Interview with Michael Meyer *supra* note 140; Telephone Interview with Mark Damon, *supra* note 74.

251. *See supra* (discussion about conflicts of interest).

252. *See Vestron, Inc. v. Home Box Office Inc.*, 839 F.2d 1380, 1381 (9th Cir. 1988) (describing the producer's termination of a home video distribution deal for the films *PLATOON* (Orion Pictures 1986) and *HOOSIERS* (Orion Pictures 1986), after initial theatrical success).

253. *PLATOON* (Orion Pictures 1986).

254. *See Vestron*, 839 F.2d at 1381.

255. *Id.*; *accord* Interview with Steve Monas, *supra* note 3. Monas was Vice President of Business Affairs with Vestron Pictures during the suit. *Id.*

256. *FOUR OF THE APOCALYPSE* (Anchor Bay Entertainment 1975).

257. The hotel cases are founded on basic agency principles and do not rely on any factual premises unique to the hotel industry. *See Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (1991); *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555 (1993); *Gov't Guarantee Fund of Fin. v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996). Another example of a revocable agency agreement is the revocable proxy in Delaware corporations law. *See, e.g., Rivka Weill, Declassifying the Classified*, 31 DEL. J. CORP. L. 891 (2006); *Haft v. Haft*, 671 A.2d 413, 413 (Del. Ch. 1995).

258. The ubiquitous waiver of *droit morale* (moral rights) is one example. *See MOORE, supra* note 4, at 109. Although the artist's moral rights cannot be waived in

provisions are generally included because it is the transactional attorney's job to protect against risks, both known and merely contemplated. Whether their preparations will ultimately shield their clients from future attack may only be answered in hindsight. In the meantime, attorneys with foresight look to case law in analogous industries. Savvy sales agents and their attorneys can learn from their comrades in the hotel industry in the specific ways that follow and possibly arm themselves against revocation, if they so desire.

1. ACE HIGH:²⁵⁹ AGENCY TRUMPS CONTRACT

In the context of independent film, a distributor is a grantee of one or more exclusive rights,²⁶⁰ and such grants are subject to both copyright and contract law.²⁶¹ When the two authorities are in conflict, copyright law governs, so long as the issue involves a matter to be determined under the Copyright Act.²⁶² Where rights are *not* granted, the relationship is an agency and governed by agency law and contract.²⁶³ The hotel management cases resolved the issue—who wins in the conflict between agency and contractual authority regarding revocability of agency contracts—in favor of agency.²⁶⁴ This is because California statute codified the common law rule²⁶⁵ first articulated by Chief Justice Marshall in 1823,²⁶⁶ that on its face limits or modifies the contract law in this manner.²⁶⁷ “The principal’s power of revocation is absolute and applies even if doing so is a violation of the contract or the agency is characterized as ‘irrevocable.’”²⁶⁸

“It is a *cardinal principle* of agency law that a principal who employs an agent *always* retains the power to revoke the agency.”²⁶⁹ The underlying rationale is that agency is founded on the mutual as-

many countries, it is still a matter of practice to include a waiver. See MICHAEL C. DONALDSON, CLEARANCE & COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION 222–23, 450–53 (3d ed. 2008).

259. ACE HIGH (Paramount Pictures 1968).

260. See *supra* Part I.C.

261. Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 559 (9th Cir. 1990).

262. Scholastic Entm’t Inc. v. Fox Entm’t Grp., Inc., 336 F.3d 982, 985–86 (9th Cir. 2003).

263. See *supra* Part I.C.

264. See *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719, 724–25 (1991); *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555, 561 (1993); *Gov’t Guarantee Fund of Fin. v. Hyatt Corp.*, 95 F.3d 291, 300 (3d Cir. 1996).

265. CAL. CIV. CODE § 2356(a)(1) (West 1985 & Supp. 2013).

266. *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174 (1823).

267. See, e.g., *Woolley*, 278 Cal. Rptr. at 724–25.

268. *Id.* at 725 (citing RESTATEMENT (SECOND) OF AGENCY, § 118, cmt. b. at 300; WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 46, at 87 (West 1964)).

269. *Woolley*, 278 Cal. Rptr. at 724 (emphasis added).

sent of both parties, and if one party no longer wishes to be represented by the other, then that assent is destroyed.²⁷⁰ Contracts are also driven by mutual assent, at least at formation.²⁷¹ But because of the intimate nature of an agency, with its heightened duties, “it should *always* be within the power of the principal to manage his own business[,] and that includes the power of the principal to re-assume the control over his own business which he has *but delegated* to his agent.”²⁷² Therefore, the power of assent in agency, which includes the power to revoke assent, is stronger than the power of assent in contract to limit the parties’ ability to revoke agency.²⁷³

While contractual recitations are not determinative of the type of relationship at issue, they may factor as evidence.²⁷⁴ In one hotel management agreement, the use of the term “Agent” undermined the management company’s protestations that it could not be an agent to the hotel owner because its relationship with the owner “defie[d] simple principal-agent classification.”²⁷⁵ However, the contract also expressly denounced any “partnership or joint venture.”²⁷⁶ The court held that these terms were *not* “mere labels,”²⁷⁷ but evidence of an agency created for the benefit of the principal.²⁷⁸ While not dispositive, the chosen terminology balanced in favor of a finding that the relationship was an agency, since not a partnership or joint venture, and therefore was revocable at will.²⁷⁹

In the independent film business, foreign sales agents often make similar disclaimers,²⁸⁰ such as: “Nothing contained in this agree-

270. *Id.* at 724–25.

271. *Utley v. Donaldson*, 94 U.S. 29, 47 (1876) (“There can be no contract without the mutual assent of the parties.”).

272. *Woolley*, 278 Cal. Rptr. at 725 (emphasis added).

273. *Id.*

274. *See, e.g., id.*

275. *Id.* (arguing that because the hotel owner entrusted the “entire operation” of the hotel to the manager, the relationship was not an agency. “However the very nature of a managerial relation is to delegate authority from principal to agent. ‘A manager normally has the widest authority of all business agents and, unless limited by instructions, is in complete control of its operations.’” (quoting *SEAVEY*, *supra* note 268, § 26, at 48.).

276. *Woolley*, 278 Cal. Rptr. at 725.

277. *Id.*

278. *Id.* at 726 (“The agency must be created for the *benefit of the agent* in order to protect some title or right in the subject of the agency or secure some performance to him.”) (emphasis in original) (citing *Becket v. Welton Becket & Assocs.*, 114 Cal. Rptr. 531, 533 (1974)).

279. *Woolley*, 278 Cal. Rptr. at 725–26.

280. Interview with Steve Monas, *supra* note 3.

ment shall constitute or be construed to be . . . a partnership or joint venture . . . ,”²⁸¹ whether or not the agreement includes the term “Agent.” While contractual recitations in the face of contradictory evidence do *not suffice* to prove the nature of that relationship,²⁸² the court held that “[g]iven provisions that unambiguously provided that the agreements were between principal and agent and did not create a . . . partnership or joint venture, [then] as a matter of law the agency *could be* terminated.”²⁸³ Foreign sales agents who include such disclaiming language in an attempt to shield themselves from tort liability should be aware that this may mean risking unwaivable revocability. In summary, if the relationship is *not* an agency, care should be taken to call the distributorship, partnership, joint venture, or other entity by its proper legal term. Conversely, even if the term “Agent” is *not* used, if there *is* found to be an agency relationship, the agreement may be revoked, unless it includes a power coupled with an interest.²⁸⁴

2. A FISTFUL OF DOLLARS:²⁸⁵ COMPENSATION IS NOT THE REQUISITE INTEREST

An agent who wishes to establish an irrevocable agency agreement must first establish a “power coupled with an interest.”²⁸⁶ That is, the power to act as an agent must be coupled with an interest in the agency. Chief Justice Marshall defined “the interest which can protect a power”²⁸⁷ as “an interest in the thing itself . . . the power must be engrafted on an estate in the thing.”²⁸⁸ However, the precise meaning

281. *Woolley*, 278 Cal. Rptr. at 725.

282. *Id.*; see also *E1 Films Can. Inc. v. Syndicate Films Int’l*, No. B236146, 2013 WL 153347, at *5 (Cal. Ct. App. Jan. 15, 2013) (holding that the language of the contract that the appellant entered into “in its capacity as sales agent for the licensor of a Picture” was not sufficient in the face of contradictory evidence that it acted on its own behalf).

283. *Gov’t Guarantee Fund of Fin. v. Hyatt Corp.*, 95 F.3d 291, 306 (3d Cir. 1996) (emphasis added) (citation omitted).

284. *Woolley*, 278 Cal. Rptr. at 724–25.

285. *A FISTFUL OF DOLLARS* (United Artists 1964). Sergio Leone originally asked Mark Damon to play a villain in the film, but his agent made him pass. See *COWBOY*, *supra* note 67, at 361–62. Damon did contribute to *A Fistful of Dollars* by reaching out to his friend Clint Eastwood, then starring in the television series *Rawhide* (1966), and asking him to meet with Sergio Leone. *Id.* at 362 (“And to this day . . . whenever I see Clint he says, ‘Mark it’s all your fault.’”).

286. See, e.g., CAL. CIV. CODE. § 2356(a)(1) (West 1985 & Supp. 2013); *Hunt v. Rousmanier’s Adm’rs*, 21 U.S. 174, 204 (1823).

287. See *Hunt*, 21 U.S. at 204.

288. *Id.*

of the term “interest” was under continual revision in the courts²⁸⁹ until the hotel cases provided some clarity for California agents.²⁹⁰

Now, one thing is clear: “Monetary compensation, in whatever form it may take, does not create a power coupled with an interest so as to make the agency irrevocable.”²⁹¹ For example, because a hotel “‘management fee’ of five percent of the gross revenue”²⁹² is compensation, a court declared that it could *not* be interest.²⁹³ An agreement that a hotel owner would share in profit participation with the hotel manager above and beyond the management fee similarly failed, because the manager did *not* also participate in the *losses*, as required of a partner, or non-agent.²⁹⁴ In the language of entertainment contracts, “profit participation” is also known as “contingent *compensation*.”²⁹⁵ Sam should therefore take heed that whether performing for a flat fee, a percentage of revenues, profit participation or other compensation model, compensation is *not* an interest that will keep his agency from being revoked.

3. A BULLET FOR THE GENERAL:²⁹⁶ INTELLECTUAL PROPERTY DOES NOT SAVE THE DAY

The agent’s contribution of its own intellectual property is likewise not an interest.²⁹⁷ Hotel managers and foreign sales agents both create materials to market and build the principal’s brand.²⁹⁸ However, the courts consider these contributions to be within the scope of the agency, as they are made for the benefit of the principal, in order to sell the product.²⁹⁹ One hotel manager argued that it had made a capital investment to the hotel of its intellectual property, including trademarks, logos, marketing materials and proprietary information.³⁰⁰ According to the manager, the intellectual property was “to be used in

289. Yale Note, *supra* note 203, at 111 (“the word ‘interest,’ has no precise meaning”).

290. *See, e.g.*, *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (1991); *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555 (1993); *Gov’t Guarantee Fund of Fin. v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996).

291. *Woolley*, 278 Cal. Rptr. at 726 (citing 2 BERNARD WITKIN, SUMMARY OF CAL. LAW (10TH), § 209, at 207; *O’Connell v. Super. Ct. of S.F.*, 41 P.2d 334, 336 (Cal. 1935)).

292. *Woolley*, 278 Cal. Rptr. at 726.

293. *Id.*

294. *Gov’t Guarantee Fund*, 95 F.3d at 303.

295. *See* MOORE, *supra* note 4, at 149.

296. A BULLET FOR THE GENERAL (AVCO Embassy Pictures 1966).

297. *See Gov’t Guarantee Fund*, 95 F.3d at 305.

298. *Id.*; *see also* Telephone Interview with Robbie Little, *supra* note 36.

299. *See Gov’t Guarantee Fund*, 95 F.3d at 305.

300. *Id.*

connection with the hotel *only because it insisted upon and received agency powers* to manage the resort.”³⁰¹ The logical conclusion, the manager argued, is that its management duty was a security for its investment of intellectual property into the hotel.

This argument failed.³⁰² The court held that the manager’s contributions of intellectual property were “merely a normal incident of an agency relationship, and did *not* create an irrevocable agency.”³⁰³ Like hotel managers, foreign sales agents make significant investments to their projects, creating marketing campaigns, treatments, synopses, and other materials for each film.³⁰⁴ As the hotel holdings make clear, these contributions, without more, do *not* comprise the interest necessary for an irrevocable agency.³⁰⁵ What that extra element might be is unclear. If the intellectual property contributions rise to the level of joint authorship, the foreign sales agent may have an argument that it is a co-owner or tenant in common in the relevant copyrights; but then the foreign sales agent may also cease to be an “actual agent,”³⁰⁶ with its protection from contractual and tort liability.³⁰⁷

The court hints that the result in the hotel case might have been different if there had been “a separate clause linking the franchise agreement to the agency relationship . . . to protect the agency’s interest.”³⁰⁸ Accordingly, if Sam or another sales agent were to take this court’s suggestion, he might draft a license agreement or clause that separately grants to the filmmaker the use of his intellectual property (copyrights, trademarks, etc.) toward the marketing of the film, and specify that it secures his performance as a sales agent. The issue of materials created by the sales agent is explicitly covered in many existing sales agency forms,³⁰⁹ but the court seems to suggest contractual language that clearly links the branding agreement to the agency relationship, and states that the use of the materials is intended to secure the agency’s interest.

301. *Id.* (emphasis in the original).

302. *Id.*

303. *Id.* (emphasis added).

304. Telephone Interview with Robbie Little, *supra* note 36.

305. *See Gov’t Guarantee Fund*, 95 F.3d at 305.

306. *E1 Films Can. Inc. v. Syndicate Films Int’l*, No. B236146, 2013 WL 153347, at *1 (Cal. Ct. App. Jan. 15, 2013) (“In the film industry, the term ‘sales agent’ typically describes an entity that sells movies to distributors. It does not mean that the entity operates as an actual agent.”).

307. *Id.* at *5 (holding the appellant/agent liable on the contract that it claimed to have entered into on behalf of a disclosed principal, because it was deemed to not be an “actual agent.”).

308. *See Gov’t Guarantee Fund*, 95 F.3d at 306.

309. Interview with Steve Krone, *supra* note 5.

However, this suggestion may not be as applicable to the foreign sales agent. Even with a separate clause granting the filmmaker the use of the agent's intellectual property, with that grant made to secure the agent's interest, the intellectual property may still be deemed to be an ordinary incident of the agency relationship. Here, the worlds of hotel manager and foreign sales agent diverge. The hotel manager's intellectual property usually consists of its trademarks and other materials already in existence, which it contributes to an empty building in order to create a hotel brand.³¹⁰ The sales agent, on the other hand, creates branding specifically for the film.³¹¹ These differences cast doubt on the applicability of the court's suggestion to the sales agent, because even with a separate clause granting the filmmaker the use of the agent's intellectual property, that intellectual property was still created in the context of an agency relationship, for the benefit of the filmmaker.

4. *GOD FORGIVES, I DON'T*:³¹² INTEREST MUST BE COUPLED IN THE SAME ENTITY

A loan may be a type of interest in a power coupled with an interest, but only if that interest is *properly* coupled with the agency.³¹³ One hotel manager almost succeeded in creating this coupling; however, it failed to observe formalities.³¹⁴ The management company made a series of loans to the hotel owner, which *would have* created an interest that the power of its agency would be deemed to secure.³¹⁵ However, the loans were made by a subsidiary of the management company, *not* the hotel manager itself.³¹⁶ The trial court initially held that the interest was the same for the manager as for its subsidiary, thus "disregarding the separate corporate entities involved."³¹⁷ However, the appellate court held that the entities should *not* be conflated, because "the law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities."³¹⁸

310. *Gov't Guarantee Fund*, 95 F.3d at 305.

311. Telephone Interview with Robbie Little, *supra* note 36.

312. *GOD FORGIVES, I DON'T* (a.k.a. *BLOOD RIVER*) (American International Pictures 1967).

313. *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc.*, 23 Cal. Rptr. 2d 555, 562-63 (1993).

314. *Id.*

315. *Id.* at 561-63.

316. *Id.* at 562.

317. *Id.* at 563.

318. *Id.* (citing *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990)).

This holding has special relevance to the film industry, where custom and practice is often a tangle of entities and assignments.³¹⁹ Advances for festivals, materials, or recoupable minimum guarantees (“MGs”) may provide the requisite interest, at least until the interest is recovered.³²⁰ However, the shell game that many sales agents play, of obtaining pictures under one entity then entering into an agency relationship with another, related, entity to shield itself from liability³²¹ may backfire. The cautionary tale told by *Pacific Landmark Hotel v. Marriott*,³²² warns against attempting to shield from liabilities to the extent that one is also shielded from the attendant protection. Meanwhile, in the film business, New Line lost its superior security interest claim for the motion picture *The Grass Harp*³²³ after New Line entities New Line Productions and New Line Cinema unsuccessfully “refer[red] to ‘New Line’ in a collective sense perhaps to derive benefit by blurring the entities together[.]”³²⁴ The lesson is this: In the foreign sales agent’s changing landscape of mergers, subsidiaries, affiliates and partnerships,³²⁵ names matter, and formalities must be observed.³²⁶

319. See *LeFlore v. Grass Harp Prods., Inc.*, 67 Cal. Rptr. 2d 340, 341–42 (1997) (“This case involves a . . . common business arrangement in the entertainment industry A tangled web of contractual relationships formed the basis of this claim.”).

320. See *infra* Part V.B.

321. *E1 Films Can. Inc. v. Syndicate Films Int’l*, No. B236146, 2013 WL 153347, at *6 (Cal. Ct. App. Jan. 15, 2013) (“the evidence showed that appellant, BYP, the Yari Film Group and the four film licensors were essentially interchangeable, sharing common ownership, business and e-mail addresses, employees and corporate titles. For example, Glasser simultaneously served as appellant’s president, the Yari Film Group’s chief creative officer and the executive producer of the four films. Rapkowski testified that the reason he demanded payment from BYP rather than appellant was that E1 ‘considered all of these companies to be one and the same, controlled by the same controlling minds. E-mails were coming with e-mail signatures from all of these interchangeably, the principals of these companies were all working for all of them interchangeably, and in my mind this was all one company.’ Accordingly, substantial evidence supported the trial court’s determination that ‘there was no legal ‘principal’ or ‘agent.’ It would be contrary to the evidence and manifestly unjust to conclude that SFI was only an ‘agent,’ and thus immune from liability, in the face of the corporate fictions erected by these various Yari Film Group entities.”).

322. 23 Cal. Rptr. 2d at 556–57, 561–63.

323. *THE GRASS HARP* (Fine Line Features 1995).

324. *LeFlore*, 67 Cal. Rptr. 2d at 345.

325. See *Dawtre*, *supra* note 52.

326. It is clear that this was not a case of mistaken formalities, but *Marriott*’s purposeful attempt to shield itself from liability while gaining the benefit of its subsidiary’s deal. See *Pac. Landmark Hotel*, 23 Cal. Rptr. 2d at 562–63 (“For business reasons, *Marriott chose* to have the Management Agreements drafted only between [*Marriott*] and Owners. [*Marriott*] was not given any interest in the Hotel via any other document evidencing loans to or investments in Owners. . . . We assume one of the purposes of these separate corporate identities was to insulate *Marriott* from liability.”) (emphasis added).

IV. *The Ugly Ones*:³²⁷ Inadequate Remedies

There is a significant reduction in the nature of available remedies caused by the revocability doctrine. Because the sales agency agreement is a personal services contract, specific performance is not available.³²⁸ Monetary damages are hard to prove when they are predicated on estimates for future sales that are speculative by nature.³²⁹ It is possible that if a sales agency is revoked and the film sold elsewhere, a court may calculate the damages by the replacement sales.³³⁰ But the services provided by foreign sales agents are unique and based on personal variables such as the reputation and network of each agent,³³¹ so even subsequent sales are not guaranteed to be recoverable.

Other than expenses, legal damages for a revoked agency agreement are difficult to ascertain with certainty. Therefore, a liquidated damages clause may protect agents who enter into “irrevocable” sales agency agreements from the revocability doctrine. As always when creating a liquidated damages provision, care must be taken to ensure that “the amount set in the agreement [is] a reasonable forecast of just compensation” and not a penalty.³³² Otherwise, although Sam will likely recover his expenses and/or any liquidated damages, to force Sam into legal action with such limited remedies may be to “deprive him of the benefit of his bargain.”³³³ However, with a power coupled with an interest, Sam would be in a stronger position, as he would then have an equitable interest to protect.³³⁴

A. *Adiós Gringo*:³³⁵ No Specific Performance of Personal Services Contracts

“It has long been a principle of equity that a contract to perform personal services cannot be specifically enforced.”³³⁶ This is because specific performance would “run contrary to the Thirteenth Amendment’s prohibition against involuntary servitude.”³³⁷ Moreover, specific per-

327. *THE UGLY ONES* (United Artists 1967).

328. See *infra* Part IV.A.

329. See *infra* Part IV.B.

330. See *infra* Part IV.B.

331. See Dawtrey *supra* note 52.

332. E. ALLEN FARNSWORTH, *CONTRACTS* § 12.18, at 813–14 (4th ed. 2004).

333. See Yale Note *supra* note 203, at 113.

334. See Roth v. Moeller, 197 P. 62, 63 (Cal. 1921).

335. *ADIÓS GRINGO* (Trans Lux 1965).

336. *Motown Record Corp. v. Brockert*, 207 Cal. Rptr. 574, 578 (1984) (citing *Poultry Producers of S. Cal., Inc. v. Barlow*, 208 P. 93, 97 (Cal. 1922)).

337. *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719, 727 (1991) (citing *Beverly Glen Music, Inc. v. Warner Commc’ns, Inc.*, 224 Cal. Rptr. 260, 261 (1986)).

formance “would impose upon the court the prodigious if not impossible task of passing judgment on the quality of the performance . . . of a contract which calls for special knowledge, skill or ability.”³³⁸ Finally, “[c]ourts wish to avoid the friction and social costs which result when the parties are reunited in a relationship that has already failed, especially where the services involve mutual confidence and the exercise of discretionary authority.”³³⁹ Many sales agents, when discussing the theoretical threat of revocation, agree that “we don’t want to do business with anyone who doesn’t want to do business with us.”³⁴⁰

Considering that there is not much that Sam can legally do to stop his principal from revoking, this is not a bad attitude to adopt. “An injunction cannot be granted to prevent the breach of a contract which cannot be specifically enforced. And it is a fundamental rule that specific performance cannot be decreed to enforce a contract for personal services, regardless of which party seeks enforcement.”³⁴¹ Sales agency agreements, like hotel management contracts, qualify as personal services, because they “call for the rendition of services which require the exercise of special skill and judgment.”³⁴² Personal services have “a distinctly personal and non-delegable character,”³⁴³ and comprise a category that includes “actors and artists, *managers*, *sales agents*, school-teachers, mechanics, cooks, and contracts for the furnishing of personal care and support.”³⁴⁴

The hotel cases held that even large management corporations qualify as providing personal services to hotel owners.³⁴⁵ Accordingly,

338. *Woolley*, 278 Cal. Rptr. at 727 (citations omitted).

339. *Id.* (citing *Poultry Producers*, 208 P. at 97–98).

340. Interview with Steve Monas, *supra* note 3; *accord* Telephone Interview with Alison Cohen, *supra* note 36; Telephone Interview with Michael Meyer, *supra* note 140; Telephone Interview with Roman Kopelevich, *supra* note 87; Telephone Interview with Robbie Little, *supra* note 36; Telephone Interview with Mark Damon, *supra* note 74.

341. *Woolley*, 278 Cal. Rptr. at 726–27 (internal citations omitted).

342. *Id.* at 727. In California, personal services contracts cannot be enforced against the *agent* for more than seven years. See *Fox v. Williams*, 52 Cal. Rptr. 896, 906 (1966). This challenges the validity of most foreign sales agency agreements, where terms are generally for upwards of ten years. Interview with Steve Monas, *supra* note 3. However, the agent is not usually the party attempting to terminate the agreement. *Id.*

343. *Woolley*, 278 Cal. Rptr. at 727.

344. *Id.* (emphasis added) (citation omitted). In California, “[t]he rule is statutory . . . and California cases applying it to a variety of comparable fact situations are numerous . . . [including] exclusive sales agency.” *Id.* (citing CAL. CIV. CODE § 3390 (West 1985 & Supp. 2013); *Long Beach Drug Co. v. United Drug Co.*, 88 P.2d 698, 699 (Cal. 1939)) (other citations omitted).

345. See, e.g., *Woolley*, 278 Cal. Rptr. at 727.

sales agents that are also larger entities, not just lone operators like Sam, would likewise be deemed to provide personal services to their principals. Moreover, many sales agency agreements include a “key man” clause, wherein the principal designates *only* the named individual as her agent.³⁴⁶ The key man clause specifies that if the named individual ever leaves the entity with which the principal contracted, the principal will not be bound by the agency entity absent that “key” individual.³⁴⁷ Therefore, the services provided by a foreign sales agency, whether by an entity or by the “key man,” are personal to the filmmaker/principal, and cannot be specifically performed as a remedy in contract.

*B. Death Does Not Count the Dollars:*³⁴⁸ No Speculative Damages

Thus deprived of specific performance on the revoked contract, foreign sales agents may recover only monetary damages.³⁴⁹ But where “the contract did not vest in the agents a power coupled with an interest,” the principal retains the power³⁵⁰ “to revoke the agency at any time.”³⁵¹ Therefore, “*after* revocation plaintiffs had no remedy other than an action for damages suffered by them *prior* to the time of the revocation.”³⁵² Sam and his colleagues match a product with a buyer, not unlike a real estate broker,³⁵³ or a broker of potatoes.³⁵⁴ For the foreign sales agent selling films, like the potato broker, “the right to a commission depend[s] on their sale of the potatoes.”³⁵⁵ Neither agent should be allowed to speculate on how many potatoes he *would have sold* if given the chance.³⁵⁶

346. Interview with Steve Monas, *supra* note 3.

347. *Id.* Of course, even without the “key man” clause, the principal retains the power to revoke or terminate at will, for any or no reason, as discussed, *supra*. However, with a “key man” clause, the principal will also have a contractual *right* to terminate, upon the departure of the individual. As discussed *infra*, even when a contractual right is breached, damages for that breach are likely inadequate. Therefore, the contractual right of the principal to terminate may not add much value in practice.

348. DEATH DOES NOT COUNT THE DOLLARS (a.k.a. DEATH AT OWELL ROCK AND NO KILLING WITHOUT DOLLARS) (Koch Media 1967).

349. At least, that is what befell their hotel manager counterparts. See *Woolley*, 278 Cal. Rptr. at 728.

350. The decision uses the word “right,” where it is clear that it means “power.” See *Campodonico v. Marchesotti*, 134 P.2d 856, 857 (Cal. 1943) (“[T]he contract did not vest in the agents a power coupled with an interest, so that defendant had the *right* to revoke the agency at any time”) (emphasis added).

351. *Id.*

352. *Id.* (emphasis added).

353. See *Ravid*, *supra* note 124.

354. See *Campodonico*, 134 P.2d at 856.

355. *Id.* at 857.

356. *Id.*

There are several grounds for damages on breaches of contract. The first is actual damages, the amount of money that the injured party “has already expended towards performance.”³⁵⁷ Sam, like many sales agents, expends large amounts of money on marketing the films that he represents—even, at times, developing them.³⁵⁸ The Supreme Court held that when the performance of the contract requires such an outlay of expenditures, “the claimant ought at least to be made whole” with regard to what money he has already spent.³⁵⁹ However, Sam may not be made whole for the *time* he has spent on the project,³⁶⁰ although a reasonable portion of the salary that Sam has paid towards staff and himself may be recoverable upon proper proof. But because most sales agents are paid by how many licenses they secure and *not* by how much *time* they spend securing them,³⁶¹ Sam may not be able to calculate those damages with sufficient certainty to recover them.³⁶²

Lost profits, the second basis for recovery,³⁶³ are also not viable when the profits are based on commissions for future sales, uncertain to occur.³⁶⁴ Damages for unsold potatoes,³⁶⁵ or unlicensed films,³⁶⁶ are “too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires.”³⁶⁷ Even with a proven track record and mathematical statistics that demonstrate a steady demand for products much less ethereal than motion pictures,³⁶⁸ courts are asked, “what amount could plaintiff, with his long experience and wide acquaintance in the trade, have sold?”³⁶⁹ and “are constrained to answer that [they] do not know.”³⁷⁰ If the markets for such stable commodities as potatoes and canned goods are deemed too unpredictable to recover,³⁷¹ then motion picture audiences are downright mercurial.³⁷²

357. *United States v. Behan*, 110 U.S. 338, 344 (1884).

358. Telephone Interview with Roman Kopelevich, *supra* note 87; Telephone Interview with Robbie Little, *supra* note 36.

359. *Behan*, 110 U.S. at 344.

360. *See* *Stephany v. Hunt Bros. Co.*, 217 P. 797, 798 (Cal. 1923).

361. *See, e.g.*, Interview with Steve Monas, *supra* note 3.

362. *See, e.g.*, *Stephany*, 217 P. at 798.

363. *Behan*, 110 U.S. at 344.

364. *Spitzer v. Pathe Exchange*, 23 P.2d 308, 311 (Cal. 1933) (holding that “there was no evidence of profits” where a foreign sales agent breached the contract with its producer, because the value of the picture remained untested in that, or any market.).

365. *Campodonico v. Marchesotti*, 134 P.2d 856, 857 (Cal. 1943).

366. *Spitzer*, 23 P.2d at 308–09.

367. *Behan*, 110 U.S. at 344.

368. *See Stephany*, 217 P. at 799 (canned goods).

369. *Id.*

370. *Id.*

371. *See Campodonico v. Marchesotti*, 134 P.2d 856, 857 (Cal. 1943) (potatoes); *Stephany*, 217 P. at 797–98 (canned goods).

372. *See Levinson supra* note 116, at 187 (“There can be no assurance of the economic success of any motion picture since the revenues derived from the

And motion pictures are *not* entirely like potatoes—they are creative works, that are “difficult to quantify, and public tastes are difficult to anticipate.”³⁷³ Because of this added unpredictability, many different types of entertainment contracts fail to prove, and therefore recover, damages.³⁷⁴ Not to mention that with Hollywood accounting, most movies claim a net loss!³⁷⁵ Courts sympathetic to this difficulty may take into account “whether or not the entertainer or entertainment project . . . has developed a track record of success demonstrating public acceptance, thereby supporting the ‘reasonable’ assumption that such success—and damages calculated thereon—will continue.”³⁷⁶ For plaintiffs able to clearly demonstrate their track record as specifically applied to the breached contract, “[t]he fact that the amount of damage may not be susceptible of *exact* proof or may be uncertain, contingent, or difficult of ascertainment does not bar the recovery.”³⁷⁷

But the line between damages too speculative to recover and those sufficiently proven by a track record is very fine and fact specific.³⁷⁸ For this reason, Sam’s ten-year success in the film business is *not enough* to ensure that he will be able to recover prospective profits on his revoked films. To procure damages on an agreement for a specific film that has been revoked, Sam must also show proof of *that film’s* track record, and its applicability to *this market*.³⁷⁹ Sam can do this by pro-

production and distribution of a motion picture depend primarily upon its acceptance by the public, which cannot be predicted.”)

373. Melvin Simensky, *Determining Damages for Breach of Entertainment Agreements*, 8 ENT. & SPORTS LAW. 1 (1990).

374. *Id.* at 1, 12.

375. See, e.g., Ted Johnson, ‘Millionaire’ Case Jolts Studios, VARIETY (Dec. 15, 2012, 4:00 AM), available at <http://variety.com/2012/biz/news/millionaire-case-jolts-studios-1118063628/>; Christopher Matthews, *The Top Ten Biggest Money-Losing Movies of All Time*, TIME (Mar. 10, 2012), available at <http://business.time.com/2012/03/21/the-top-ten-biggest-money-losing-movies-of-all-time/>.

376. Simensky, *supra* note 373, at 15.

377. Long Beach Drug Co. v. United Drug Co., 89 P.2d 386, 388 (Cal. 1939) (emphasis added).

378. See Sw. Fin. Corp. v. Kelly, 233 Cal. Rptr. 639, 642 (1987) (holding that damages were not speculative because of the distributor’s ten years of experience, known actors in starring roles, and a completed sale to a network); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977) (holding that damages were not speculative because “[t]his is not a case in which the plaintiff sought to prove hypothetical profits from the sale of a hypothetical record at a hypothetical price in a hypothetical market. At the time of the sale . . . the record was real, the price was fixed, the market was buying and the record’s success, while modest, was increasing.”) (emphasis added); Lexington Prods. Ltd. v. B.D. Commc’ns, 677 F.2d 251, 253–54 (2d Cir. 1982) (holding that the mathematical correlation between past advertising and products previously sold provided sufficient proof of reasonably certain damages).

379. See, e.g., Cohn v. Rosenfeld, 733 F.2d 625, 627, 631 (9th Cir. 1984); accord Yaguda v. Motion Picture Publ’ns, Inc., 35 P.2d 162, 164 (Cal. 1934) (showing a product’s track record through contracts already negotiated for that product); see

viding evidence that he had concluded or had deals pending on this film before his agreement to sell it was revoked.³⁸⁰ Also, if after revoking the agreement, a producer sold the film herself to one of Sam's territories, that purchase price may similarly provide sufficient certainty for Sam to recover in damages.³⁸¹

These examples of certain, calculable damages are not specific to the entertainment industry and its emerging track record exception. Even potato brokers who have lined up "purchasers ready and willing to buy said potatoes,"³⁸² may recover damages from their lost sales.³⁸³ Because the amount of these damages *can* be calculated with sufficient certainty, contracts that are pending or already entered into are *not* speculative damages.³⁸⁴ Likewise, when the principal revokes a sales agency agreement and then enters into her own agreements in the same territory,³⁸⁵ while there is no proof that the original sales agent could have made the same sales as the principal,³⁸⁶

[T]he breach of an exclusive sales agency contract through the invasion of the territory of the agent will entitle the latter to the profits he would have made upon sales in the amount of those made by his principal in the invaded territory. The fact that the goods were sold by defendants furnished sufficient proof that they *could* have been sold by plaintiff.³⁸⁷

Under these limited circumstances, foreign sales agents may find relief when and if their agency agreements are revoked. However, these are but exceptions to the rule that prospective damages are too speculative to recover.³⁸⁸ Sales agents without a power coupled with an interest in their agreements constantly roll the dice, between "the possibility of an enormously profitable venture and the risk of colossal failure."³⁸⁹

also Zinn v. Ex-Cell-O-Corp., 306 P.2d 1017, 1029 (Cal. 1957) (showing that the product's track record is applicable in that market through the principal's direct sales of that product in that territory).

380. See *Cohn*, 733 F.2d at 627, 631.

381. See *Zinn*, 306 P.2d at 1029.

382. *Campodonico v. Marchesotti*, 134 P.2d 856, 857 (Cal. 1943).

383. See *id.* (finding, however, that it was unnecessary to entertain this argument, since there was no evidence to support the claim).

384. See *Cohn*, 733 F.2d at 627, 631 (awarding damages to a licensor after it had resold the package of films to a network before its license for several of the films was revoked).

385. See *Zinn*, 306 P.2d at 1029.

386. *Id.* ("Ex-Cell-O argues that the amount of revenue earned by it does not establish that Sealed-Pure could have accomplished the same amount of business.")

387. *Id.* (emphasis added) (citation omitted).

388. *United States v. Behan*, 110 U.S. 338, 344 (1884).

389. *Simensky*, *supra* note 373, at 2 & n.6 (quoting Hayes, *Hollywood's Hidden Millions*, N.Y. TIMES, Jan. 20, 1982, at D1, D4).

V. *Shoot the Living and Pray for the Dead*:³⁹⁰ Business Solutions

The following business advice is based on the previous legal discussion. Which, if any of the suggestions Sam takes, is dependent on his particular needs and leverage in any given deal.

A. *This Man Can't Die*:³⁹¹ Be a Distributor, Not an Agent

The first solution is for Sam to avoid agency altogether, and be a distributor to the films he represents, sub-distributing to territories. Most filmmakers will require payment before granting rights, but that is a matter for negotiation. Sam need only draft his agreements to include a transfer of copyright ownership. Because of the prevailing confusion in the industry, and the proliferation of imprecise agreements that mention both agency and distribution rights in the same document, it is likely that a number of filmmakers have already unwittingly given away their rights. To be clear to his clients, Sam should omit the term "agent" from his contracts.

Because film distributors assume the risk of failure, they reap the majority of the reward upon the project's success. Sam's marketing genius and international contacts will therefore yield him more of the profit. Aside from Sam's ability to control the film's profits, the biggest advantage to this model is that the filmmaker would *not* have the power to revoke or terminate Sam's rights for any reason not expressly agreed to in the contract. Further, the duty Sam owes the filmmaker is a contractual duty, not the higher duty of a fiduciary. Finally, and perhaps of most importance to Sam, Sam's banker *would* have given him a credit line for the value of his library, *if* he had owned the copyrights to secure against his loan.

The disadvantage to being a distributor is that Sam, per the DMCA, must assume payments on residuals for any of his films subject to collective bargaining agreements. In practice, most distributors assign the responsibility of payments back to the filmmaker, so this is not necessarily a hindrance; however, it can become one if the filmmaker is insolvent, a likelihood in independent film. Second, Sam may not have the resources to pay the "MGs" (minimum guarantees) that are customarily made to filmmakers in exchange for distribution rights. Even if he does have the money, Sam may not wish to undertake the risk of the film's success or failure in the marketplace. Finally,

390. SHOOT THE LIVING AND PRAY FOR THE DEAD (Koch Media 1971).

391. THIS MAN CAN'T DIE (a.k.a. LONG DAYS OF HATE) (Fine Products 1968).

as a distributor, Sam may become liable in legal actions that arise in connection with the film.

Traditional sales agents like Sam, although not risking as much in capital as distributors, nonetheless take a chance on the films that they represent, risking time and money, reputation and commissions. If Sam obtains a grant of rights for his endeavors on behalf of his films, at least he will be protected in his representation of them.

*B. For a Few Dollars More:*³⁹² Provide an Advance

Sales agents who do not take rights can still protect themselves by paying the filmmaker an MG. These payments are also known as “advances” because they are typically recoupable against the film’s sales.³⁹³ The MG, or advance, is therefore a loan that is repaid when the film is sold. An agent’s loan to his principal qualifies as an interest, and to be coupled with the power, the agent must ensure that the loan is made by the same legal entity as the agency.³⁹⁴ This loan, now a power coupled with an interest, creates an agency that is irrevocable, at least until the advance is recouped.³⁹⁵

However, once the advance is recouped, Sam would cease to have an interest, and his agency would again be revocable. Although not all films are profitable, an MG is a sales agent’s vote of confidence in that film, and recoupment is confirmation that at least that minimal bar of success has been met. However, because a recouped advance ceases to be a power coupled with an interest, Sam’s protection in his agency for that film ends just as his investment is paying off. And arguably, the most painful revocations will be instances where the film is ultra-successful and the advance is already recouped. This is far from ideal, but limited protection is better than no protection, which is where Sam currently stands.

*C. Fort Yuma Gold:*³⁹⁶ Perfect a Security Interest

Whether Sam decides to take rights as a distributor, provide an advance, do both, or neither for the films that he represents—he has a third choice. Sam can perfect a security interest in his films, something that distributors, lenders, and guarantors routinely do to protect their

392. *FOR A FEW DOLLARS MORE* (United Artists 1965).

393. *See* MOORE, *supra* note 4, at 4, 9.

394. *See supra* Part III.B.4.

395. *Alderman v. Cargo Craft, Inc.*, 573 S.E.2d 108, 109–10 (Ga. 2002) (holding that once a loan is repaid, it ceases to be the interest necessary for an agency to be irrevocable).

396. *FORT YUMA GOLD* (a.k.a. *FOR A FEW EXTRA DOLLARS*) (Interpeninsular 1966).

investments.³⁹⁷ The filmmaker-distributor relationship usually involves shifting most or all of the performance risk to the distributor, while the sales agency relationship shifts little or no risk to the sales agent. Perhaps this is the reason that sales agents do not take security interests and distributors do. However, while the performance risk is not borne by the traditional sales agent, the risk of revocation is. A security interest would be a simple solution to keep both the structure of the agency with its limited liability, and the security of a distributor, whose agreement with the filmmaker is in theory solid and irrevocable.

IFTA's Model Sales Agency Agreements include a Security Agreement,³⁹⁸ for use when the sales agent is providing an advance to the filmmaker.³⁹⁹ IFTA's Security Agreement stipulates that "[t]he Parties desire to secure the right of Secured Party [Sales Agent] to receive the payments and make the recoupments, including the Advance . . . to represent the Picture, and to exercise its rights and remedies under the Sales Agency Agreement."⁴⁰⁰ The critical information in the IFTA form is the agreement that the "right" of the sales agent "to *represent* the Distribution Rights in the Picture throughout the Territory during the Agency Period[.]"⁴⁰¹ and the "right to damages for any attempt by Producer to *cancel or terminate* the Sales Agency Agreement or *enjoin Sales Agent's representation* of the Picture . . ."⁴⁰² are secured by collateral.⁴⁰³ The collateral supplied by the owner includes "copyright, trademark, patent, or other intellectual property rights in the Distribution Rights in the Picture . . ."⁴⁰⁴ and "physical film, sound and video elements,"⁴⁰⁵ as well as marketing materials.⁴⁰⁶

While security interests are only taken by IFTA members under the IFTA forms when the member is providing an advance, the provision of an advance or loan is not a prerequisite to taking a security interest. A different, non-IFTA model agreement for sales agents⁴⁰⁷ includes a

397. Interview with Steve Monas, *supra* note 3.

398. IFTA Model Sales Agency Agreements, Security Agreement.

399. Telephone Interview with Susan Cleary, VP & Gen. Counsel, IFTA (Mar. 7, 2013).

400. IFTA Model Sales Agency Agreements, Security Agreement, para. C.

401. *Id.* at para. 2.

402. *Id.* at para. 2(iii).

403. *Id.* at para. 1.

404. *Id.* at para. 1(a)(i).

405. *Id.* at para. 1(b)(i).

406. *Id.*

407. Alison Cohen, *PLI-Outline: Independent Film Financing* in 2 Counseling Clients in the Entertainment Industry 2011, at 537, 563-90 (PLI Intellectual Prop., Course Handbook Ser. No. 1040, 2011).

security interest clause⁴⁰⁸ that is not limited to occasions when the sales agent provides an advance or MG.⁴⁰⁹ This agreement states simply that “Owner . . . grants to Agent a security interest in all of Owner’s right, title and interest of every kind and nature, if any, in and to the Film[,]”⁴¹⁰ in order to secure the obligations and performances of the Owner under the Sales Agency Agreement.⁴¹¹

Since a power coupled with an interest is a “specific, present property interest”⁴¹² in the subject of the agency, a security interest suffices as that type of interest required to render an agency irrevocable. However, an interest required to render an agency irrevocable does *not* suffice to create a perfected security interest.⁴¹³ To perfect a security interest and reap its benefits, such as the ability to foreclose on the collateral in case of contractual default, Sam must follow specific steps.⁴¹⁴ *In re Peregrine Entertainment, Ltd.*⁴¹⁵ clarifies that the Copyright Act preempts other state and federal law recording systems.⁴¹⁶ Therefore, to perfect an interest in a copyright, the interest holder must record that interest with the Copyright Office.⁴¹⁷ For all other non-copyright interests in the film, Division 9 of the California Uniform Commercial Code still governs.⁴¹⁸

The non-IFTA model agreements also address the issue of *where* this security interest should rank in the hierarchy of other interests held in the film.⁴¹⁹ This form agrees that the sales agent’s interest will be “subordinate to the security interests granted by Owner to the financier(s) of the Film, the completion bond company . . . and any guilds requiring security interest in and to the Film.”⁴²⁰ This form illustrates that such interests in the independent film business are generally taken by every other participant in the film’s financing and distribution chain. Although sales agents are not currently among

408. *Id.* at 575 para 17.

409. Telephone Interview with Alison Cohen, *supra* note 36. Although Ms. Cohen created the model sales agreement for PLI while working at FilmNation, this is not a FilmNation form. *Id.*

410. Cohen, *supra* note 407, at 575–76 para. 17(a).

411. *Id.*

412. *Capital Nat’l Bank of Sacramento v. Stoll*, 30 P.2d 411, 413 (Cal. 1934).

413. *See In re Peregrine Entm’t, Ltd.*, 116 B.R. 194, 198–99 (Bankr. C.D. Cal. 1990).

414. *Id.*

415. *In re Peregrine*, 116 B.R. 194.

416. *Id.* at 201–02.

417. *Id.*

418. *LeFlore v. Grass Harp Prods., Inc.*, 67 Cal. Rptr. 2d 340, 345 (1997).

419. Cohen, *supra* note 407, at 576 para. 17(a).

420. *Id.*

the parties perfecting a security interest as a routine matter in the films that they represent,⁴²¹ perhaps they should be.⁴²²

Because security interests in the film are not routinely granted to agents in a sales agency agreement, producers may be reluctant to grant them to agents such as Sam who request them going forward.⁴²³ In an ideal world, Sam would ask the producer if she plans to honor the contract that they have negotiated, to which she would reply, “*Of course!*” Sam would then simply remind the producer that her security interest acts only to protect her intention *not* to revoke the contract, and will not come into play unless she breaks her promise. However, in the film business, leverage is often more meaningful than logic. As with most changes in the entertainment industry, a party with leverage will lead the way for his “ask” to become the new standard custom and practice. Whether Sam has that leverage or whether another sales agent must be the vanguard, a simple security interest would stabilize the sales agency agreement, and therefore, the independent film industry as a whole.

Conclusion: *The Good, the Bad and the Ugly*⁴²⁴

The film business is always a gamble.⁴²⁵ But the inherent risk involved with whether a film finds an audience should *not* be compounded by uncertainty about whether a contract may be terminated without warning. Digital distribution and alternative financing models have ushered in a new era for independent film. The foreign sales agent plays an important role in this transition. But the traditional sales agent is in constant danger of revocation. While the foreign sales agents’ forefathers may not have relied on lawyers,⁴²⁶ entertainment lawyers *can* help Sam and his contemporaries, without killing the deal.⁴²⁷

421. Interview with Steve Monas, *supra* note 3; *accord* Telephone Interview with Robbie Little, *supra* note 36.

422. Interview with Steve Monas, *supra* note 3; *accord* Telephone Interview with Robbie Little, *supra* note 36 (agreeing that a security interest is a logical way to create stable sales agency agreements, but surmising that more agents do not create them because then they would need to hire lawyers).

423. Telephone Interview with Alison Cohen, *supra* note 36; Telephone Interview with Michael Meyer, *supra* note 140; Telephone Interview with Robbie Little, *supra* note 36.

424. *THE GOOD, THE BAD AND THE UGLY* (United Artists 1966).

425. See Simensky, *supra* note 373 at 1, 2.

426. Telephone Interview with Robbie Little, *supra* note 36; Telephone Interview with Mark Damon, *supra* note 74.

427. Telephone Interview with Robbie Little, *supra* note 36 (“If you listen to your lawyer, you’ll never do a deal.”).