

LEGAL EYE

by Michael Bergman

Generally the principal creative people in a motion-picture, such as the director, the writer and the leads contract to receive as part of their reward a share in the revenue or profits. This profit-sharing is sometimes referred to as points, residuals or royalties. The wonder of a picture that seems to be doing well in the theatres is that there rarely seems to be much, if anything, accruing to the creative person entitled to a share of the profits. This has much to do with the complicated and seemingly bizarre method by which the producer's revenue or profit is calculated for the purposes of profit-sharing. To the extent that creative people have problems collecting their share, it is often an indication of poor or faulty contract provisions.

The first basic problem to determining the eligibility of the sums payable through profit-sharing is calculating just what is the producer's profit. In theory, the producer's profit should consist of all net revenue which the producer receives. In practice, though, it is much more difficult to arrive at a hard and fast definition. Between the ultimate user, the audience and the producer, are a host of claimants to a share of the total monies generated from a film: from the exhibitor to the distributor to television broadcast to cassette rentals, from gross deals to net deals, participants and factors over which the creative person has little, if any, influence or control.

Where the creative person may have some influence, though, is with regard to producer-related activities, the most common of which in Canada are non-arm's length sales agents. These sales agents, whose function presumably is to sell the picture, are often controlled in a legal sense by the production company. The two entities may have common shareholders, common directors and even common officers. Whereas these sales agents may perform legitimate functions, they have the rather interesting secondary task of syphoning off a certain percentage of funds from the overall revenue of the picture before that revenue accrues to the producer. It can be argued then that the ultimate principals behind the production company and the sales agent receive money while the producer pleads poverty.

Once revenue from the picture trickles down to the producer, a whole host of claim-

ants queue to receive their share. First and foremost will be the lenders. These would usually include, in order of priority, Telefilm and other government funding agencies, the banks or other institutional lenders. These entities are quite careful not to permit any other person (or, for that matter, the producer) to in any way outrank them in priority of claim. Standing second in line, although not always, are the investors who are at this point permitted to recoup the cost of their initial investment, although no more than that. Next come, in varying order, promotion, publicity, administration, producer's expenses and the like.

At this point, a rather peculiar thing happens. The remaining mass of funds is generally divided into two, one-half of which accrues to the investors as their so-called profit and the other half accrues to the producer. In most cases, the producer will then, from his share, pay the deferred remuneration of the cast, crew, writer and producing personnel. These items, having been deducted, income and related taxes are then taken off. This finally leaves a small fraction, if anything at all, of the film's total revenues - funds which may be labelled profit in the production company's hands. It is generally at this point that creative personnel will become entitled to their profit-sharing, but even then there is a hitch. Only the producer knows when the picture is in a position that enough revenue has trickled down so that something is left for profit sharing. At that point, the factor of the timing of payment comes into play. Profit-sharing payments are generally made annually, sometimes semi-annually. When they are made during the calendar year, that can be at the producer's discretion. Consequently the producer may select a time for payment which is more advantageous to the producer than to the creative person. Furthermore, in the interval, the

producer is retaining monies which would otherwise be paid out to the creative person as profit-sharing; consequently, the interest accrues to the producer. Finally, this pool of net profits is not always held by the production company, but is often retained by the holding or parent company which in many cases has taken the assignment of all of the production company's rights in the film. The holding company may be responsible for several films at the same time. Under this arrangement the creative person is relying on the good faith and solvency of this entity

to assure that the net profits are not dissipated or otherwise lost before profit-sharing is paid out.

The preceding example describes the situation of many creative persons who are entitled to what is euphemistically called "net profits." This phrase "net profits" often appears in the creative person's contract and may be loosely, if at all, described. It is generally a synonym for 'a cut of the smallest portion of the remaining revenue of the film after everyone else is paid.'

Given the importance of the contribution of primary crea-

tive personnel, this situation is neither justified nor does it have to be. The definition of "net profit", or whatever term is used to indicate profit-sharing, can be adjusted so that there is a genuine reward for the positive results of inspired creation. "Net profits" can be determined for profit-sharing purposes *before* taxes and even before the division of the massive revenue into two pools between investors and the producer. After all, it can be legitimately argued that the true profit of a film is that amount which ultimately ac-

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crues to the investors and the producer together since the combination of their financial and organizational abilities has resulted in the infrastructure which makes the movie possible.

The key, then, is the negotiation of the creative person's contract. These negotiations

have to be conducted with regard to the expectations of profit-sharing and so that the ultimate written terms and conditions which define profit-sharing are realistic. There is not much sense providing for points, residuals or royalties if their provision is just an attempt to confirm the mathematical equation that

says that a percentage of zero equals zero.

*Michael N. Bergman, Barrister & Solicitor, is a member of the Bars of Quebec, Ontario and Alberta, with offices in Montreal and Toronto.*

### Date set to launch Festival of Festivals under new director

TORONTO - June 25 is the date set for the opening press conference at which the content and character of the 11th annual Festival of Festivals, running from September 4-13, will be first revealed. The Festival of Festivals office is inviting entries for Canadian films or co-productions, whether it's feature-length, short, documentary, animated, or experimental, to pre-selection screenings in Toronto from June 17-27.

The preview deadline for prints or cassettes is June 13, with the pre-selection entry flyer noting that preference will be given to Canadian premieres.

The Festival of Festivals, in a bid to get its funding underway, had begun a mailing of flyers seeking Friends of the Festival. Sent out in April with an annual price tag for friendship of \$50, the flyer entices would-be patrons and sponsors with early notice of pass/ticket sales, advance information on screenings, news releases, advance screening invitations, membership card, 10 per cent off Festival merchandise, a free Festival poster and program book, the chance to win a Festival gold pass and - the ultimate teaser - a tax receipt from the registered non-profit organization.

### Mr. CBC retires

TORONTO - Cec Smith, known in Canadian newsrooms by the nickname "Mr. CBC," retired after 30 years of service with the public broadcaster with the filing of his final news release May 16.

Smith, press relations director of the CBC's English TV and

Radio networks for the past 20 of his 30 years with the corporation, has worked under six CBC presidents and been involved with 22 fall television launches. Responsible as well for the CBC's speakers' bureau and audience relations division, the 57-year-old Smith is considering public relations and freelance writing



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