

LEGAL EYE

by Michael Bergman

Small Print and Invisible Ink

The editors of Cinema Canada are pleased to welcome Canadian entertainment lawyer Michael Bergman among the magazine's columnists. Each month Bergman will address legal aspects of current problems of interest to the production community and industry.

ciate the value of the finely drafted contract. Properly worded agreements do not merely protect the rights and interests of the respective parties, in a broader sense they advance the interests of the principals into indirect areas such as taxation, prevention of abuse, post-contractual disputes and many others.

While oral agreements are legally possible, they suffer from the mind's internal workings: misunderstanding, difference of interpretation and the famous lapse of memory. A written contract serves as a memorial the interpretation of which

is subject to defined legal principles. Furthermore, an agreement reduced to writing confines the parties to "the four corners of the writing." The document speaks for itself, no amount of oral commentary will change its interpretation or meaning, no one can examine the pre-contractual negotiations on which it is based (unless the consent of the parties is in dispute).

The written agreement will not be buffeted by the hot wind of personal, interpreted preference, but at the same time, it must not speak through an equivocal haze. Contractual clarity and precision defines the rights of the parties. It isolates specific legal rights which should be the cornerstone of the agreement. This is particularly important for proprietary and creative interests. A writer may option a script granting the copyright, a world-wide license or a limited license, all of which will have a direct bearing on his control, fees and the usefulness of his remaining proprietary rights. Yet how many options are grab-bag one-page affairs which require further negotiations if exercised, assuming it is not already too late?

A prudent contract will simplify the result of negotiations into an agreement which is a paradox. It states the understanding in good faith, it anticipates litigation and it serves extra contractual needs. A simple example illustrates this. There is a difference between contracting for a fee of \$1,000 per week for 10 weeks of work and a fee of \$10,000 payable

\$1,000 per week. The former gives the impression that the individual is hired by the week and, if terminated, his severance should be determined in terms of weeks. In the latter case, the fees seem to be global and not necessarily determined by time. An individual terminated without cause in this case may be able to argue that the whole amount is due on severance. If the contract provides for weekly or other invoicing periods, the contractant may argue that he is self-employed and should be exempted from mandatory employer deductions. Thus, appropriate wording may enlarge fees on severance, establish a plausible argument in the event of subsequent court action and provide relief from immediate tax payments.

Even the weaker of the parties is not altogether in a hopeless position. By competent drafting the contract should limit the more powerful reach of the other party or at least secure some pole for the weaker to hang on to. Whether the retention of copyright, suitable priority ranking of deferrals, rights of first refusal, option agreements, restructuring of fees and per diems, there is always something to work with.

Film projects are formed of numerous contracts, all of which have a kind of subliminal effect on each other. The well-written contract will always have a greater effect on other agreements which will in turn buttress the former. This is not necessarily a function of the rights granted to the contrac-

tant but rather the result of the inability of others to run roughshod over properly drafted, even minimum, rights. One only has to remember how distribution agreements can undo everyone else's fees and residuals to understand the point.

Gaps in a contract do not necessarily mean silence. It probably signifies confusion. Worse though, gaps like a "black-hole" may suck in legally implied contractual terms or recourse to the notion of custom and usage. The simplest contract should be a tailor-made suit; implied terms can be an ill-fitting straight-jacket. Perhaps this is most evident when film people fall back on union, guild or other group agreements. Individual contracts which do not mesh with these agreements may defeat the good intent of the latter or deny the contractant individually negotiated better terms.

Contracts with gaps become litigation nightmares and not simply because there is more to prove. In court tactics, gaps are more of a "negative" which are harder to fill than the "positive" of existing working. Most parties begin with the thought that lawsuits are for others, an attitude that overlooks the real possibility of differences arising in good faith.

A better appreciation of contract values will no doubt result in better agreements. Some common sense and an open-eyed approach will remedy many difficulties even when many are hesitant to have first recourse to lawyers.

Otherwise, the small print and invisible ink is relentlessly at work even while the contract rests in your top drawer.

Michael N. Bergman is a Canadian entertainment lawyer. He is a member of the Bars of the Provinces of Quebec, Ontario and Alberta, with offices in Montreal and Toronto.

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Contact
Donato Baldassarra
at (416) 368-4672



The Association of Canadian
Film Craftspeople
(A.C.F.C.)
43 Britain Street, 3rd Floor
Toronto, Ontario M5A 1R7
(416) 368-4672

Cine Pioneers gather

TORONTO - Canadian Picture Pioneers is hosting its annual Pioneer of the Year Award dinner Nov. 20. Top honour goes to Don Watts, director of advertising and promotion at Famous Players (see People). CPP will also be honouring Irving Stern, general manager of Warner's; Genny Le Blanc, manager of the Paramount Twin in Moncton; and Hilliard Gunn, former manager of the Capital Theatre in Winnipeg. The late George Heiber, Orion's general manager, will be honoured with a posthumous award.

Canadian Picture Pioneers was founded in 1940 to promote the welfare of those in the motion-picture industry in Canada. With over 900 members in six branches across the country, it undertakes extensive charitable activities. Membership requirements call for 20 years of service in the industry.