# KEY PROVISIONS IN TELEVISION DISTRIBUTION DEALS

**FOR BENEFIT OF COPYRIGHT OWNER/LICENSOR**

GRANT OF RIGHTS

i. Exclusive right to exhibit the finished tapes of the Licensed Episodes via basic cable linear television by any means of transmission only to authenticated subscribers, provided such transmission is linear television ("**Television Rights**").

ii. In connection with the Television Rights, the non-exclusive right within the Territory to stream (not download) each Licensed Episode via a free video-on-demand catch up window ("**FVOD**") on a branded platform of the linear Network of the Licensee commencing as of the television premiere date of each such Licensed Episode for up to seven (7) days.

Any such internet and/or wireless and/or mobile exploitation with respect to the Licensed Episodes granted hereunder shall be geo-filtered to prevent such exploitation outside the Territory and Licensee shall have appropriate security, digital rights management and copy protection in place in accordance with industry standards.

RESERVATION OF RIGHTS

All rights not specifically granted to Licensee in this Agreement are hereby reserved by Owner, including without limitation, the right to exploit the Licensed Episodes via the internet, wireless, and/or any and all digital media, whether now existing or hereafter invented. For the avoidance of doubt, SVOD and /or AVOD/FVOD (except on a catch-up basis) rights are not being granted hereunder; and Licensee cannot exhibit the Licensed Episodes via a stand-alone SVOD and/or OTT site (*e.g.*, Hulu/Netflix/Amazon) even if the Licensed Episodes are organized under Licensee's branded environment.

**FOR BENEFIT OF DISTRIBUTOR/LICENSEE**

PRIOR EXPOSURE/EXCLUSIVITY

i. *Prior to* the commencement of the Term, the Program shall only be exploited via theatrical, non-theatrical, airlines, traditional home video, electronic sell-through/download to own (i.e., a permanent copy is retained for a fixed fee per program download), Pay-Per-View/Video On Demand per the definition below, and pay cable television and the subscription video-on-demand **("SVOD")** service, which is branded the same as the pay cable television service to authenticated subscribers (e.g., Showtime On Demand is acceptable if the Program has already been licensed to Showtime prior to Licensee's License Period), provided a periodic subscription fee is charged.

ii. The Program shall be exclusive to Licensee during the License Period in the English language against all media except theatrical, non-theatrical, traditional home video, download to own (i.e., a permanent copy is retained for a fixed fee per program download), and Pay-Per-View/Video On Demand per the definition below.

"Pay-Per-View/Video On Demand" – Grantor shall be permitted to exploit the Program during the Term via pay-per-view as scheduled by a pay-per-view service or "video-on-demand" (i.e., where a per-viewing fee is charged to the consumer for viewing an exhibition of any Program for a twenty four (24) hour viewing period or up to seventy two (72) hours if required under VOD/PPV Agreements at a time selected by the consumer) ("**VOD Exploitation**"); and is not offered on a FVOD or SVOD service, subject to the following terms and conditions:

(a) Any service offering such VOD Exploitation shall not be commercially supported/sponsored once a Program has been selected by the viewer (i.e., no commercial ads prior to, during or after such Program and commercials are not integrated into such Program itself), but banner ads can appear on the overall service itself;

(b) Such VOD Exploitation shall not be named, marketed or branded in a manner similar or the same as a cable or broadcast network ; and

(c) Viewers of any VOD Exploitation must be charged a per-exhibition transactional fee in the range customarily charged by providers of PPV/VOD services for the viewing of programs that are comparable in age to the Program.

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August 2011
(updated December 2012)

**<u>Client Alert</u>: *Who Wants To Be A Millionaire?***

By Ezra Doner*

**In an integrated production, distribution and broadcast company like ABC/Disney, which division makes the profits?[1]**

Contestants who appear on *Who Wants To Be A Millionaire* play to win a million dollars. Now Celador Productions, the show's creator, has successfully upheld a jury verdict in its favor of more than $319 million against the ABC Network.

<u>Background</u>

In 1999, Celador, a U.K. production company, licensed North American format rights in *Who Wants To Be A Millionaire* to the ABC television network and Buena Vista Television, both of which are owned by The Walt Disney Company. ABC's U.S.-produced *Millionaire* exploded out of the gate. One-time Disney Chairman Michael Eisner placed the value of *Millionaire* to ABC at "$1B, wild guess, maybe more."

Disney's accounting statements, however, reported Celador's 50% profit participation in the U.S. series as not a billion, nor a million, but . . . zero. In 2004, Celador proceeded to bring suit, and in 2010, a federal jury awarded Celador damages of $270 million, which, together with prejudgment interest, amounted to almost $320 million.

How did Disney determine Celador's profits to be zero, what happened to ABC's billion dollars in value, and what does this mean for revenue participants and television companies that produce, distribute and exhibit their own shows?

<u>Whose Revenues?</u>

In the jargon of filmed entertainment, people often ask about the "gross" of a movie, the "profits" of a TV show, the "sales" of a videogame. The follow up question they should be asking is, whose gross, whose profits and whose sales? The answer can be crucial.

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[1] *Celador Int'l v. Walt Disney Co.*, 347 F.Supp.2nd 846 (C.D. Cal. 2004); affirmed, *Celador Int'l v. Am. Broad. Cos.*, 499 Fed.Appx. 721 (9th Cir. 2012).

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* Ezra Doner is an entertainment and copyright lawyer who focuses on the film, TV and other content sectors. He has worked both as an in-house business and legal executive and as a private lawyer. He did not represent any of the parties in this case. 

In the case of *Millionaire,* Disney designated little-known Valleycrest Productions Inc., an affiliate, to produce the episodes; then arranged for Valleycrest to license the episodes to ABC at cost; and then reported profits to Celador at the Valleycrest level – that is, the production company level. Under this structure, it was a legal certainty that in the initial broadcast cycle, there would be zero profit to Valleycrest and, hence, zero profit to Celador.

Of course, had Disney produced *Millionaire* for CBS, NBC or FOX, it is inconceivable that the deal would have been designed to yield zero profit from the first cycle. Either Valleycrest as producer, Buena Vista Television as distributor, or a Disney company acting for either or both, would have bargained for at least the possibility of profits.

Good Faith And Fair Dealing

Every contract carries with it an implied obligation of good faith and fair dealing. At trial, Disney argued it acted in good faith, but that's not how the judge and jury saw it. In this case, good faith and fair dealing meant that a contracting party, like Disney, which had the ability to manipulate financial outcomes, could not do so unfairly.

Renegotiation Anyone?

On successful television shows, it is not unusual for fees to production companies, show runners and on-screen talent to be periodically renegotiated, even if there isn't a contractual requirement to do so.

After *Millionaire's* breakout success, the Disney companies raised the per episode fee to Regis Philbin, the show's star host, and improved the commission to William Morris Agency, the show's packager, which had represented Celador in the *Millionaire* negotiations. But Disney did not revisit Celador's participation formula, which locked Celador at zero profits from the initial run.

Measure of Damages

At trial, Celador's experts testified regarding typical license fee increases for successful TV shows, and projected what Celador's 50% profit participation might have looked like if episode license fees had been increased to fair market value. Of the alternate projections presented by Celador's experts, the valuation to which the jury came closest operated as follows.[2]

For the first 107 episodes, the experts assumed that license fees would have stayed flat; that is, each of those episodes would have continued to yield zero profit to Celador. Starting at episode 108, however, the license fee would have risen to something like $2.4 million per episode, a big jump over ABC's actual license fee to its corporate cousin Valleycrest.

[2] Since the jury was not required to report details of how it assessed damages, this is an attempt to reconstruct the jury's calculation by reference to information in the court file.

Whose Profits Anyway?

Disney, as an integrated production, distribution and exhibition television company, had the practical ability to shift profits between its production, distribution and broadcast divisions. It could have favored Buena Vista Television, by increasing its distribution fee. Or it could have favored Valleycrest Productions by increasing its license fee (and, indirectly, Celador's profits). But the massive inflow of advertiser dollars, together with a more or less flat license fee, made ABC the big winner. And, in the participation reports, that made Celador the loser.

The Lesson

If you have the unilateral ability to structure a participant's outcomes, think carefully before you report a breakout success as a total loser. Because a jury may restructure that outcome for you.

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August 2012

**Client Alert: Another $300 Million for *Guitar Hero* Purchase; When is a Statement Final?**

By Ezra Doner*

**Eager buyers often overpay for entertainment assets. Add a problematic earn-out[1] and the possibility of overpayment increases.**

In the latest *Guitar Hero* case[2], the problem was that an earn-out statement became final against Viacom, the purchaser of videogame company Harmonix Music Systems, notwithstanding a sudden, rapid decline in the value of Harmonix's game inventory.

If you're in the position of Viacom, ideally, your earn-out and participation statements will not be final until you say they're final. In fact, even if your earn-out statement is final vis-à-vis Harmonix, you don't want it to be final for you. As the accounting party, you want the opportunity to revise, revisit, rethink and recalculate your statements.

In the arbitration underlying this latest *Guitar Hero* case, an earn-out statement was held to be final against Viacom in part because it was final against the selling shareholders of Harmonix. In the case itself, the reviewing court affirmed an arbitration award to the selling shareholders of close to $300 million.

The Initial Transaction

Harmonix is one of the companies behind such videogame franchises as *Guitar Hero* and *Rock Band*, iconic properties of the first decade of this century. Viacom wanted to be in that space and, in September 2006, it bought Harmonix for $175 million in cash plus an earn-out for the years 2007 and 2008. For each of those years, the earn-out formula was gross sales of Harmonix's games, less manufacturing and sales costs, less a flat $45 million; then 3.5 times the remainder[3].

The 2007 Earn-Out

In September 2008, Viacom paid $150 million as the earn-out for 2007, the first earn-out year. In calculating the first year earn-out, Viacom did not deduct the costs of goods that were unsold at year-end. At the time of this earn-out payment, Viacom, per evidence in the case, was

[1] An earn-out is future compensation to the seller of a business, based on the business' post-sale performance.
[2] *Viacom Int'l v. Winshall*, 2012 WL 3249620 (Del.Ch. Aug. 09, 2012), affirmed 76 A.3d 808 (2013)
[3] The court's decision does not explain the rationale behind this formula.

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* Ezra Doner is an entertainment and copyright lawyer who focuses on the film, TV and other content sectors. He has worked both as an in-house business and legal executive and as a private lawyer. He did not represent any of the parties in this case. 

"delighted to have Harmonix 'in the family' and thrilled with the progress of the *Rock Band* franchise." But that same month, Lehman Bros. filed for bankruptcy. Soon, the economy was in a tailspin. Had Viacom overpaid?

## The 2008 Earn-Out

In March 2010, Viacom delivered to Harmonix a final earn-out statement for 2008 which, despite some $768 million in sales, showed no earn-out due. In preparing this statement, Viacom deducted not only cost of goods sold, but also the cost of unsold goods at year-end 2008.

## The Earn-Out Formula and Inventory Cost

The Harmonix earn-out formula apparently did not permit deduction of costs of unsold goods. If it were otherwise, a purchaser like Viacom could load up on inventory during the earn-out period, burdening the selling shareholders with excessive inventory cost. Then, after the earn-out period, Viacom, having recovered the cost of goods, could sell free and clear of the earn-out participation.

## The Arbitration

Harmonix objected to the 2007 and 2008 earn-out calculations, and the parties, pursuant to their underlying agreement, proceeded to arbitration. In the arbitration, Viacom not only argued for deduction of costs of unsold year-end inventory but, in a variant of that position, argued that it was entitled to deduct an inventory write-down for 2008. Viacom pointed to an inventory write-down in its corporate financial statements, and claimed the right to make a parallel write-down in the earn-out statement.

In a December 2011 award, the arbitrators, siding with Harmonix, rejected both arguments, and determined the 2008 earn-out to be $298.8 million. In another part of the arbitrators' decision which wasn't challenged in court, the arbitrators added $84.4 million to the $150 million earn-out previously paid for 2007.

## The Reviewing Court's Decision

The arbitrators' decision meant that Viacom couldn't charge either the cost of unsold goods, or a write-down for their lost inventory value, to the earn-out. Viacom re-raised both arguments in the judicial review, but the reviewing court rejected them, affirming the arbitrators' award of $298.8 million for the 2008 earn-out.

## What This Case Means For You

If the Harmonix earn-out provision had been more sensitive to inventory risk, Viacom might have been in a better position to respond to the sudden and rapid decline in inventory value. Moreover, in participation agreements (if not earn-outs), the incontestability provision frequently makes statements final against the participant but not necessarily against the accounting party, and a provision along these lines might have provided more leeway to Viacom to revise the Harmonix earn-out statements.

Of course, this is hindsight, and since the text of the earn-out provision is not part of the reviewing court's decision, we don't know the precise state of play. From all appearances, the selling shareholders were able to negotiate highly favorable earn-out terms.

More generally, since inventory risk exists in every entertainment "hard goods" distribution arrangement, whether for DVDs, CDs, merchandise, physical books, and so on, it should be carefully considered in revenue participation agreements of all kind.

Coda

The total price Viacom paid for Harmonix, including upfront cash and earn-outs, was over $708 million. There may have been other costs as well.

Yes, Viacom apparently overpaid. The earn-out was cranked up to eleven! (See *This is Spinal Tap!*) Within a few years of the sale, *Guitar Hero* and *Rock Band* were (excuse the puns) played out, and Viacom ultimately sold the company back to the founders, reportedly for a song . . . plus a spot of sympathy from the Taxman[4].

[4] News outlets have reported that the sale yielded substantial tax benefits to Viacom. One of Harmonix's top games was *The Beatles: Rock Band*; hence the *Taxman* reference.

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December 2012

**<u>Client Alert</u>: *Napoleon Dynamite* litigation: Pick the Correct Video Royalty**

By Ezra Doner*

**Participation reporting for certain media and uses can be idiosyncratic.**

<u>Multiple Choice Question</u>:

Cult phenomenon *Napoleon Dynamite* generated a phenomenal $139 million in DVD sales in its first few years of release. What percentage of this amount did distributor Fox Searchlight share with the movie's producers?

A. 100%
B. 31%
C. 12.88%
D. 10%
E. zero

For the answer, keep reading.

<u>The Business Context</u>

After a successful theatrical release in June 2004, *Napoleon Dynamite*, a quirky, independent, low budget film, went on to generate a staggering $139 million in DVD sales *at the distributor level*.

As happens, success became a magnifier for differences of opinion.

Following an audit, in 2011, the movie's producers sued, claiming (among other things) that Searchlight underpaid by $10 million because the studio applied a wrong DVD royalty rate. At the end of November, however, a judicial referee, in a preliminary round, took the studio's side on this big ticket issue.

What was the correct DVD rate, and what can be learned from the producers' handling of their claim?

<u>Accounting for Home Video</u>

The usual notion of a movie distribution accounting is: there are revenues; there are costs; revenues are credited; costs are debited; and the balance is the "net" – that is, profit.

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Whatever the merits of this notion in general, when it comes to DVD and related media, that's not how it usually works.

In DVD accountings, as a rule, not all revenue is credited, and many costs are not debited. Instead, crediting is limited, by contract, to a negotiated percentage of revenue, commonly referred to as the "royalty rate" or, simply, the "royalty". And the distributor absorbs certain ordinary costs, such as duplication and freight, from the revenue that it retains and doesn't credit.

<u>Royalty Rate in this Case</u>

The documentation for Fox Searchlight's distribution of *Napoleon Dynamite* has two royalty rates: 31.66% of revenue from high price sales (sales of so-called "rental priced units"), and 10% from sale of "sell-through" units. Where did one category end and the other begin? In this case, that was a $10 million question.

From its DVD gross of $139 million from high price and sell-through combined, Searchlight credited only $17.9 million to the producers' account as contractually defined revenue. In other words, despite $139 million in total sales, the accounting statement treated only $17.9 million as monies in which the producers might share – 12.88% of the true gross. This 12.88%, the effective royalty, was a weighted average, based on a small portion of revenue at 31.66%, and the lion's share of revenue at 10%.

The claim ultimately made by the producers, however, was that Searchlight should have applied the higher rate, 31.66%, across-the-board, to all DVD revenue. This would have increased the amount to be shared by the producers from $17.9 million to $44.1 million, a jump of $26.2 million. After deduction of a 25% distribution fee (which was uncontested), the asserted increase would have been $19.6 million.

Since the producers shared profits with Searchlight on a 50/50 basis, their share of the $19.6 million would have been $9.8 million. So, this claim, rounded up, was worth $10 million.

If all of these figures are a bit confusing, suffice it to say that, when you start with $139 million in distributor's gross, even a moderate shift in a royalty rate can put a lot of money in play.

<u>Audit Process and the Claim</u>

At key points in the distribution and audit process, the producers, their sales agent and their auditor didn't challenge the dual royalty rate structure of 31.66% for rental priced DVDs and 10% for sell-through. They questioned at what unit prices these rates should apply, but not the two rates as such. Indeed, the auditor's report that was marked "final" expressly acknowledged the two rates.

Fifteen months after his final report, though, and on the eve of trial, the auditor issued a supplemental report in which he rejected the 10% sell-through rate category, on the basis that it wasn't properly part of the governing contract. This supplemental report claimed, apparently for the first time, that the full 31.66% rate should apply to sales of DVDs at *all* conventional price points.

The Referee's Report

In her "Proposed Statement of Decision"[1] which, on this issue, favors Searchlight, the judicial referee homed in on the auditor's change of position. She noted that for almost seven years, the film's producers and their sales agent had conducted themselves as if the Searchlight documentation, which included the dual rates, was in effect. Their conduct, she concluded, demonstrated that they "intended to be governed by" the dual rates.

Although the referee didn't expressly use this terminology, her analysis is analogous to the principle of "practical construction" – the notion that how a contracting party performs can be an important indicator of a contract's meaning, especially if that party later asserts a meaning inconsistent with their actions. Or, put differently, actions speak louder than words.

Timing

Although the precise text of the contract was fixed on signature, once accounting statements started to flow, and prior to audit and litigation, the producers and their team had the opportunity to argue that the contract called for the high price royalty rate only, but they didn't. Later, when the audit process began, and prior to their auditor's "final" report, they had another opportunity to take the "one rate fits all" position; this time they were slow off the mark. When they eventually took this position, it was well after issuance of the final audit report, and on the eve of trial.

The Answer

The answer to the multiple choice question is C: 12.88%. The referee, in her report, rejected the producers' challenges to this effective rate[2].

[1] *Napoleon Pictures v. Fox Searchlight Pictures*, No. SC 113978 (Super. Ct. Cal. Nov. 29, 2012); affirmed 2015 WL 1594299 (Cal. Ct. App. Apr 14, 2015)

[2] The *Napoleon Dynamite* dispute occurred in the context of the transition, in the late 1990's and early 2000's, from a DVD rental to sell-through business model. The home video sector, of course, is now undergoing another major transition – from physical units (DVDs and Blu-rays) to a digital model.

What This Case Means for You

In your business, if you commence an audit, develop your “final” position before you approve a final audit report. And if you see litigation on the horizon, assert your final position early, and often.

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February 2014

**Client Alert: *Crash* Profits Restated; Court Responds with "Big Interest"**

By Ezra Doner*

**Can a film company issue a participation statement, then later revise and reissue it, making major changes in its favor? If the changes are decidedly wrong, can there be consequences?**

Profit definitions typically give film companies an express right to correct mistakes, even retroactively. After all, mistakes get made.

But on January 31, a California appellate court, in a long running litigation over profits of the film *Crash*, rejected a film company's revised profit participation statements to key talent[1]. Calling the changes "bogus", the Court confirmed a $2.5 million interest add-on to a judgment for more than $9 million of unpaid profits.

How it Started

*Crash*, Oscar winner for Best Picture of 2005, was a box office success, especially in relation to its production cost. When the film company issued its first profit statements, the filmmakers' auditor claimed that profit participations had been underpaid. In response, the film company, citing its own newly discovered "mistakes", claimed that, to the contrary, it had overpaid the participations. Litigation ensued.

The Underlying Contracts

The filmmaker group, which included Paul Haggis, Bobby Moresco and Brendan Fraser, wrote, produced, directed and starred in *Crash*, pursuant to agreements with companies controlled by film financier Bob Yari (herein, collectively, "Yari")[2]. Starting at a defined breakeven, the filmmaker group and Yari had agreed to share defined profits on a 50/50 basis.

"Gross Receipts" were defined in the agreements as all monies actually received by or on behalf of, or credited to, Yari, and "third party participations" were a permitted deduction in determining profits. The meaning of these defined terms was a principal focus of the litigation.

[1] *Paul Haggis, Inc. v. Persik Prods. No.* B240556 (Cal. App. Jan. 31, 2014). Because the opinion was not certified by the court for publication, it may not be cited or relied upon in any other case. Nevertheless, readers may find the Court's analysis instructive.

[2] The Court found that the defendant entities were all under the ultimate control of Bob Yari and his holding company, Davand Holdings LLC. In a separate ruling, however, the Court held that a late amendment of the judgment adding Yari, as an individual, had been improper.

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What Is A “Third Party Participation”?

When Yari restated profits to correct its own “mistakes”, one of the changes was to re-characterize return on investment to a co-financier[3] as a “third party participation”. As a participation, payments to the co-financier would be ahead of the filmmakers, reducing the profit pool in which the filmmakers shared. On the other hand, if the payment to the co-financier stayed as a return on investment, it would be borne by Yari, and not reduce the filmmakers’ share.

The trial court, in rejecting Yari’s revision, noted that neither sides’ contract negotiators, nor an expert witness, had understood “third party participations” to mean or include payments like those to the co-financier.

Whose Revenues are Gross Receipts?

Another “correction” put forward by Yari was the exclusion, from Gross Receipts, of certain picture revenues which, per the financing agreements, were initially routed to the co-financier. In prior profit statements, however, Yari had treated these revenues as Gross Receipts. Excluding these revenues would have also reduced the pool of profits in which the filmmakers shared.

The Court, in rejecting this revision of the participation statements, pointed to provisions in the Yari / co-financier agreement that the financiers would pool receipts and pay talent participations from the entire pool.

Practical Construction

In scrutinizing the alleged corrections, the Court looked to Yari’s “predispute, post-contracting conduct” – the initial profit statements – as “powerful evidence” of the true meaning of the agreements. This legal principle is sometimes known as “practical construction” – the notion that how a contracting party performs a contract can be an important indicator of the parties’ real intentions, before a revisionist impulse clicks in.

The Price Of A Bad Faith Claim

In the *Crash* case, the dispute had been pending for so long, and the underpayment of profits had been so substantial, that prejudgment interest, on the underpayment itself, was a hefty $2.5 million. Were the filmmakers entitled to this much interest?

Under the general rule in California, a prevailing plaintiff in a contract case may not be entitled to prejudgment interest if the amount owed is not readily determinable because of a genuine dispute as to the method of calculation. In this case, however, the Court awarded interest under a bad faith exception. In particular, the Court cited findings of the trial court that Yari’s contractual interpretations were “bogus”, and that Yari had engaged in “creative accounting”,

[3] The co-financier was German media fund Apollo.

"an intentional scheme to withhold money" and a "diversion of funds" – pointed language that one does not often see in legal decisions.

<u>What This Case Means For You</u>

Judges may or may not know the difference between third party participations and return on investment, or excluded revenues and accountable gross. But they do know when litigants change positions. Reading between the lines, this Court was seemingly more circumspect about the Yari companies' positions than it might have been if those positions hadn't been changed.

Changed positions were similarly a factor in the *Napoleon Dynamite* case, which I wrote about at http://donerlaw.com/client-alert-napoleon-dynamite-litigation-choose-the-correct-dvd-royalty-rate. In that case, it was the participant's auditor and counsel who changed positions, but the general point I made there applies equally here. If you are a film company with a breakout picture, develop a good faith, best case position before you issue a first profit statement.

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May 2014

**<u>Client Alert</u>: Harlequin e-Books Royalty Case: A Dollar or a Dime?**

By Ezra Doner*

**In entertainment and media, sometimes business practices evolve more quickly than standard contracts.**

As recently as 2004, Harlequin Enterprises, the leading publisher of romance novels, did not specify a royalty rate for e-books in its author agreements. Rather, e-book sales were lumped into an "other rights" category originally intended for book clubs and other activities handed off to third parties, with revenue under this category shared between publisher and author on a 50/50 basis.

<u>Multiple Choice Question</u>:

Even though Harlequin has now taken much of its e-book activity in-house, this 50/50 revenue arrangement, unless amended, continues to apply to e-publishing of older titles. But under the original agreements made in 2004 and earlier, what percentage of e-book revenue is Harlequin *actually* reporting to and sharing with authors? Specifically, under these older agreements, does Harlequin report and share:

A. 100% of gross e-book sales, or
B. 70%, or
C. 50% or
D. between 6% and 8%?

For the answer, keep reading.

<u>The Lawsuit</u>

In <u>*Keiler v. Harlequin Enterprises*</u>, a class action lawsuit, authors are challenging Harlequin's accounting for e-book revenue under publishing agreements from 2004 and earlier (herein, "*Keiler* agreements"). After an initial dismissal on technical pleading grounds, an appeals court, in a revealing decision, recently revived the suit. See <u>*Keiler v. Harlequin Enterprises*</u>, 751 F. 3rd 64 (2d Cir. 2014).

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* Ezra Doner is an entertainment and copyright lawyer who focuses on the film, TV and other content sectors. He has worked both as an in-house business and legal executive and as a private lawyer. He did not represent any of the parties in this case. 

Business Context for the Dispute

From 2008 to 2012, U.S. e-book sales grew from $64 million to over $3 billion annually, a startling increase of over *4,700 percent*. And since distribution costs for e-books are so much less than for print (no paper, ink, warehousing or freight), e-books are especially profitable for publishers. Harlequin, like other publishers, has benefited from this explosion in e-book sales.

The rise of e-books, however, has exposed an inconsistency in Harlequin's royalty accounting practices. When it comes to print books, Harlequin has typically applied a modest 6% royalty against author advances and, once the advance is earned out, paid a royalty in that amount to the author. But for e-publishing of back catalog, older agreements continue to provide that 50% of e-book revenue will be credited against author advances and, once an advance is earned out, will be paid outright.

Now, authors in the *Keiler* case claim that Harlequin, through abusive arrangements with its subsidiaries, is trying to minimize the amount of shared e-book revenue.

Related Company Provisions

Under the *Keiler* agreements, Harlequin has the right to enter into agreements with companies that it owns – so-called "related companies". But if e-book and "other rights" are licensed to a related company, then per specific contract language, the amount paid by one Harlequin company to another must be "equivalent to the amount reasonably obtainable" from an unrelated company.

For the *Keiler* authors, how much e-book revenue has Harlequin actually moved from one Harlequin company to another? And if Harlequin had licensed e-book rights to an unrelated company, could it have obtained more e-book revenue than the amount it actually reported to the authors?

Harlequin Business Structure

Some years ago, Harlequin, seeking tax efficiencies, started designating Swiss subsidiaries as the nominal "publisher" in its author contracts. While, for practical purposes, Parent Harlequin continued to function as publisher in both print and (later) e-book media, Parent paid the nominal publisher only 6% to 8% of e-book revenue. The nominal publisher then reported this 6%-8% to authors as a "new 100%" – that is, as the *entire pool* of revenue which author and publisher were to share on a 50/50 basis.

So, the answer to the Multiple Choice Question at the top of this post is "D". Under these older agreements, Harlequin does not report 100% of its e-book sales, or 70%, or even 50% to authors under the *Keiler* agreements. Instead, Harlequin reports between 6% and 8% of e-book sales, and of this amount only 3% to 4% actually accrues to the author.

Ten Times Multiple

In an *amicus* (friend-of-court) brief in the case, the Romance Writers of America and the Authors Guild characterize the 6%-8% intercompany e-book royalty as an "unprecedented artifice" to deprive authors of the real benefit of the 50/50 e-book revenue sharing arrangement. They believe that, because of its dominance in the romance novel genre, Harlequin, in reality, would be able to obtain license fees of 50% to 70% of retail e-book sales, which at the high end is as much as ten times the 6%-8% that Parent Harlequin remits to Swiss Harlequin, the affiliated nominal publisher.

In everyday language, if Jack at Parent Harlequin can make a dollar from e-books, may Jill at Swiss Harlequin tell authors that they only made a dime?

Status of the Case and Key Issue

To be clear, so far, the Court in *Keiler* has not ruled that Harlequin has done anything wrong, much less that the company is liable for damages. In its recent decision, the Court merely held that the authors' pleadings are technically sufficient for the case to go forward.

Postscript

On May 2, the day after the *Keiler* case was revived, Harlequin announced a $420,000,000, all cash sale of the company to Rupert Murdoch's News Corp, which owns publisher Harper Collins. Presumably, the announcement had been held pending the Court's decision, and deal terms of the sale take into account possible outcomes in the litigation.

Post Postscript

April 2016 – Documents in the docket for this case seem to indicate that this case is on a path to settlement.

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March 2015

**<u>Client Alert</u>: *The Walking Dead*: Is AMC's License Fee "Improper" and "Outrageous"?**

By Ezra Doner*

**What is a fair deal between a captive TV production company and a network parent? That may depend on who you ask.**

In a pending lawsuit, writer/director Frank Darabont, creator of mega TV series *The Walking Dead*, along with talent agency Creative Artists Agency, claim that AMC Entertainment and affiliates artificially lowballed license fees via a "sweetheart deal" between related companies. The alleged result of this arrangement was to shift profits from AMC Entertainment, which the plaintiffs would share, to AMC Networks, which they wouldn't share, leaving the series hopelessly in deficit[1].

Darabont and CAA claim the related company license fees are "improper", "outrageous", "abusive" and "unconscionably low".

Below, I analyze certain of Darabont and CAA's related company claims. But first, a look at the customary TV production / distribution scenario.

<u>Production Companies and Networks</u>

In the typical scenario, a television production company (Prodco) contracts with a showrunner (a series originator such as Darabont) to create and produce a TV series. Compensation to the series creator typically includes fixed fees, paid from production budgets, plus contingent fees (a/k/a revenue participations) which are a percentage of series revenues.

If the TV production company is a standalone company, unaffiliated with the network or other end user of the series, then the participation interests of a series creator such as Darabont are aligned with those of the Prodco. A standalone Prodco would want to license the series to the highest bidder, because the more revenue the series generated, the more revenue for the creator and the Prodco to share.

[1] *Darabont et al v. AMC Network Ent. et al*, No. 654328 (NY Sup. Ct. 2013)

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Captive Production Company

But what if the TV production company isn't a standalone but, rather, is affiliated with and controlled by a TV network, so that the Prodco can't sell the series to the highest bidder? In other words, what if the Prodco is a captive production company? In that scenario, the Prodco is typically not a separate profit center but, instead, a stand-in for the network. In that case a creator such as Darabont or a packager such as CAA can find themselves directly in conflict with the network over calculation of network license fees.

That's what is alleged in this litigation.

Plaintiffs Frank Darabont and Creative Artists Agency

Plaintiff Frank Darabont, the creator of *The Walking Dead*, together with series packager CAA, claims just such a captive relationship and resulting misalignment of interests. The case is still in the discovery phase, the plaintiffs have not proven their claims, and the defendants have denied the truth of the claims. But a close reading of the complaint is a useful guide to the pitfalls of the production and licensing arrangement used by the AMC defendants for this series.

Darabont Develops *The Walking Dead*

*The Walking Dead*, which is set amidst a zombie apocalypse, started out as a black and white graphic novel by Robert Kirkham initially published in 2003. Frank Darabont, the acclaimed writer/director of such films as *The Shawshank Redemption* and *The Green Mile*, brought the property to NBC, which commissioned him to write a pilot episode but, ultimately, did not proceed to series. Darabont then took the project to AMC, the formerly sleepy classic movies channel originally known as American Movie Classics, which, thanks to *Mad Men* and *Breaking Bad* (both produced by independent TV companies), had become the hottest network on basic cable.

AMC and Darabont reached agreement in general terms and, while Darabont began revising the pilot script, AMC began preparing an agreement. The draft agreement provided for a revenue participation to Darabont of up to 12.5% of profits of an unaffiliated company that AMC would designate. But after receiving Darabont's new work, AMC decided instead to produce the series via an affiliated rather than an unaffiliated company.

Imputed License Fee

Because AMC's captive arrangements called for its affiliated production company to produce the series for the AMC Network, the Prodco would not be putting the project on the market to objectively establish a license fee. So how would the license fee be set?

Per allegations in the complaint, AMC was permitted to "impute" a license fee on "monetary terms comparable to the terms on which [AMC] enters into similar transactions with unrelated third party distributors for comparable programs." In other words, the license fee was to be set at fair market value.

The Profits Definition and Actual License Fee

The above language of the agreement established the principle of fairness, but lacked a mechanism to put it into effect. The net profits exhibit which AMC subsequently provided, however, set the related companies' license fee as a percentage of production cost at a level that Darabont and CAA allege is "unconscionably low" and has "no regard for what AMC or any network would pay in an arms' length agreement for the right to broadcast such a comparable highly successful series."

Multiple Choice Question

What is the percentage of production cost at which AMC allegedly set the imputed license fee?

A. 90%
B. 65%
C. 33⅓%
D. 10%

The Answer

The percentage is B – 65%. But, per the complaint, at the time the net profits exhibit, including the 65% license fee, was first circulated, the first season finale had already aired and the series was a certified hit. Moreover, the imputed license fee was capped at $1,450,000 per episode (with 5% bumps in subsequent seasons), leading to an effective rate well below 65%. Finally, the fee arrangement was also perpetual, and didn't provide an opportunity for a re-set at the end of the fourth season which would have been customary in an arm's length license.

At the end of season two, AMC's accounting to Darabont showed no profits, but instead a loss on the series of $55 million, rising to $71 million when interest and overhead are factored in. The plaintiffs highlight these numbers to show the economic unreality of the related party arrangements.

The Future of This Lawsuit

To be clear, evidence has not yet been presented or tested in this case, by way of a motion for summary judgment or a trial. The plaintiffs have also made other claims, among them, that Darabont was wrongly fired as executive producer in the second season, to avoid the vesting of certain valuable contract rights. So I have no view as to the merits or the likely disposition of the dispute. But if the allegations are sustained, AMC may well want to change its practices (and indeed, may already have) so that it specifies related company license fees earlier in the contracting process. Because if you are the network and you're late, you may end up with a license fee or profit calculation set by a jury. See my Client Alert at http://www.donerlaw.com/client-alerts/?p=18 regarding the profits of reality TV phenomenon *Who Wants To Be A Millionaire*. In that case, the jury did indeed make the plaintiffs millionaires – 320 times over!

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September 2015

**<u>Client Alert</u>: Glen Larson TV Profits Dispute: If You Wait to Sue, How Long is Too Long?**

By Ezra Doner*

**Glen Larson produced some of the most successful television shows of the 1970s and 80s, including *Quincy M.E.*, *McCloud*, *Knight Rider* and *Battlestar Galactica*. In 2011, he sued Universal Television, claiming that despite Universal's having made "hundreds of millions of dollars" on shows which he produced, the company hadn't paid him a penny in profits. But had Larson waited too long?**

That question was addressed in a recent court decision, *Glen Larson Prods.* v. *Universal City Studios Prods.*, No. BC465172 (Super. Ct. Cal. Sep. 2, 2015).

<u>Multiple Choice Question</u>

Per the Court's decision, just how long could Larson wait without unequivocally losing his right to sue?

A) one year
B) 33 months
C) four years
D) 20+ years

For the answer, keep reading.

<u>No Audit / Timeliness</u>

Larson didn't audit Universal's accounts prior to suing and claimed he wasn't aware of reporting issues until 2010, after Jack Klugman, the star of *Quincy, M.E.*, took Universal to court over profits of that series. Universal, while denying that it did anything wrong, responded that Larson could and should have brought his claims years before, and having failed to do so, his claims were timed out.

<u>Sitting On Your Hands</u>

In general, the law doesn't permit an aggrieved person to sit on his or her hands indefinitely. If you have a claim but don't act on it, at some point, under statutes of limitation and related common law principles, you'll be "time-barred", meaning you will have lost the right to sue. Frequently, entertainment industry agreements expressly limit claims periods even further.

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The rationale behind limitations periods is that over time, memories fade, business records are lost, and at some point the books should be closed. While statutes of limitations vary by jurisdiction and type of claim, typical periods range from one to six years.

When Does the Clock Start?

Of course, the length of a statutory limitations period isn't necessarily the real question. In many cases, it isn't when the period ends, it's when it *begins*.

Suppose, for example, that a plaintiff failed to act because he or she didn't know they had a claim? In that scenario, applying the so-called "discovery rule", the limitations period wouldn't start to run until the plaintiff "discovered" the wrong. That might be the date the plaintiff actually knew of the wrong, or suspected it, or should have suspected it, or was on inquiry notice. The discovery rule can thus serve as a counterbalance to harsh and mechanical application of limitations principles.

Suspicions?

Determining when a plaintiff should have known or suspected something, though, can be fact-intensive and complicated. In the *Larson* case, Universal claimed that between 1983 and 1994, it issued six accounting statements to Larson, each reporting zero profits, using the very methods of calculation to which Larson objected in the lawsuit. For his part, Larson didn't acknowledge receipt of *any* of these statements.

The Judge's Decision

In response to Universal's motion for summary judgment, the judge in the *Larson* case ruled that whether Larson had waited too long should be decided by a jury as a question of fact and not simply by the court as a matter of law. In particular, the judge declined to hold that Larson was under a legal obligation to "verify" Universal's accountings via audit or otherwise. Using forceful language, the judge wrote:

> A defendant cannot expect relief from its own alleged deceit and punish the plaintiff for not discovering the lie earlier . . . A failure to discover falsity is excusable as reasonable when the falsity is not clear on the face of the representations made to the plaintiff.

Answer to Multiple Choice Question

So the answer to the question of just how long Larson could wait, without unequivocally losing his right to sue as a matter of law, is –

D: 20+ years.

But to be clear, the judge in the *Larson* case didn't definitively decide that Larson's lawsuit was timely. She merely ruled that the case wouldn't end solely by reason of the date suit was filed, and that timeliness could go to a jury along with other questions of fact. Trial is now scheduled for January 2016.

Sadly, Glen Larson died in November 2014, so the jury won't have the benefit of his in-person testimony.

<u>How Much Money is Involved?</u>

In the case files I've seen, there's no information as to how much Glen Larson's shows generated in total license fees, how much the shows cost to produce, or the difference between the two. But in 2008, Jack Klugman told a reporter that on $250 million in license fees for *Quincy, M.E.,* Universal reported to him a net loss of $66 million. Query whether Universal's internal financial (as opposed to participant) reporting yielded the same results.

<u>What This Case Means for You</u>

If you're a distributor or other company which is accounting to a revenue participant, the more you disclose, the less vulnerable you may be to a claim that the participant didn't know or couldn't discover key facts. If you're a participant, don't wait the way Larson did. Best advice: audit early, and often.

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December 2015

**Client Alert: *Bones* Complaints: Did Fox Properly Account for Hulu monies?**

By Ezra Doner*

**Twentieth Century Fox produces the hit TV series *Bones* for its broadcast network and also makes the series available on Hulu of which it is a one-third owner.**

**Did Fox properly report and share monies it received from its license of *Bones* to Hulu? Two complaints recently filed by revenue participants claim it did not.**[1]

## The Big Picture

As new media technologies and services continue to develop, revenue participants want the opportunity to shape corresponding licensing practices. This is especially true when a distributor, such as Fox, licenses to a new media company, such as Hulu, which Fox co-owns. These new *Bones* cases raise issues I previously explored in posts about *The Walking Dead* and Harlequin Books.

## *Bones*, the Series

*Bones*, a one-hour crime procedural, debuted on the Fox broadcast network in September 2005 and is now in its 11th season, making it Fox's longest running one-hour drama ever. As of the date of this writing, a remarkable 220 episodes have aired.

The TV series is based on the "Temperance Brennan" book franchise by Kathy Reichs, a forensic anthropologist. The stars of the series are Emily Deschanel as Brennan and David Boreanaz as Agent Booth. Barry Josephson, an originator of the series, has been an executive producer since inception.

## The Plaintiffs

Reichs, Deschanel and Boreanaz are plaintiffs in one of the recent complaints, and Josephson is the plaintiff in the other. Per the complaints, the plaintiffs' profits participations are: Reichs, 5%; Deschanel and Boreanaz, 3% each; and Josephson, a "significant" but unspecified percentage. While the two lawsuits are separate, there's a fair amount of overlap, and I'll discuss the allegations in them together, without specifying in which complaint specific allegations appear.

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[1] The cases are *Temperance Brennan et al* v. *Twenty-First Century Fox et al*, No. BC602548 (Super. Ct. Cal.) and *Wark Ent.* v. *Twentieth Century Fox Film Corp. et al*, No. BC602287 (Super. Ct. Cal).

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* Ezra Doner is an entertainment and copyright lawyer who focuses on the film, TV and other content sectors. He has worked both as an in-house business and legal executive and as a private lawyer. He did not represent any of the parties in this case. 

<u>Overall Series Performance</u>

The plaintiffs claim that Fox Television has taken in over $1.1 *billion* in revenues on the series, from domestic broadcast licenses, syndication revenues, subscription video on demand (SVOD) services such as Netflix, and networks and platforms abroad; and that Fox's owned and operated stations and networks which have exhibited the series have received "hundreds of millions of additional dollars" in ad revenues. Yet according to the complaints, despite this level of success, Fox is reporting the show to be deeply in the red, with deficits that are increasing over time. Specifically, the plaintiffs allege that the first *Bones* profits statements, issued during season 3, show Fox in an overall loss position of roughly $70 million; the next statements put the Fox loss at over $80 million; and more recent statements put the Fox loss at either approaching, or exceeding, $100 million, depending on the plaintiff.

<u>Much to Fight Over</u>

With this much in receipts but a growing loss, there can be a lot to fight over. The plaintiffs allege a multitude of wrongs, ranging from simple breach of contract to strong arm tactics and even fraud, involving tens of millions of dollars or more. But in this brief post, I focus solely on claims relating to Hulu, the streaming service which is one-third owned by Fox and which, at least for purposes of Fox programming, may function as a Fox affiliate.

<u>Hulu and the Hulu Claims, in General</u>

Hulu offers viewers three tiers of service: a free, ad-supported service, and two tiers of subscription services, one with limited and the other with no commercials. In contrast to cable channels, Hulu is delivered via the internet.

The nub of these plaintiffs' Hulu claims is that because Hulu is an affiliate, Fox's license agreements with Hulu must be on terms comparable to those on which Hulu enters into agreements with unrelated third parties. But, the plaintiffs claim, the Hulu licenses for *Bones* do not reflect such an arm's length standard.

<u>Challenges to Hulu Arrangements</u>

The plaintiffs specifically claim that Fox licensed *Bones* to Hulu at "below market rates" under agreements that "differ markedly" from Hulu's agreements with third parties, and that Fox has not fully reported Hulu's payments to them, and in some cases has not passed through Hulu payments at all. By way of example, the plaintiffs allege that while many program suppliers insist on cash guarantees in their Hulu licenses, Fox licensed *Bones* to Hulu for a "speculative" percentage of Hulu's ad sales and monthly subscriber fees. This claimed arrangement presumably flows from Fox's shareholder status, as it would be unusual for an unaffiliated series licensor to share in subscriber and ad revenue.

<u>Stacking of Episodes</u>

As a second example of wrongdoing, the plaintiffs claim that Fox improperly "stacks" current season episodes on Hulu. "Stacking" is a strategy of making available all or many episodes of a series at the same time across multiple platforms, such as broadcast, broadcaster websites, cable on demand services, paid subscription services and (as in this case) the free Hulu service. The problem for participants in plaintiffs' shoes is that Fox apparently does not report revenues from Hulu for current season episodes and Netflix pays lower license fees – perhaps as much as 30% lower – for current season episodes which have been "stacked". See Wall Street Journal article at http://www.wsj.com/articles/streaming-era-sets-off-battle-over-tv-rights-1448793184.

The *Bones* plaintiffs imply that Fox placed current season episodes on Hulu, at the expense of potential fees from Netflix, because of Fox's self-interest.

Out-Of-Date Agreements?

Of course, whether Fox properly licensed to Hulu and accounted to the plaintiffs depends, first and foremost, on the governing agreements. But it may be that the plaintiffs' agreements with Fox, which date from 2004, 2005 or 2006, don't adequately take into account digital technologies and services, as these agreements pre-date not only Hulu but commercial streaming and SVOD services generally.

Next Steps

Assuming the *Bones* lawsuits proceed, the plaintiffs in these cases will likely try to discover and establish market rate fees which Hulu pays under agreements with unaffiliated licensors for comparable programs. And they may also try to establish the full economic value to Fox of its Hulu arrangements, which may well be higher than actual market rate licenses. If the *Bones* profit participants succeed in latching on to a share of subscription and ad monies, this would be big win for them.

Other Claims, Other Lawsuits

Even if the plaintiffs don't win on the Hulu issues, they still have many other claims to pursue against Fox. And if the plaintiffs succeed in capturing a share of subscription and ad monies, it may have consequences for Fox on other shows and other deals. Because of that potential risk to Fox, in this case, for these plaintiffs, their Hulu claims are especially powerful.

Disclaimer

Since this dispute is only at the complaint stage, there haven't yet been judicial findings or rulings. This Alert is based solely on the claims of one side.

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February 2017

**Client Alert: Did Relativity Media Run a $100M "Romance Scam" on a Film Investor?**

RKA Film Financing has sued a group of film executives and financiers claiming that they schemed with much-hyped film distributor Relativity Media to pull off a $100 million-plus fraud.

Putting movie industry context side, RKA's fraud allegation, in key respects, looks like a classic "Romance Scam", in which the scammer:

** posts great-looking photos

** claims he or she is trapped and

** begs cash to escape and join the "mark" (the victim of the scam).

Is this alleged fraud a new twist on an old scam?

The Complaint

In its complaint, RKA Film Financing alleges that the defendants promoted a massive financial fraud to prop up beleaguered Relativity Media.[1] RKA believed it was making *low-risk* loans to be used solely for release prints and advertising buys ("P&A Costs") of studio-level motion pictures. But, RKA claims, Relativity instead used the loans for working capital. In July 2015, Relativity filed for bankruptcy, leaving RKA almost totally underwater on a slate of films.

P&A vs. Working Capital Loans

Some film investors favor P&A loans over working capital loans. Why? Loans for P&A Costs are typically made on a "LIFO" basis: loan advances are "Last In", but are repaid "First Out" from specific revenues of the released picture. By contrast, working capital loans are typically repaid out of a company's general revenues pursuant to a very different formula.

Use of Loan Advances

Per the complaint, each of RKA Film Financing's P&A loan advances should have been routed to a separate, special purpose entity ("Film SPE") set up by Relativity for each of the films, and used by such Film SPE solely for the P&A Costs of the film owned by that SPE. For example, RKA's P&A loan advance for the film *Solace* should have been routed to RML Solace Films, LLC for that film's P&A Costs. Same for other films for which RKA advanced P&A Costs, such as *November Man*, *Best of Me*, *Beyond the Lights*, *Woman in Black 2*, *Black or White*, *Lazarus Effect*, *Solace*, *Masterminds*, *Before I Wake*, and *Disappointments Room*.

But some films in the slate were barely released domestically, others not at all, and per the complaint, Relativity used the P&A loans, instead, for working capital. Then, as Relativity headed toward bankruptcy, its senior lender, One West Bank (under the then-stewardship of Steve Mnuchin, the new Treasury Secretary) swept Relativity's bank accounts, seizing RKA loan advances and applying them to One West debt.

But why did RKA Film Financing give loan proceeds to Relativity in the first place? Why didn't RKA advance the loans directly to the SPEs?

Claimed Problem #1: Film Vendor Discounts were Restricted

RKA alleges that it wanted to disburse P&A loans straight to specific Film SPEs, but that:

> [Relativity Chairman Ryan] Kavanaugh told RKA that it could and should not send funds directly to the Film SPEs because Relativity's contracts with its vendors were only with Relativity, which received benefits and discounts from those vendors by virtue of its purchasing power.

But was it true that Relativity's vendors would only have honored volume discounts if paid directly by Relativity, not by affiliates? And if true, couldn't there have been a workaround?

Claimed Problem #2: Separate Bank Accounts would be Burdensome

Per the complaint, defendants also told investor RKA that:

> it would be too logistically and legally cumbersome to set up individual bank accounts for each Film SPE, and that the funds would instead be earmarked in a Relativity account for P&A on each film.

But, again, was it true that managing a separate bank account for each Film SPE would have been unduly burdensome? And wasn't a workaround possible?

*<u>The Classic Romance Scam</u>*

With that background, let's return to the elements of a classic Romance Scam. In a Romance Scam, the scammer:

1. posts great-looking pictures

2. claims he or she is trapped and

3. begs cash to escape and join the mark.

The scammer often starts by posting the great-looking pictures to an online dating site. Once online affections are kindled, the scammer then claims a costly obstacle to meeting in person, such as a transcontinental flight or an onerous exit visa. And when the unwitting mark offers to directly pay the cost of the obstacle, the scammer says, "No, you can't do it yourself, the only way is to give me the cash, and I'll do it . . . *Believe me*." Then, when the cash arrives, the scammer disappears.

<u>Comparison to Defendants' Alleged Fraud</u>

How does the classic Romance Scam compare with the fraud alleged by RKA Film Financing?

1. The relationship between RKA and the defendants was built around great-looking pictures; in this case, great-looking *motion* pictures, starring the likes of Pierce Brosnan, Michelle Monaghan, Kevin Costner, Olivia Wilde, Colin Farrell, Kristen Wiig, Zach Galifianakis, Kate Bosworth, Gugu Mbatha-Raw and Kate Beckinsdale. Handsome and beautiful people . . .

2. Relativity lacked necessary funds to release the films. Absent P&A loans, the films were trapped.

3. Relativity begged cash for release of the pictures, with a promise that RKA would be rewarded. But *the only way* to do this was for RKA to disburse the cash straight to Relativity. There was no other way. *Believe me . . .*

<u>What This Means for You</u>

When lending or investing, be alert for things that don't ring true. If your would-be counterparty tells you something that doesn't make sense, pursue it. If your counterparty says "This is the only way business can be done in my industry", but that structure increases your risk, make your counterparty find a workaround. If, out-of-the-gate, your counterparty keeps saying "*Believe me*", don't!

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August 2017

**Client Alert: *The Walking Dead:* Should AMC be paying less than $2 Million Per Episode for this Mega Series, or more than $20 Million?**

Writer/director Frank Darabont is the creator of mega series *The Walking Dead* (the "Series"); talent agency Creative Artists Agency is the Series' packager; and AMC Studio is the producer and distributor of the Series, and licenses it for broadcast to the AMC Network[i].

Plaintiffs Darabont and CAA, who share in the profits of AMC Studio, claim that the AMC Studio and the AMC Network together improperly set a below market, "sweetheart" license fee for the Series of less than $2 Million per episode, thereby shortchanging the plaintiffs.

By contrast, plaintiffs' expert, whose report was recently made public, puts the fair market value of the license fee not at $2 Million per episode, but at more than $20 Million – at first blush, an astounding number.

Multiple Choice Test

Which of these data points did plaintiffs' expert incorporate into his valuation?

A. After renegotiation, the average license fee for the AMC series *Mad Men* and *Breaking Bad*, produced by unaffiliated studios, was $3.32 Million per episode.

B. NBC and CBS pay the NFL $45 Million per game for *Thursday Night Football.*

C. One-third of AMC's annual revenue of $1.3 Billion is attributable to *The Walking Dead.*

D. All the above.

Here's the detailed answer (shorter answer follows at the end).

Arm's Length Negotiations

When a television studio licenses a series to an unaffiliated network, the per episode license fee is typically set by means of arm's length negotiations. The studio wants as much as it can get, the network wants to pay as little as possible, and a spirited negotiation ensues. But where, as here, the studio and the network are affiliated (that is, under common ownership), by definition, the negotiation is not at arm's length.

Operative Language

The profits definition in the agreement which Darabont signed does not designate a specific per episode license fee for *The Walking Dead,* or even a specific formula. Instead, the signed agreement provides that the per episode license fee will be on "monetary terms comparable to the terms on which [AMC] enters into similar transactions with unrelated third party distributors for comparable programs."

The Rate Set By AMC

Per allegations in the case, after Darabont signed his agreement, AMC unilaterally set the per episode license fee for the Series at 65% of production costs, with a cap of $1,450,000 per episode (subject to cumulative 5% season-to-season bumps). In contrast to a "negotiated license fee" (that is, a fee set via arm's length negotiation), a fee between related companies is sometimes called an "imputed license fee". When revenue participants claim that a deal between related entities shortchanges them, they often call such an arrangement a "sweetheart deal".

The Expert's Approach

The plaintiffs engaged economist James Dertouzos to examine whether the imputed license fee set by AMC reflects the fair market value of the Series. The expert framed his analysis with these questions:

"What has AMC paid for 'comparable' programs in transactions with unaffiliated third parties?" The expert calls this path of investigation "Comparable Sales to AMC Network".

"What have other networks paid to acquire successful programs in the past?" The expert calls this path "Comparable Sales to Other Networks".

"What is the value of *The Walking Dead* to AMC"? The expert calls this the "Value Method" and analogizes it to the "income method" for valuing businesses.

Comparable Sales to AMC Network

Plaintiffs' expert Dertouzos put forward these (and other) data points regarding comparable sales to AMC Network.

** After renegotiation with independent studios following season four, the combined average license fee for AMC Network's *Mad Men* and *Breaking Bad* was $3.32 Million per episode. (Lionsgate is the studio for *Mad Men*, while Sony Pictures Television is the studio for *Breaking Bad*.)

** Before renegotiation, the combined average live plus same day rating for these series was 0.59 in the 18-49 year-old demographic. ("Rating" is the percentage of TV households that watches a show; a rating of 1.0 means that 1% of U.S. households tuned in.)

** Accordingly, AMC was paying $5.62 Million per rating point for these series ($3,320,000 divided by 0.59 = $5,620,000)

** The average comparable rating of *The Walking Dead* in the first through fourth seasons was 5.11 points.

** Applying the episode license fee price per ratings point paid for *Mad Men* and *Breaking Bad*, the per episode price of *The Walking Dead,* after renegotiation, would have been $28.7 Million (5.11 points multiplied by $5.62 Million per point = $28.7 Million).

Comparable Sales to Other Networks

Plaintiffs' expert Dertouzos put forward these (and other) data points re: comparable sales to networks other than AMC:

Based on other hour dramas in the marketplace (including megahit *ER*), the plaintiffs' expert developed an imputed license value of more than $23 Million per episode for *The Walking Dead*. Plaintiff's expert then opined that the $45 Million per game license fee for *Thursday Night Football* is consistent with that value for *The Walking Dead*. He got to this result as follows:

$45 Million per game for *Thursday Night Football* translates to $15 Million per game hour; the 2015 upfront spot rate for *Thursday Night Football* was $465,000; and football had no meaningful rerun value and only limited benefits in terms of affiliate revenues from cable service providers. By contrast, AMC's 2015 spot rate for *The Walking Dead* was $500,000, it has numerous reruns of each episode. And, per plaintiffs' expert, for every $5 in advertising sales and other program revenues, AMC can expect as much as $4 in affiliate revenues – that is, fees paid by cable and satellite service providers such as Comcast, Cox and Direct TV to carry networks like AMC. So, in the view of plaintiffs' expert, adding the value of Series' reruns and allocated affiliate revenues to a $15 Million base price supports a $23 Million per episode value for the Series.

Value Method

Plaintiffs' expert Dertouzos offered yet a third way to generate an imputed license fee for *The Walking Dead*, which he calls the value method. In 2016, AMC's gross revenues were projected to reach $1.3 Billion. Per Dertouzos' calculations, at that time, 26% of AMC's total viewership was directly attributable to *The Walking Dead*, and a further 7% was indirectly attributable via the "tentpole effect" of the Series. On this basis, the combined 33% share of Network viewing generated by *The Walking Dead* meant that one-third of AMC's gross revenues, or $433 Million, was attributable to the Series. Allocating this $433 Million over 16 episodes amounts to $27 Million per episode which, in the expert's view, "represents a conservative upper bound to the fee that AMC Network would be willing [to] pay for a program with properties of *The Walking Dead.*"

This $27 Million is roughly in line with the imputed license fees which Dertouzos developed using his other methods.

Answer to the Multiple Choice Test

So the short answer to the Multiple Choice Test question about data points is: All of the above. In other words, all of the given data points formed part of the expert's opinion.

How did the Parties Get Here?

A key element of this case is that Darabont and CAA claim that they never agreed to AMC's imputed license fee formula based on 65% of production costs. They assert that AMC did not even propose this formula until after the Series' first season. If that formula had appeared in the text of the agreement that Darabont signed, this litigation might never have happened.

What This Means for You

In the filmed entertainment sector, it's not unusual for at least some price terms to be left to later determination. Depending on the transaction, that may make sense. But if you don't timely nail down a foreground price term like a per episode license fee, you run the risk that a court or jury may set that term for you.

Caveat #1

This Client Alert is obviously an oversimplification of Dertouzos' expert report. My limited objective here is to introduce certain of the expert's calculations and concepts (for what they're worth).

Caveat #2

If AMC Network were to pay a $20 plus Million per episode license fee for *The Walking Dead*, economically, much less than the full $20 plus Million would function as a real expense. AMC would essentially be making bookkeeping entries in which its Network was debited by, and its Studio was credited with, equal amounts. The real economic expense would be limited to the amount of the incremental profit shares of Darabont, CAA and perhaps others who participate in profits at the AMC Studio level.

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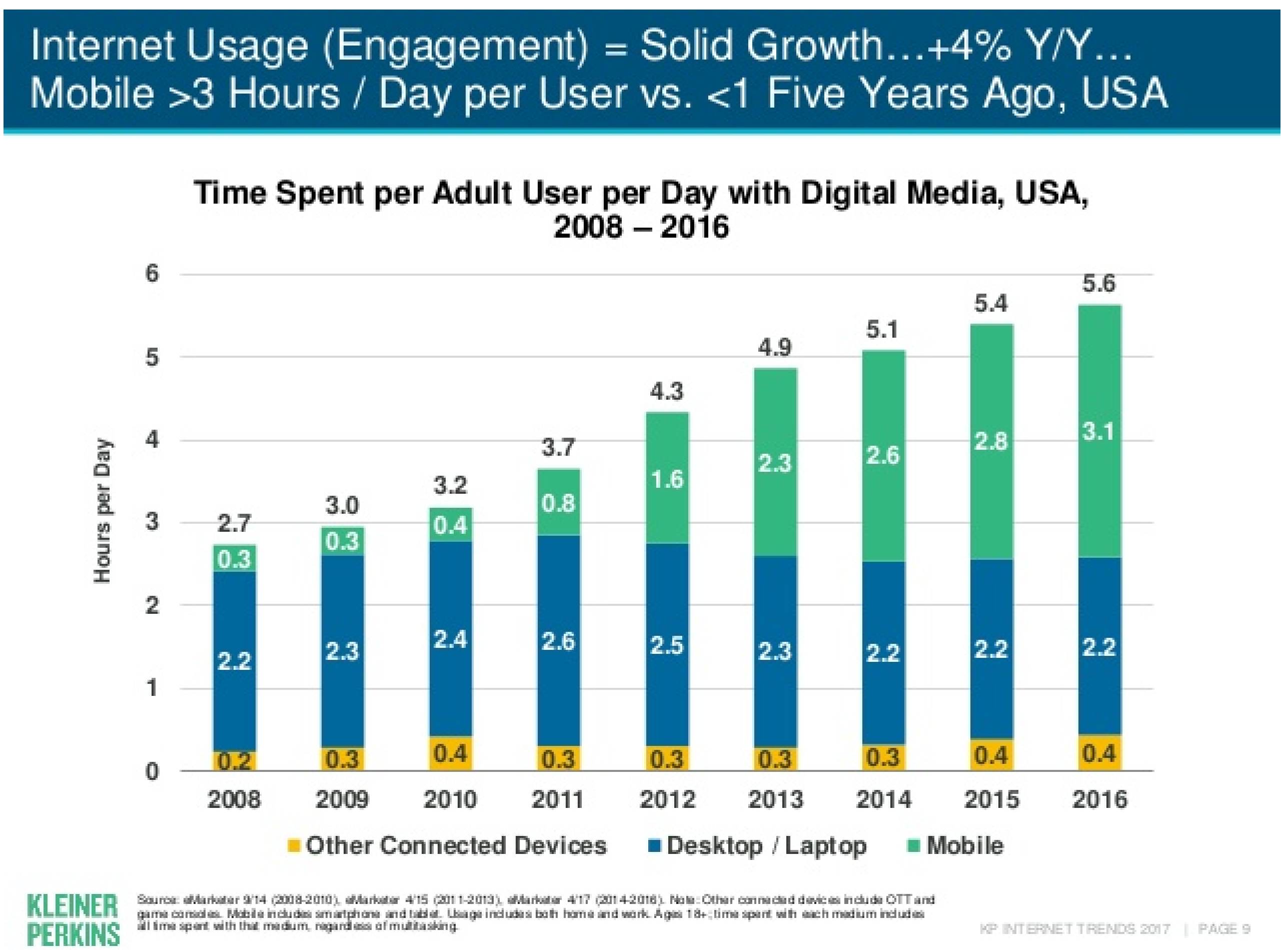
The eagerly awaited 2017 edition of Mary Meeker's Internet Trends has just been released. Meeker's report is generally viewed by industry insiders as the most comprehensive compilation of data and surveys available. Some general observations this year are:

- Total Internet growth will register a 10 percent gain over 2016.
- Social media and video will continue their dramatic growth.
- Gaming is highlighted as the most compelling form of social media.

A more detailed analysis reveals:

## Digital Media Use Continues to Grow

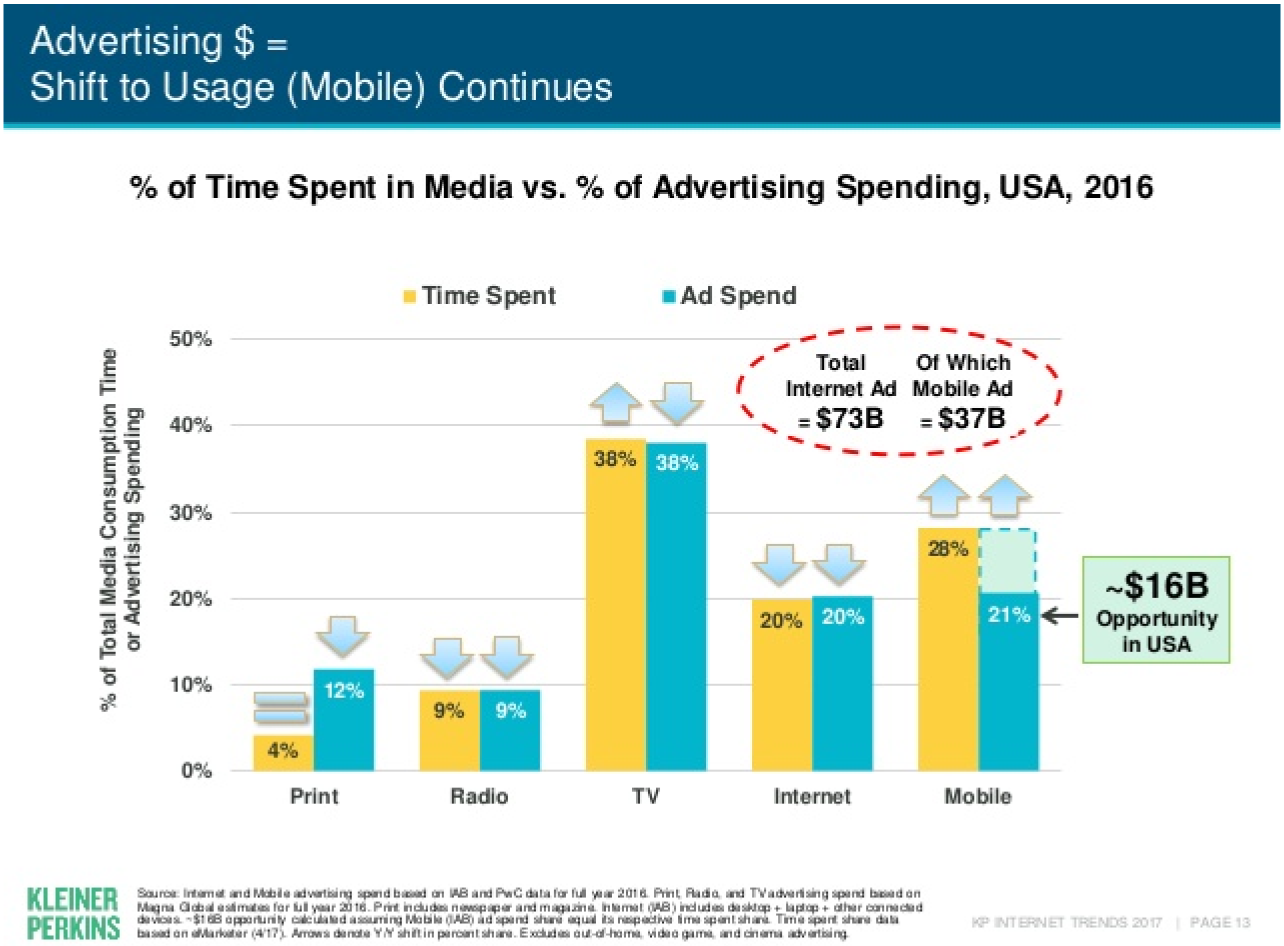



The amount of time adults spent with digital media in 2016 grew from the previous year, with average time increasing to 5.6 hours a day—up from 5.4 hours in 2015. Of that, mobile accounted for 3.1 hours (increasing from 2.8 in 2015) while desktops stayed flat at 2.2 hours. Other connected devices made up the remaining 0.4 hours.

## Internet Ad Spending has Surpassed TV Ad Spending

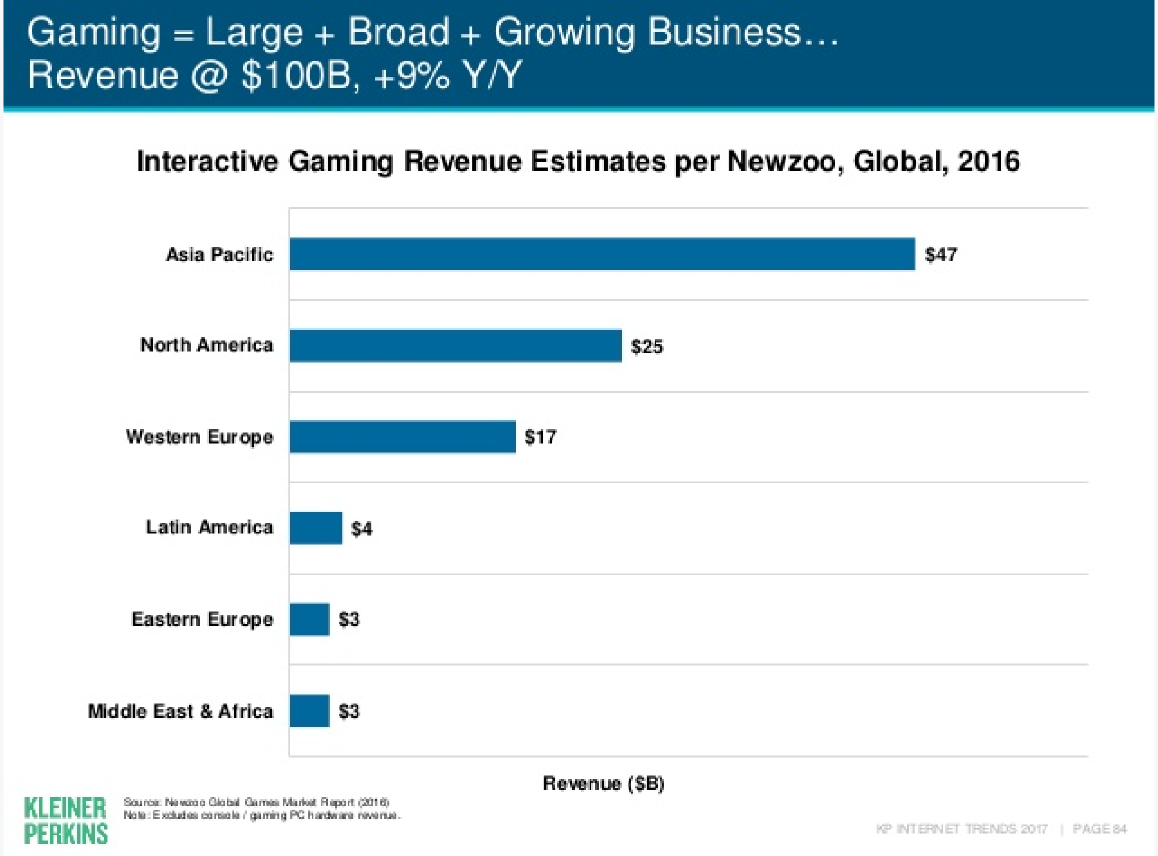
While internet and TV companies continue their fierce competition for advertising dollars, new media finally outpaced old media in 2016. The total amount of global ad dollars last year for the Internet and TV combined was around $180 billion, with internet spending expected to outpace TV this year.

Of the Internet ad spending, Google and Facebook remained well ahead of the pack, accounting for 85 percent of all growth in the U.S. Last year, Google was up 20 percent versus its 2015 revenue, while Facebook grew by 62 percent.



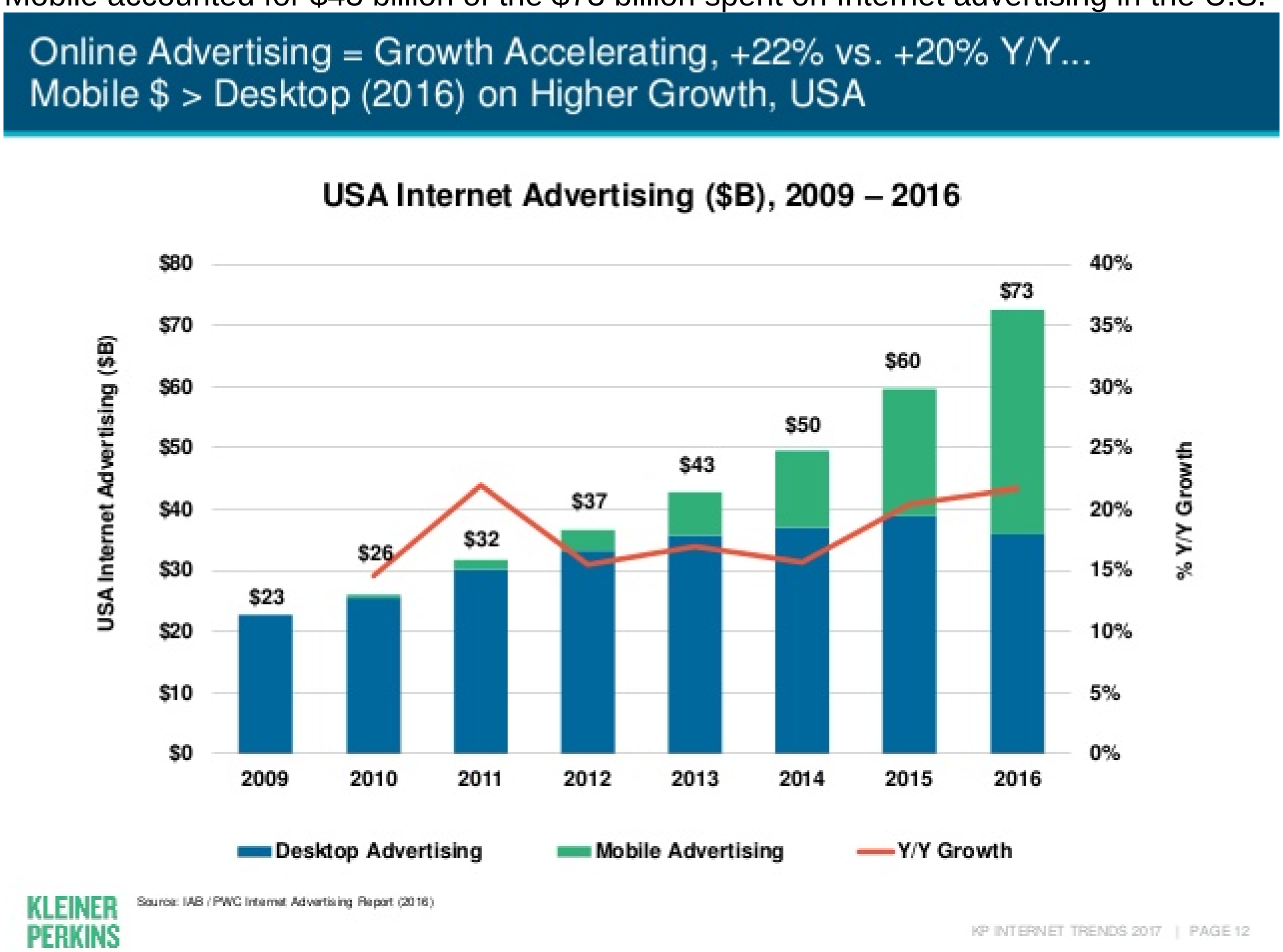

## The Gaming Business is Exploding

Global revenue for interactive gaming stands at $100 billion reflecting a nine percent gain from 2015.When gaming is compared with other digital media, it beats out other popular platforms in terms of the amount of time users spend with it. People spend 51 minutes on average playing console games every day, edging out Facebook (50 minutes), Snapchat (30 minutes) and Instagram (21 minutes).




## Mobile Advertising Dollars Continues to Rise

Mobile advertising made significant gains last year with billing rising to 22 percent from 20 percent in 2015. Mobile accounted for $43 billion of the $73 billion spent on Internet advertising in the U.S.



Desktop advertising decreased slightly but remained at about $30 billion.  This figure is around $8 billion less than in 2014.  The report also notes that time spent with media on mobile devices is still increasing at a faster rate than ad spending, while other platforms such as radio and television are about equal.

*Internet Trends*, 2017
*Adweek*, June 2, 2017
*Washington Post*, June 3, 2017

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## SNL Kagan Has Outlined Wide Ranging Media Trends for 2017; Our Selected Summary:

- For the past two years, total U.S. spending on media entertainment fell 1.5.
- The greatest amount was spent on cable pay TV, followed by video services from DBS and telco.
- HSD (high speed data) video took third place and was 89.4% of the amount spent on cable.
- The biggest growth category was paid online video at 24.1% growth year over year, while the slowest increase came from home video with a 12.5% decline.
- The growth of digital video was related in part to losses from the home video sector.

**Key Highlights by Category:**

**CABLE NETWORKS**

**Cable network subscribers:**

Results from second-quarter 2017 indicate video subscriber trends point to continuing falling numbers. . AT&T Inc., Comcast Corp., Charter Communications Inc. and Verizon Communications Inc. collectively lost 475,000 traditional video customers in the second quarter, effectively doubling the decline from the year-ago period.

**CPMs**

With weakening ad revenue growth many cable networks are pushing for higher CPMs to stabilize their top and bottom lines.

**INTERNET:**

**E-commerce**

E-commerce sales in the U.S. continued to move higher in 2016 and could likely see further gains through 2026 because in part retailers are now offering same-day delivery in many major U.S. markets and a widening inventory of goods.

**Digital advertising projections**

Digital advertising revenues in the U.S. are likely to see more dramatic gains, although growth in 2015 and 2016 has been somewhat lopsided and concentrated largely with Alphabet Inc.'s Google Inc. and Facebook Inc. which dominate the digital ad market by a wide margin.

**Social advertising**

The U.S. social ad sector continue to perform well in the first quarter, powered by demand for video ad inventory and continued strength from Facebook Inc. Combined U.S. ad revenues for Facebook, Twitter Inc., Snap Inc. and LinkedIn Corp. have logged annual gains of about 40% to nearly 60% since the beginning of 2016, with Facebook leading the category by a wide margin.

## MULTICHANNEL (CABLE, TELCO, DBS):

### Multichannel video sub projections

The downward trend of traditional multichannel subscribers in the U.S. continues to increase due to streamed bundles, online subscription services, self-aggregation and even over-the-air delivery are playing more prominent roles.

### Broadband subscriber projections

Broadband subscriptions are on track to surpass 80% of U.S. households in 2017 and enjoy growing appeal in the five-year outlook. However, like the U.S. multichannel segment before it, continued cord cutting is a major threat to this sector...

### Broadband only homes

The seasonal deceleration in broadband subscriber gains did little to slow down broadband-only home growth, with the segment logging its second-largest quarterly net add since we began tracking it.

### Wireline phone subscribers

Cable's first-ever voice subscriber losses added pressure on wireline phone in the period ended June 30, with the universe logging its largest quarterly drop since the third quarter of 2013.

## ONLINE VIDEO/OTT:

### OTT viewing

The fourth quarter of 2016 saw mixed desktop viewing results among a group of U.S. OTT services. Netflix Inc. topped the list in year-over-year increases in average monthly content minutes viewed during the fourth quarter and 2016 as a whole. Hulu LLC, the group's only other realistic contender to Netflix showed a decrease in the fourth quarter compared to the same quarter in 2015, but was up strongly overall for 2016.

### Online video projections

While multichannel video operators endure subscriber losses, online video services are likely to continue to see growth both as consumers move to different platforms and as others supplement their TV needs with OTT services.

### Online video – Ad-supported

While momentum in recent years in the OTT video space has tilted toward the subscription (SVOD) and virtual service provider (VSP) models, the ad-supported video market continues to generate significant revenues. A vast array of short-form and long-form video content is available through the ad-supported model, with additional digital video ad inventory coming online from VSPs as well as from growing TV Everywhere accessibility of live linear programming from broadcast networks and cable networks for authenticated users.

**PREMIUM NETWORKS:**

### Premium subscribers

For the fifth straight quarter, premium networks recorded losses in multichannel units. However, significant gains from OTT amounted to an overall rise in total units, reaching 106.7 million. Looking at the first half of the year for the past decade, premium returned mostly growth with the exception of 2009. The first half of 2017 delivered the second decline in multichannel homes, losing some 2.1 million units. On the plus side, OTT added 2.4 million units for a net gain of some 305,000 units.

### Premium network projections

Over the next decade it appears that the number of multichannel video subscribers with full-premium units will drop from 103.4 million at the end of 2016 to 82.5 million in 2027 for the main players.

**VIDEO:**

### Home video projections

The domestic home video market continued to evolve from an optical disc market to a digital delivery market in 2016. Total consumer spending on DVDs and Blu-rays dropped by more than $1 billion for the 10th year in a row, down 12.5% from $9.12 billion in 2015 to $7.98 billion in 2016, while more and more people migrate to digital services.

**WIRELESS**

### Connected devices

Nearly 1 billion video playback devices could be in use by 2020 in the U.S., ranging from smartphones to smart TVs. We estimate that 785.1 million such devices are in use in 2016 in the U.S., or about eight per broadband home. While they boast the smallest screen, now and going forward, we estimate smartphones will have the largest share of devices in use for video playback, followed by smart TVs/Blu-ray players and computers.

### Smartphone projections

Over the last decade, the tiny screens in our pockets have gone from an early adopter's toy to probably the most important consumer electronics device we own. Kagan estimates that by year end, 75% of Americans will have a smartphone.

### Wireless subscribers

Keeping up a multi-quarter trend, "connected devices" was the fastest-growing mobile subscription type in the U.S., up 12.4% year over year to 71.0 million for the second quarter.

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## OTT Growth Surging With Over 200 Services Available in the U.S.

According to a just released industry report, 60 companies have introduced over-the-top video services since the beginning of 2016. During that same period, only seven OTT providers in the U.S. have ceased operations...

Noting the increased number of competitors in the programming marketplace, Parks Associates points to the fact that there are currently more than 200 OTT services challenging the existing pay TV operators. Another indication of OTT's ascendance is that 53% of U.S. broadband households subscribe to both pay TV and at least one OTT service.

Also outlined in the report is the strategy that finds many OTT services evolving to be complementary to the market's largest players, instead of trying to compete directly against the likes of Netflix, Amazon and Hulu. Conversely consumers are adopting primary entertainment content sources and supplementing those sources with complementary video options.

Other key findings:

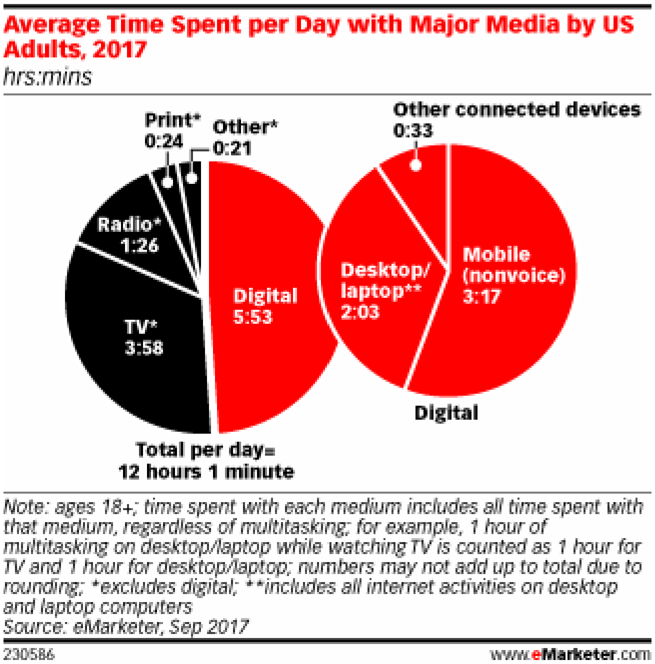
- There is a growing amount of collaboration in the OTT market. As an example, Roku is reportedly talking to Apple and Google about extending its operating environment to smartphones. Pay TV operators, meanwhile, are aggressively looking to aggregate OTT services like Netflix and Hulu into their programming bundles.
- Several factors are driving an increase in partnerships with and among OTT video services, including fragmentation of content, the success of bundling, polarization in the OTT subscription market, a low threshold for OTT service survival, and low awareness of many OTT service brands.
- 87% of U.S. OTT services offer some kind of subscription opportunities while TV Everywhere awareness only stands at around 34% nearly eight years after it was introduced...

*Fierce Cable*, October 26, 2017

Read the Entire Artlcle:
http://www.fiercecable.com/cable/more-than-200-ott-services-active-u-s-market-research-group-says?mkt_tok=eyJpIjoiTWprNE1qUTBPV0V6TlRrMSIsInQiOiIzeHVxTUlwV2t5dUNlRjJ3ekpDMVdyaFg3WDYzR0tVTVRUeStRNWJrbmpVNlEwSUdWYlRoTVk2Vm5nZkpMSmNJVzV3RWgxQW9wWVwvK3ZHSUNPZkNcL1wvM2NTWGMwM2FDam44TXJDZGJYYTNQVDB1WDBkYWJOKytEZFpvTkd5RlkyZiJ9&mrkid=49680617&utm_medium=nl&utm_source=internal

# Adults Will Spend Half Of Their Media Day Accessing Digital Content in 2017

A recent report from eMarketer indicates that people spend the equivalent of half a day consuming media. Adults will devote an average of 12 hours, 1 minute per day with major media this year. Also noted is that people have become more efficient at multitasking, thanks largely to mobile devices (excluding voice), which will take up more than one-quarter of total media time.




The report counts each minute of media consumption time regardless of whether it's simultaneous with any other media. Therefore, total media consumption time continues to grow, even as the number of hours in a day remains the same. In 2017, the average US adult will spend an additional two minutes per day with media over figures from 2016, and 24 minutes more than was spent in 2012.

Other key findings:

- Multitasking via mobile is primarily responsible for the overall increase in time spent with media. Consumers are spending more time on mobile devices with activities like video viewing and mobile gaming, but also with less visual activities like audio listening that enable continuous media intake.

- US adults will spend 3 hours, 17 minutes per day on nonvoice mobile activities in 2017—an increase of more than an hour since 2013.

- The growth of the amount of attention that an individual can provide to media is slowing. Time spent with mobile nonvoice will rise by 12 minutes in 2017, and will be offset by declines in time spent with desktops/laptops, print, radio and—most of all—TV.

- TV will still remain the most time-consuming traditional medium for US adults. The format will account for 3 hours, 58 minutes of daily time this year; however, that's down 7 minutes from 2016. It's also lower than eMarketer's previously published forecast of 4 hours, 19 minutes per day.

*eMarketer*, October 9, 2017

Read the Entire Article:

https://www.emarketer.com/Article/eMarketer-Updates-US-Time-Spent-with-Media-Figures/1016587

**Eriq Gardner (Senior Editor, The Hollywood Reporter)**

**Written CLE Materials for 2018 Annual Meeting**
**New York State Bar Association/Entertainment, Arts & Sports Law Section**

**Content Distribution in the 21st Century: Traditional TV, VOD, Streaming and More**

**Top Ten Cases of 2017 (Five Down and Five To Go)**

*A. Five Significant Decisions in 2017*

1. FCC Votes to Repeal Net Neutrality Rules

(a) FCC Action December 14, 2017 (FCC 17-166)
https://www.fcc.gov/document/fcc-takes-action-restore-internet-freedom

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/fcc-votes-repeal-net-neutrality-rules-1067667

2. Google Stuck With Worldwide Injunction in Canadian Legal Fight; New Suit in California

(a) Google Inc. v. Equustek Solutions Inc. (Supreme Court of Canada, 2017 SCC 34)
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/google-stuck-worldwide-injunction-canadian-legal-fight-1017407

(c) Google Inc. v. Equustek Solutions Inc. (U.S. District Court, N.D. Cal, San Jose Div.) Case 5:17-cv-04207
https://assets.documentcloud.org/documents/3900043/Google-v-Equustek-Complaint.pdf

(d) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/google-has-a-big-canadian-problem-getting-desperate-1024149)

3. European Court Rules ISPs Can Be Forced to Block Pirate Bay

(a) Stichting Brein v. Ziggo BV, XS4ALL Internet BV (Case C-610/15, rel. 2/8/17)
http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6948b75e6d81a476f8b42cd6adb2daf8c.e34KaxiLc3qMb40Rch0SaxyLchb0?text=&docid=187646&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=565267

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/european-court-rules-isps-can-be-forced-block-pirate-bay-1013993

4. Appeals Court Rules TV Streamers Don't Get Compulsory License to Broadcast Networks

(a) Fox Television et al v. Aereokiller (FilmOnX), 851 F. 3d 1002 (9th Circuit, 2017)
http://cdn.ca9.uscourts.gov/datastore/opinions/2017/03/21/15-56420.pdf

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/appeals-court-rules-tv-streamers-dont-get-compulsory-license-broadcast-networks-987614

5. Rock Band Wins First Amendment Appeal Over "Disparaging" Trademarks

(a) Matal v. Tam (Slants), 137 U.S. Supreme Court 1744 (2017)
https://www.supremecourt.gov/opinions/16pdf/15-1293_1o13.pdf

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/rock-band-wins-first-amendment-850689

*B. Five Pending Cases Worth Watching*

6. Justice Department Files Lawsuit to Block AT&T-Time Warner Merger

(a) United States of America v. AT&T et al (US District Court, D.C. Cir.)
Case 1:17-cv-02511
https://www.justice.gov/opa/press-release/file/1012896/download

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/justice-department-files-lawsuit-block-at-t-time-warner-merger-1058483

7. Fox News Appears to Have Edge in Showdown That Could Curtail Sharing of Clips

(a) Fox News Network v. TV Eyes (appeal from SDNY pending at 2nd Circuit)
https://www.scribd.com/document/316896277/Fox-News-Network-v-TVEyes-Brief-for-Fox-News-Network-2nd-Circuit-Redacted

(b) Fox News Network v. TV Eyes, 124 F.Supp.3d 325 (U.S. Dist. Court, SDNY, 2015)
https://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2013cv05315/415525/173

(c) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/fox-news-appears-have-appellate-edge-showdown-could-curtail-sharing-clips-983955

8. Vizio Can't Dodge Claims Its TVs Spy on Viewers

(a) In Re Vizio, Consumer Privacy Litigation (U.S. Dist. Ct., CD California)
Case 8:16-ml-02693-JLS-KES
https://www.documentcloud.org/documents/3901160-Vizio-725.html

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/vizio-cant-dodge-claims-tvs-spy-viewers-1024438

9. U.S. Government, Hollywood Studios Weigh in on Dispute Exploring Reach of U.S. Copyright Law

(a) Spanski v. Telewizja Polska (appeal from U.S. Dist. Ct., D.C. Cir, pending DCCA)
USCA Case 17-7051

Appellant's Brief: https://www.documentcloud.org/documents/4081747-TVP.html
CO Amici Brief: https://www.copyright.gov/rulings-filings/briefs/spanski-enters-v-telewizja-polska-sa-no-17-7051-dc-cir-2017.pdf

(b) Spanski v. Telewizja Polska (U.S. District Court, D.C. Circuit)
2/14/17 https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv0957-85
(Memorandum Opinion currently on appeal)
9/30/17 https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv0957-95
(re attorney fees in copyright infringement action)

(c) Gardner/THR re Spanski
https://www.hollywoodreporter.com/thr-esq/us-govt-hollywood-studios-weigh-dispute-exploring-reach-us-copyright-law-1046433

(d) Gardner/THR re related story
Dish Claims Univision Breached Contract by Streaming Soccer Matches on Facebook
https://www.hollywoodreporter.com/thr-esq/dish-claims-univision-breached-contract-by-streaming-soccer-matches-facebook-1025006)

10. Olivia de Havilland Gets Judge's Green Light in 'Feud' Lawsuit Against FX

(a) De Havilland v. FX Networks et al, California Superior Court, Los Angeles
Case No. BC 667011
https://pmcdeadline2.files.wordpress.com/2017/06/olivia-de-havilland-feud-suit-2.pdf
Complaint (6/30/17)

(b) Gardner/THR
https://www.hollywoodreporter.com/thr-esq/olivia-de-havilland-gets-judges-green-light-feud-lawsuit-fx-1044359

[Date]

[Artist]

Dear Artist:

The following letter agreement, together with the other schedules attached hereto (collectively referred to as the "Agreement") will confirm the understanding between you ("you" or "Artist") and ___________________"Company" with respect to the terms and conditions of your employment and shall supersede all prior oral or written understandings and agreements between Company and Artist. The parties agree as follows:

1. Company hereby employs Artist during the Term (as hereinafter defined) as an on-air personality and/or in any other capacity, on any programs or in connection with any other content, whether or not such programs are originally produced for exhibition on one or more sites owned by Company, or included within the owned, operated or controlled network of Company (collectively, the "Company Properties"). Artist shall report to the manager as is designated by Company from time to time. Artist shall also provide other services for Company as directed by Company. Artist's initial assignment is set forth on <u>Schedule B</u>. Artist also agrees to accept temporary or trial assignments including substituting when others are on vacation or absent due to illness or work assignment or emergencies, as Company may direct. Artist agrees that during the term of this Agreement, Artist will perform all such duties in accordance with the highest standards of competence, skill, integrity, efficiency and professionalism, subject to Company's direction and control and shall devote substantially all of Artist's professional time to the performance of such duties unless expressly agreed otherwise in writing executed by Company. Artist hereby accepts such employment and will complete and perform all of the agreements and obligations entered into by Artist. Artist's services to Company as described in this Agreement shall be exclusive (i.e. Artist shall not provide the same or materially similar services to or on behalf of any third party, and shall not engage in any activity or undertaking that is, in the reasonable opinion of Company, competitive with Company (including, without limitation, any Company Property)).

2. Artist acknowledges and agrees that this Agreement and Company's obligations hereunder are expressly contingent upon Artist completing all standard forms and

meeting such other requirements as designated by Company including without limitation, an employment application, required tax forms, releases for the authorization of background checks, each as applicable.

3. Programming may be produced live or prerecorded, as Company may determine, and may be distributed and/or made available for sale or download in any manner and media, and by means of any technology, platform or distribution system now known or hereafter devised. Company shall have the right to reproduce, distribute, display, perform, modify, adapt, create derivative works, license, market, advertise, promote, exhibit and otherwise exploit all rights in and to all results and proceeds of Artist's services, in perpetuity throughout the universe in all languages, media and formats by any and all means with no further obligation or compensation to Artist. Company shall have no obligation to use the results and proceeds of Artist's services, including, without limitation, any programming or other content created or produced by Artist, or featuring Artist's image or likeness. Artist acknowledges and agrees that the programming, if any, produced by Company featuring Artist may contain the names, logos, trademarks, products and services of companies other than Company, and that any product tie-ins, integrations or sponsorships of such programming, and/or any mere use or verbal mention by Artist of such product or service shall not constitute an endorsement for purposes of this Agreement. Company shall retain all proceeds and profits derived from the programming for its own account with no duty to account to Artist. Company shall have the perpetual right to use, and to authorize others to use, in any and all media now or hereafter known or devised, Artist's name, image, voice, likeness, and biography in connection with the production, distribution, exhibition, marketing, advertising, promotion, merchandising and/or other exploitation of all programming or other content featuring Artist. The compensation payable to Artist pursuant to this Agreement includes full and complete consideration for the rights granted to Company under this Section, and Artist shall not be entitled to receive any additional compensation therefor. Notwithstanding the foregoing, Company acknowledges that it has no right to use Artist's services for the purpose of endorsing any third party product or service.

4. Artist's services shall be performed at such times and places during the Term as Company may designate.

5. (a) The term of this Agreement (the "Term") shall commence as of ____________ (the "Effective Date") and shall continue, subject to suspension, extension or termination as hereinafter provided, for a period of ____________ thereafter. At the sole option of Company and upon thirty (30) days prior written notice to Artist, the Term may be continued for an additional __________ period until __________ (the, "Option").

(

b) You agree that the Company has no obligation to exercise the Option, and you expressly acknowledge that no promises or understandings to the contrary have been made or reached.

6. (a) The Company may terminate your employment and this Agreement for Cause, in which case you will be entitled to payment of any accrued but unpaid salary due to you through the date of termination and any accrued but unpaid vacation solely to the extent required by law. "Cause" includes, but is not limited to:

(i) Your failure or refusal to perform your duties or other breach of the terms of this Agreement;

(ii) Your misconduct, including but not limited to fraud, embezzlement, misappropriation of funds or property and/or breach of fiduciary duty or loyalty to Company;

(iii) Your material failure to comply with any policy applicable to Company employees, as such policies may be amended from time to time, including, without limitation, Company editorial policies and/or guidelines, and/or policies set forth in the Company Employee Handbook;

(iv) Your commission of any act or involvement in any situation or occurrence (including but not limited to a conviction or guilty plea to a felony or crime involving moral turpitude), whether before or during the Term, which brings you into widespread public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a significant portion of the community, or your being subject to publicity for any such conduct or involvement in such conduct;

(v) Your engaging in professional activities that conflict with or compromise your obligations under this Agreement or are competitive with or otherwise could have a detrimental impact on the reputation or financial condition of Company or any affiliate of Company.

(vi) Your disparagement of Company, any its affiliated entities or any sponsor of Company programming or other content; or

(vii) Your gross negligence or willful misconduct in the performance of your duties or obligations hereunder.

(b) Prior to any termination for Cause, the Company may choose to provide you with notice setting forth the reasons that Cause exists, in which case you will have an opportunity to cure to the Company's satisfaction, provided a cure is reasonably possible and timely effected, and the event(s) giving rise to such notice is/are not related to a matter that was the general subject matter of an earlier cure notice given to you. It is expressly understood that the Company's ability to terminate for Cause is not an exclusive remedy, and further that nothing in this Agreement prevents the Company from obtaining any and all appropriate remedies for any injury that arises out of or is related to any breach of this Agreement.

7. As full compensation for the services to be rendered by Artist hereunder and in consideration of the rights granted by Artist and subject to full performance by Artist of Artist's obligations hereunder, Artist's compensation hereunder shall be as set forth on <u>Schedule C</u>.

8. Artist shall be considered a full-time employee and entitled to paid vacation time and such other employee benefits, in each case in accordance with Company policy as in effect for all similarly situated employees of the Company. The scheduling of such vacation shall be mutually agreed upon between the Company and Artist, but in the event of a failure to agree, the Company shall designate the vacation period, and endeavor to accommodate Artist. Artist shall be entitled to participate in Company's wardrobe program for on air talent, to the extent that such program exists. In the event of a corporate transaction requiring a change in the application to Artist of any Company benefit, equity or other program(s), such changes shall be dictated by the terms and conditions of the existing and applicable Company plans and the availability of newly defined programs.

9. (a) During the Term of this agreement, Artist will not directly or indirectly:

(i) Own or hold any equity or ownership interest in, or participate as a co-venturer, partner, proprietor, manager or employee of, or consultant or freelancer to or for, any Company Competitor (as defined below); provided, however, that this provision shall not apply to interests held as a result of (X) investments in an automatic investment plan, so long as Artist does not elect to purchase an interest in a Company Competitor on an individual basis, (Y) investments in accounts over which the Artist has no direct or indirect influence or control (e.g. a blind trust) or (Z) investments of one percent (1%) or less in any company listed on a national securities exchange or quoted on an automated quotation system;

(ii) Solicit or attempt to solicit business from or for any Company Competitor;

(iii) Use, or authorize the use of Company Marks (defined below) or the trade names, trademarks, or other marks of Company's affiliated entities for any purpose without Company's prior written consent in each instance (which Company will grant or withhold in Company's sole discretion). Artist's unauthorized use of Company Marks shall constitute a material breach of this Agreement, and, in addition to all other remedies available to Company for such breach, Artist shall pay to Company a royalty for such unauthorized use at a rate to be determined by Company in its sole but reasonable discretion, which Company may deduct from any compensation due to Artist hereunder. As between Company and Artist, the parties agree that (i) the names, titles and/or logos of Company, any programming or other content produced, developed or created hereunder, of Company's websites, digital and linear television networks, programs and series, and any other trade names, trademarks, or other marks of Company (collectively, the "Company Marks") are owned by Company and are Company's sole and exclusive property unless otherwise licensed to Company by third parties and (ii) Artist shall not acquire or own any right, title or interest of any kind or nature in the Company Marks or the trade names, trademarks, or other marks of Company's affiliated entities;

(iv) use (or enable or permit any third party to use) any visual or audiovisual recording devices at Company's and/or the production company's offices, sets or locations without Company's prior written consent, which Company will grant or withhold in Company's sole discretion. Should Company grant such written consent, the copyrights in all photographs and/or audiovisual recordings created by Artist or Artist's representatives or permitted invitees at Company's and/or the production company's offices, sets or locations shall belong solely to Company, and Artist shall not publicly display, exhibit, or distribute, or authorize the public display, exhibition, or distribution of, any such photographs or audiovisual recordings, unless otherwise agreed by Company in writing;

(v) Give or agree to give any person or entity directly and/or indirectly associated with the services provided by Artist hereunder anything of value in exchange for Artist's engagement for such services. Further, Artist will not accept any money, services or other valuable consideration other than the compensation provided for in this Agreement for the inclusion of any item in any programming or other content produced or developed under this Agreement or for the endorsement of any company, product or service in such programming or other content. In addition, Artist will not visibly wear any product name or logo while rendering services hereunder without Company's prior consent. If Company approves the inclusion in the programming or other content produced or developed hereunder of any logo or trademark that is proprietary to Artist, then Artist hereby grants Company the worldwide, perpetual, irrevocable right to include such logo or trademark in connection with the exploitation of the Program or all platforms and by any means and modes of transmission, whether now existing or hereinafter created; or

(vi) Solicit, induce or attempt to induce any employee or freelancer of Company to terminate his or her employment with or retention by Company. This prohibition shall survive the expiration or earlier termination of this Agreement for a period of twelve (12) months thereafter.

(vii) Enter into any advertising, marketing or promotional relationship with any advertiser or sponsor that (i) currently advertises in or sponsors any programming or other content featuring Artist on any Company Property or any website, channel or outlet of any company affiliate, (ii) was engaged in bona fide negotiations with Company or any Company affiliate within during the twelve (12) month period immediately preceding the launch of the most recent programming or other content featuring Artist, to advertise in or sponsor programming or other content featuring Artist on any Company Property or any website, channel or outlet of any Company affiliate or (iii) advertised in or sponsored any programming or other content featuring Artist on any Company Property or any website, channel or outlet of any company affiliate, for a period of six (6) months following termination of such advertiser or sponsor's agreement with Company or the applicable Company affiliate. Artist shall also not enter into any agreements which in any way prohibit or limit any third party's rights or ability to enter into agreements or otherwise do business with Company or any Company affiliate.

(viii) Enter into any advertising, marketing or promotional relationship with any third party without the prior written consent of Company, which consent shall not be unreasonably withheld, provided that (i) actual or potential conflict between the relationship proposed by Artist and an existing or potential advertising, marketing or promotion relationship between Company and a third party with respect to any programming or other content featuring Artist (e.g. Artist seeks to enter into an endorsement deal with Pepsi while Company has an actual or potential ad sales deal to bring Coke in as a sponsor of content featuring Artist).

(b) For purposes of this Agreement, the term "Company Competitor" means (i) the companies identified on Schedule D attached hereto, as the same may be amended in writing by Company from time to time, and their respective parent and affiliated companies and (ii) any programming network or other creator or producer or lifestyle-based content for distribution on any platform (whether now existing or hereinafter devised), in any category/genre for which Company then creates or produces (directly or indirectly) content.

10. Subject to the terms and conditions set forth in Schedule E, Company encourages the development by Artist of new video content and YouTube channels (i.e., not relating to or competitive with the services being provided by Artist to Company and subject, in any event, to Company's approval which may be given or withheld in Company's sole discretion). Accordingly, Artist acknowledges and agrees that (i) the terms and conditions set forth in Schedule E shall govern the development and exploitation by Artist of any and all video content and/or YouTube channel(s) outside the scope of his or her employment by Company.

11. Any and all publicity, paid advertisements, press notices, interviews or other information with respect to any programming content or services provided by Artist hereunder shall be within Company's sole control, and Artist shall not release, issue or authorize any statements, interviews, publicity, press notices or other information relating thereto without Company's prior written consent in each instance; provided, however, that subject to Artist's confidentiality obligations as set forth herein, Artist may make accurate, incidental, non-derogatory, non-disparaging references to the services provided under this Agreement solely in Artist's biographical materials, and then only after Company has issued an initial press release or other public announcement regarding the services or applicable content. During the Term, Company shall have the

right to require Artist to make himself/herself available to participate in publicity and promotional appearances for any programming other content, or services provided by Artist hereunder, and to contribute online or mobile-based publicity and marketing related thereto, including, without limitation, through use of Twitter, Instagram, Snapchat, Facebook and other platforms, applications or devices, whether now existing or hereinafter devised.

12. Without limiting any exclusivity requirements and/or consent or approvals required in this Agreement, in the event that Artist (or any business owned or partially owned by Artist) enters into any merchandising, publishing and/or other licensing agreement (collectively, “Merchandising Agreements”) for the exploitation of any items (i) designed by Artist, in whole or in part, or at Artist’s direction, (ii) bearing Artist’s name, image, likeness or other right of publicity, and/or (iii) bearing Artist’s business name, logo or trademark, Company shall receive xxxx percent (**xx**%) of the gross compensation or any kind, payable to Artist therefrom for the period commencing on the first day of the Term of this Agreement, and continuing through the date that is one (1) year after the later to occur of (i) Company ceases to regularly exhibit programming or other content in which Artist is featured and (ii) expiration or earlier termination of this Agreement**.** Artist shall render to Company periodic statements showing the calculation of all Adjusted Gross Sales Revenue and Increase in Gross Sales Revenue, which shall be accompanied by Company’s share thereof, if any. Statements shall be rendered on a quarterly basis, within sixty (60) days after the end of the applicable quarter; provided, however, that no statements need be rendered for any accounting period in which no Gross Revenues are received. Company may, at its own expense, audit Artist’s records relating solely hereto for the purpose of verifying the payments made to Company hereunder.

13. Artist hereby represents and warrants that (i) he/she has the right to enter into this Agreement and to grant the rights herein granted, that he/she neither has made nor will make any contractual or other commitments which would conflict with the performance of her/his obligations hereunder or the full enjoyment by Company of the rights herein granted, (ii) he/she is not entitled to receive any compensation of any kind under any union, guild or other collective bargaining agreement, or any compensation other than the compensation set forth in <u>Schedule C</u> hereto, and this Agreement is not and will not be subject to any claim against Company for fees or commissions by any agent or representative of Artist or any other person.

14. Artist shall indemnify and hold the Company, its affiliates and each of their officers, directors, employees, agents and representatives harmless from and against any and all claims, causes of action, damages, liabilities, costs and expenses (including, without limitation, reasonable attorneys’ fees) arising out of or from (i) Artist’s activities and (ii) any matter involving Artist’s breach of this Agreement or any representation, warranty or obligation of Artist hereunder. Except to the extent that Artist’s indemnification obligations apply, Company will indemnify, defend (at Artist’s request) and hold harmless Artist from and against any claims, causes of action, damages, liabilities, costs and expenses (including, without limitation, reasonable outside attorneys’ fees) arising out of or from Company’s development, production, distribution, modification or other exploitation of the programming or other content developed or

produced pursuant to this Agreement. The obligations under this Section shall survive the termination or expiration of this Agreement.

15. The original and continuing effectiveness of this Agreement is contingent upon Artist remaining at all times, under applicable law, eligible to perform the services contracted for hereunder in the United States and/or in any other location in which Artist may be required to perform services pursuant to this Agreement.

16. Artist's remedies in the event of a breach of this Agreement by Company shall be limited solely to the right to recover money damages, if any, in an action at law, and in no event shall Artist be entitled to terminate or rescind this Agreement or enjoin or restrain Company's exploitation of the Content and/or any results and proceeds thereof. Artist agrees that the services provided by Artist hereunder and the results and proceeds thereof are of a special, unique, unusual, extraordinary and intellectual value and character, the loss of which would cause Company irreparable harm that could not be adequately compensated by money damages in an action at law. Artist hereby expressly agrees that Company shall be entitled to seek injunctive and other equitable relief to restrain, enjoin or prevent any breach or threatened breach of Artist's obligations herein, in addition to any other rights that Company may have in equity or at law. In the event Company incurs any damages as a result of Artist's breach of this Agreement, Company shall have the right, in addition to any other remedies, to withhold and offset any payments due Artist under this or any other agreement between the parties in an amount reasonably necessary to satisfy Artist's indemnity obligations hereunder and/or any damages incurred by Company. The prevailing party in any action at law between Company and Artist shall be entitled to recover reasonable outside attorney fees and disbursements.

17. All notices required to be given hereunder shall be given in writing and sent by certified mail, courier service, express mail service or personal delivery to Company's and Artist's respective addresses as set forth in this Agreement (or such other address as a party may designate from time to time by written notice to the other party). Notices shall be deemed given (i) as of the date of receipt, with written confirmation, if delivered via courier service, express mail service or personal delivery, or (ii) five (5) days after mailing if sent postage prepaid via certified mail, return receipt requested. Notices given to Company shall be sent to the attention of ___________________.

18. This Agreement is a personal contract, and Artist shall not sell, transfer, assign or pledge any of Artist's respective rights, interests or obligations herein. Company shall have the right to assign or otherwise transfer this Agreement in whole or in part to any third party.

19. Such provisions that explicitly or by their nature should survive, shall survive expiration and/or termination of this Agreement, as well as termination of Artist's employment, in accordance with their terms. This Agreement shall constitute the entire agreement between the parties with respect to the subject matter hereof, all prior understandings being merged herein. All questions with respect to this Agreement shall

be determined in accordance with the laws of the State of New York without reference to principles of conflicts of laws. Artist waives any objection that Artist might have now or hereafter with respect to jurisdiction, venue or forum. This Agreement may not be changed, modified, renewed, extended, or discharged except as specifically provided herein or by an agreement in writing signed by the parties hereto. No failure or delay by either party in exercising any right under this Agreement shall operate as a waiver of such right. A waiver by either party in any instance shall not be construed as a continuing waiver or a waiver in any other instance. If any term or provision of this Agreement is held invalid or unenforceable for any reason, such invalidity or enforceability shall not affect any other provision, and the Agreement shall be interpreted as if such term or provision had never been contained in the Agreement. An electronic version of this Agreement executed by the parties shall have the same force and effect as an original. The parties have read and understand this Agreement and have had the opportunity to consult with counsel and/or personal representatives with respect hereto. The parties acknowledge and agree that there shall be no presumption against any party on the ground that such party was responsible for preparing this Agreement or any part thereof.

THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

This Agreement may be executed by each of the parties hereto in separate counterparts, each of which shall be deemed to be an original and both of which taken together shall constitute one and the same Agreement. If this Agreement is not executed by Artist and received by Company on or before June __, 2017, the offer of employment contained herein shall be automatically withdrawn unless Company agrees otherwise.

Please indicate your acceptance of and agreement with the foregoing by signing where indicated below.

Very truly yours,

COMPANY

______________________________ ______________________________

Print Name: Title

ACCEPTED AND AGREED:

______________________________ ______________________________

Date

**ACKNOWLEDGEMENT:**

**I ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH COUNSEL AND THAT I HAVE READ AND UNDERSTAND EACH OF THE FOLLOWING ATTACHED DOCUMENTS:**

Exhibit A
**Acknowledgement of Intellectual Property, Confidentiality and Property Rights**

Schedule B
**Initial Assignment**

Schedule C
**Compensation**

Schedule D
**Company Competitors**

Schedule E
**Development of New Video Content and Channels**

Employee Signature: ____________________________

Employee name (print): ____________________________

Date: ____________________________

SCHEDULE A

**ACKNOWLEDGMENT OF INTELLECTUAL PROPERTY, CONFIDENTIALITY AND PROPERTY RIGHTS**

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I acknowledge that I am an employee of _________________ ("Employer"), and, for good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, I acknowledge and agree as follows:

**1) Intellectual Property Rights:**

**a)** I agree that I will promptly make full written disclosure to Employer, will hold in trust for the sole right and benefit of Employer, and hereby assign to Employer, or its designee, all my right, title, and interest in and to any and all worldwide right, title and interest in and to all trademark, copyright, patent, trade secret and/or other intellectual property rights, and all concepts, designs, patterns, enhancements, discoveries, improvements, designations, know-how, works of authorship, developments, ideas and/or inventions (whether or not capable of intellectual property registration or other form of protection), which I at any time have (solely or jointly with others) created or developed or hereafter create or develop, in whole or in part, within the scope of my past, present or future employment by Employer, or using or incorporating, in whole or in part, any tangible or intangible equipment, services or any other asset(s) of Employer (all the foregoing, the "Intellectual Property").

**b)** Without in any way limiting the foregoing, all Intellectual Property is and/or shall be deemed as "Works Made for Hire" under applicable copyright laws, and shall be the sole and exclusive property of Employer. In the event that any Intellectual Property does not qualify as a "Work Made for Hire" under the applicable copyright laws, I hereby assign (and/or upon learning of such non-qualification shall assign) to Employer any and all right, title and interest that I may now or at any time possess in or relating to such work.

**c)** I understand and agree that the decision whether or not to commercialize or market any Intellectual Property is within Employer's sole discretion and for the Employer's sole benefit and that no royalty will be due to me as a result of the Employer's efforts to commercialize or market any such Intellectual Property.

**d)** I have attached hereto as Exhibit A a list describing all inventions, original works of authorship, developments, improvements and trade secrets that were made by me prior to my employment with Employer and are related to Employer's proposed business, products or research and development, and/or are owned in whole or in part by me ("Prior Inventions"); or, if no such list is attached or if Exhibit A is unsigned, I represent that there are no such Prior Inventions. I agree that I will not incorporate, or permit to be incorporated, any Prior Invention into an Employer product, process or service without Employer's prior written consent. Nevertheless, if, in the course of my employment with the Employer, I incorporate into an Employer product, process or service a Prior Invention, I hereby grant to Employer a nonexclusive, royalty-free, fully paid-up, irrevocable, perpetual, transferable, sublicensable, worldwide license to reproduce, make derivative works of, distribute, perform, display, import, make, have made, modify, use, sell, offer to sell, and exploit in any other way such Prior Invention as part of or in connection with such product, process or service, and to practice any method related thereto.

**e)** I agree to assign to the United States government all my right, title, and interest in and to any and all Inventions whenever such full title is required to be in the United States by a contract between Employer and the United States or any of its agencies.

**f)** I shall not attempt to register, or maintain any application or registration for any Intellectual Property. During and after my employment by Employer, I shall cooperate with and assist Employer in Employer's preparation, recordation and/or prosecution of any documents relating to Employer's ownership of, or attempt to register, any Intellectual Property. I hereby irrevocably designate and appoint Employer and its agents as attorneys-in-fact to act for me in executing and filing any document to further the foregoing, with the same legal force and effect as though executed and filed by me.

**2)** Confidentiality: I understand that, in the course of my employment by Employer, I may conceive, create, review or receive information considered by Employer to be confidential or proprietary, including without limitation information or material relating to drawings, designs, products, services, fees, contacts, business plans, marketing, intellectual property, ideas, analyses, data, improvements, financial data, and customer or supplier lists ("Confidential Information"). During and after my employment: (a) I shall maintain any and all Confidential Information in strict confidence, except if and to the extent such Confidential Information has been made publicly available by another without breaching a confidentiality obligation, (b) I shall use all reasonable precautions to ensure that Confidential Information is protected from unauthorized disclosure, and (c) I shall not use any Confidential Information for the benefit of any person or entity other than Employer, and only then with Employer's prior consent.

I agree that I will not, during my employment with the Employer, improperly use or disclose any confidential or proprietary information or trade secrets of any former employer or other person or entity and that I will not bring onto the premises of the Employer any confidential or proprietary information belonging to any such employer, person or entity unless consented to in writing by such employer, person or entity.

I recognize that Employer has received and in the future will receive from third parties their confidential or proprietary information, subject to a duty on Employer's part to maintain the confidentiality of such information and to use it only for certain limited purposes. I agree to hold all such confidential or proprietary information in the strictest confidence and not to disclose it to any person, firm or corporation or to use it except as necessary in carrying out my work for Employer consistent with Employer's agreement with such third party.

**1)** Property: I agree to keep and maintain adequate and current written records of all Intellectual Property during the term of my employment with Employer. The records will be in the form of notes, sketches, drawings and any other format that may be specified by Employer. Any and all records, documents, electronic files and/or other materials which contain Confidential Information which are prepared by me or which otherwise come into my possession during the time of my employment by Employer are and shall remain the Employer's property. Upon termination of my employment by Employer, or if and when Employer may otherwise request, I shall immediately return to Employer (a) all such materials in my possession, custody or control, together with any copies thereof, and (b) any other tangible property issued to me by Employer for use during my employment, including without limitation keys, electronic devices, laptop computers and/or such property that may have been provided.

**2)** Necessary Protections: I acknowledge and agree that the agreements set forth above are reasonable and necessary for the protection of Employer's business interests, that irreparable injury will result to the Employer if I breach any of the agreements contained herein, and that in the event of my actual or threatened breach of any such agreements, the Employer will have no adequate remedy at law. I therefore agree that, in the event of any actual or threatened breach of any of said covenants, the Employer shall be entitled to immediate injunctive and other equitable relief, without bond and without the necessity of showing actual monetary damages. Neither the foregoing nor anything else in this document shall limit the Employer's monetary or other remedies for any breach of threatened breach. In the event that I leave the employ of Employer, I hereby grant consent to notification by Employer to my new employer about my rights and obligations under this Agreement.

Employee Signature: ____________________________

Employee name (print): ____________________________

Date: ____________________________

## SCHEDULE B

## INITIAL ASSIGNMENT

**Services to Perform:**

As on-air talent, you will be required to perform all responsibilities and tasks as assigned by your supervisor. Without limiting the foregoing, the main requirements of your job are:

**NOTE that prior approval from your supervisor is required for ANY public appearance or other media-related activity (including any social media posting using either a Company handle or a handle associated with your on-air persona).**

**SCHEDULE C**

**Compensation**

**SCHEDULE D**

**COMPANY COMPETITORS**

**SCHEDULE E**

**DEVELOPMENT OF NEW VIDEO CONTENT AND CHANNELS**

Artist shall have the right to develop new video content, websites and channels subject to the terms and conditions set forth below, and provided the same does not interfere with the performance by Artist of his or her responsibilities under this Agreement and is developed without the use of Company property, equipment or materials.

1. **Right of First Refusal**. (a) During the Term and any extension thereof pursuant to Section 5 of this Agreement (the "Option Period"), Artist shall not (i) own or hold any equity or other financial interest in, (ii) perform any services for or in connection with or (iii) appear in or otherwise permit his or her name, social media handle, voice or likeness to be associated with, any video content in any medium whatsoever, whether now known or hereafter devised, unless such video or concept thereof (inclusively, an "Artist Project") is first presented to Channel Lead - Rated Red or other Company designee in writing.

(b) Company shall have a period of ten (10) business days after receipt of an Artist Project in which to notify Artist in writing as to whether Company will finance and/or acquire the rights to such Artist Project for exhibition on one or more Company Properties. In the absence of any written notification from Company within such ten (10) day period, Company shall be deemed to have declined to exercise any and all rights with respect to such Artist Project.

(c) If Company timely notifies Artist that it intends to acquire an Artist Project, then Artist shall assign, transfer and convey to Company all rights in and to such Artist Project and execute such documents as Company shall deem necessary or appropriate to effectuate the foregoing. Company shall thereupon assume any and all third-party production costs incurred on or after such date in connection with such Artist Project. The foregoing notwithstanding, if Company fails to commence production or development of an Artist Project so acquired within six (6) months after the date of its acquisition thereof, Artist shall have the right to require Company to assign, transfer and convey to Artist all rights in and to such Artist Project.

(d) If Company declines to acquire an Artist Project, Artist shall have the right to exploit such Artist Project solely by means of an Artist Website or Artist Channel (as hereinafter defined).

2. **Artist Website.** During the Option Period, Artist shall not (i) own or hold any equity or other financial interest in, (ii) perform any services for or in connection with or (iii) appear in or otherwise permit his or her name, social media handle, voice or likeness to be associated with, any website or mobile site (an "Artist Website") unless such Artist website is a party to or otherwise bound by Company's standard Website Sales Representative Agreement (the "Sales Representation Agreement"). The Sales Representation Agreement shall be coterminous with the Option Period.

3. **Artist Channels.** During the Option Period, Artist shall not (i) own or hold any equity or other financial interest in, (ii) perform any services for or in connection with or (iii) appear in or otherwise permit his or her name, social media handle, voice or likeness to be associated with, any YouTube channel unless such channel (an "Artist Channel") is a party to or otherwise

bound by a YouTube Video Sales Representation Agreement executed by Company, which shall provide for a revenue share (as determined therein) of 80-20 in favor of Company (the “MCN Agreement”). The MCN Agreement shall be coterminous with the Option Period.

**4. Additional Content Investment by Company.** In the event that any Artist Website or Artist Channel achieves more than xxxx subscribers, Company agrees to make a cash investment in such Artist Website or Artist Channel equal to $xxxx (the “Content Incentive Investment”). The Content Incentive Investment shall be used solely for purposes of developing additional content and may not be used for any other purpose whatsoever.

5. **Covenant Not to Compete Applies to Artist Websites and Artist Channels.** For purposes of clarity and without limiting any of the foregoing, Artist acknowledges and agrees that the covenants not to compete set forth in Sections 1,9 and 10 of the Agreement shall apply to all Artist Websites and Artist Channels for the term set forth therein.

**TALENT AGREEMENT**

| | |
|---|---|
| **Dated:**<br>As of ___________, 2017. | **Start Date of Services:**<br>Start date currently anticipated to be no later than ___________, 2017. |
| **Talent:** ______________ ("Talent") | |
| **Talent's Address:**<br>___________________________<br>___________________________ | **Cycle:** One (1) episode a day, four (4) days a week for not less than twelve (12) weeks, for a total of forty eight (48) episodes of the Program, with each episode having a running time (exclusive of main and end credits) of no less than fifteen (15) minutes (a "Cycle"). For further clarity, Talent agrees to appear in/provide Services for not less than sixteen (16) episodes per month. |
| **Program(s) / Network(s):**<br>*"___________________":*(the "Program").<br>_____________ ("Network") | **Role / Services:**<br>On-Camera Host/Personality/Narrator/Voice-Over Talent/ Voice Talent ("Services").<br>Talent will provide Services for at least one (1) Cycle of the Program. |
| **Travel & Production Dates / Location(s):**<br>On-camera Services currently scheduled to start no later than ____________, in _________________. | **Compensation:**<br>$ |

**Additional Terms and Conditions**

A. Services: Network hereby engages Talent, and Talent hereby accepts such engagement, to render personal services as an On-Camera Talent, Personality, Narrator, Voice-Over Talent, and Voice Talent for and in connection with the Program. Talent's services are further described in Paragraph 1 of the Standard Terms and Conditions as set forth below (the "Standard Terms").

B. Credit: In Network's sole discretion, and provided that Talent is not in breach or default of his/her obligations, warranties and representations hereunder, Talent may receive an end credit in each episode of the Program in which Talent actually appears and/or renders Services. All elements of any credit provided hereunder, including without limitation size, style and placement, shall be at Network's sole discretion. No casual or inadvertent failure by Network to provide such credit, nor any failure by any third party to provide such credit, shall be deemed a breach of this Agreement.

C. Service/Options: Talent's Services shall be rendered on an exclusive basis during the period commencing on the date hereof and continuing until the initial exhibition of the final episode of the then current Cycle of the Program ("Service Term"). Network shall have three (3) exclusive, consecutive, dependent options (each an "Option") to extend the Service Term and engage Talent to provide Services for additional Cycles of the Program (e.g., for a second Cycle) on the same terms and conditions as set forth in this Agreement. Network shall exercise each such Option, if at all, in writing (email being deemed sufficient) no later than the last day of the then-current Service Term. Upon prior written notice to Talent, Network, in its sole discretion, shall have the right to increase the number of episodes for a Cycle in which Talent shall render services in the Service Term and/or determine the number of episodes for which Talent shall render services for a Cycle in any subsequent Service Term. Notwithstanding the foregoing provisions of this paragraph, Network will have the right, in its sole discretion, to accelerate commencement of any subsequent Service Term to any date during the preceding Service Term (thereby terminating said preceding Service Term on the day before said date) and/or to extend the termination date of any Service Term if such extension is for the purpose of completing the applicable production order of episodes for the current Cycle of the Program during such Service Term. Any accelerated Service Term will continue until the date upon which such Service Term would terminate hereunder in the absence of such acceleration unless extended pursuant to any provision hereof. Extension of any Service Term will delay the commencement and, at Network's election, the termination of any succeeding Service Term by a period lesser than, or, in Network's sole discretion, equal to the period of such extension and will also extend the date(s) for

Network's exercise of any Option by a period equal to the period of such extension. Network's right to extend any Service Term pursuant to this paragraph will not limit any other right of extension provided to Network under this Agreement.

D. <u>Promotional Requirements for Talent</u>**:**

Talent shall coordinate with Network on the promotion of the Program produced by Network and/or featuring Talent, as applicable, through social media (e.g. Facebook, Snapchat, Instagram, etc.) the specifics of which shall be mutually agreed by Network and Talent after good faith discussion of the Talent's social media profile and the marketing and release strategy for the Program and shall include the following activities: 1) Talent shall post social announcement of Program in advance of the premiere episode of the applicable Cycle of the Program to active social account(s) based on agreed upon posting schedule, including but not limited to: Facebook, Twitter, Instagram, Snapchat, Vine, YouTube, including at least 30 seconds duration on YouTube; and 2) Talent shall post social announcement of each episode of the Program to active social account(s) based on agreed upon posting schedule, including but not limited to: Facebook, Twitter, Instagram, Snapchat, Vine, Youtube (where YouTube is a minimum of 30 seconds). Notwithstanding anything to the contrary contained in this section D, Network's decision as to the substance and schedule of all social media posts/promotions shall govern should the parties fail to agree.

E. <u>Exclusivity</u>:

Throughout the Service Term (and any extension thereof) (the "Exclusivity Period"), Talent's services shall be exclusive to Network in all media. In furtherance of the foregoing, unless Talent has obtained Network's prior written consent, Talent shall neither render services for, appear in, sponsor or otherwise endorse any programming, promotion, product or service (using or licensing Talent's Name and Likeness or otherwise) substantially similar to or that detracts from the Program in any media. Talent shall notify Network in writing, immediately after Talent's receipt of any third-party request for Talent's services, including without limitation publicity and personal appearance requests, and requests to use Talent's Name and Likeness (as defined in the Standard Terms) in association with any programming, promotion, product or service substantially similar to the Program, for Network's review and approval (or disapproval). For the sake of clarity, substantially similar shall mean any talk radio programming, including audio-visual and audio only programming.

F. <u>Standard Terms and Conditions</u>:

The Standard Terms are by this reference incorporated herein and made a part of this Agreement. Without limiting the generality of the foregoing, and notwithstanding anything to the contrary set forth in this Agreement, all of each party's obligations hereunder, including without limitation, Network's obligation to engage Talent to render services, to pay compensation to Talent, or to accord Talent credit, are subject to the Standard Terms. In the event of a conflict between the Standard Terms of this Agreement below and the Additional Terms and Conditions above (the "Additional Terms"), the Additional Terms shall prevail.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above written.

| AGREED TO AND ACCEPTED BY: | AGREED TO AND ACCEPTED BY: |
|---|---|
| **COMPANY.** | **TALENT** |
| By: ___________________________________ | By:__________________________________ |
| Printed Name:___________________________ | Printed Name: _________________________ |
| Its: ___________________________________ | |

**<u>STANDARD TERMS AND CONDITIONS</u>**

1. **<u>Engagement/Services</u>.**

(a) This Agreement covers Network's engagement of Talent as an On-Camera Talent/Personality/Narrator/Voice-Over Talent/Voice Talent for and in connection with the Program at the Compensation set forth in the Additional Terms. Talent's services shall include all pre-production, production and postproduction services customarily rendered by On-Camera Talent/Personality/Narrator/Voice-Over Talent/Voice Talent in the entertainment industry and/or required by Network or its licensees, including without limitation any necessary (as determined by Network) research; rehearsals; travel; auditions; pickups; on-camera shoot days; narration; voice-over services; interstitials; wraps or other segment material; vignettes; on-and off-camera promos; openings, closings, trailers, lead-ins and lead-outs for use in and in connection with the Program; weblogs, vlogs and other interactive/social media content; "special" episodes; "behind-the-scenes" programs and books; consultation;[interviews for publications about the Program; creation of design plans; facilitating and overseeing all design plans and other related activities; building/repair. construction, and consultation on proposed project;] any other creative services as Network may assign Talent and Talent agrees that all such services shall be rendered in a first-class, professional manner and shall be subject to the instructions and direction of Network and its designated representatives, including, but not limited to any third-party broadcaster. Talent shall not engage in any activities that interfere with or delay the rendering of Talent's services hereunder. Network's determination in all matters respecting the performance of Talent's services (including without limitation matters involving artistic taste, quality and judgment) will be final and controlling. All services requested by Network shall be consistent with the editorial direction of Network and the Program.

(b) Talent further acknowledges and agrees that all services rendered hereunder, including Publicity and Promotional Services as defined below in sub-paragraph 1(c), shall comply with any and all Network guidelines and policies.

(c) Whenever Talent is rendering or is obligated to render services hereunder, and thereafter at such time or times as Network may require, Talent will, if, as and to the extent required by Network, cooperate with Network in such manner as Network deems necessary or desirable in order to furnish the services of Talent for the purpose of advertising, promoting, publicizing or otherwise exploiting the Program and any episode thereof, Network and/or Network's businesses, any network or sponsor of the Program, the products or services of Network or any such sponsor, or any rights granted to Network hereunder, including without limitation appearances at press and media events; print, radio and television interviews; satellite media tours; on-camera and off-camera promotions; still photography sessions; online chats/activities and other social media initiatives; Q&A sessions; "tweets" and notes from the field; autograph sessions; trade shows; in-store appearances (such appearances not to be construed as a direct or indirect endorsement of a product or sponsor); and making any public or personal appearances as may be requested by Network ("Publicity and Promotional Services"), all without additional compensation, unless otherwise stated in the Additional Terms.

(d) Network's obligations under this Agreement are conditioned upon the following (collectively "Conditions Precedent"): (i) Network's receipt of a fully signed copy of this Agreement and all exhibits hereto; and (ii) Network's receipt of all appropriate payment eligibility forms such as an INS Form-I9 and W-4 from Talent.

2. **<u>Rights / Ownership / Exploitation.</u>**

(a) Talent's services hereunder shall be performed on a "work-made-for-hire" basis, specially ordered or commissioned by Network, and, as such, all results and proceeds from Talent's services and all material suggested, composed, written, performed or furnished by Talent in connection with the Program and all material owned or controlled by Talent which is incorporated or used in connection with the Program (collectively, the "Results and Proceeds") are owned exclusively by Network, its successors and assigns, in perpetuity and in all languages throughout the universe including, without limitation, all copyrights (and renewals and extensions thereof), for all now known or hereafter existing uses, media, forms, means and methods including, without limitation, all forms of motion picture, television, digital television, literary, dramatic, video cassette and video or laserdisc, video and computer games and any computer-assisted media (including, but not limited to CD-ROM, CD-I and similar disc systems, interactive media, internet media and multimedia and any other devices and/or methods now existing and/or hereinafter devised), sound recordings, publishing, merchandising and all allied and all ancillary and subsidiary rights therein. To the extent such Results and Proceeds do not vest in Network, its successors and assigns as a "work made for hire," Talent hereby irrevocably grants, assigns and transfers to Network, its successors and assigns, without any right of revocation, all of Talent's right, title and interest thereto (including, without limitation, all copyrights and trademarks, together with all goodwill) for valuable consideration acknowledged herein. For this purpose, Talent hereby appoints Network attorney-in-fact for the limited purpose of effecting this Agreement and executing all documents necessary to effect this assignment.

(b) As the rightful owner, Network has the unlimited right to cut, edit, add to, subtract and omit from, adapt, change, arrange, rearrange, or otherwise modify the Results and Proceeds including, without limitation, to double Talent or to freely "dub" or subtitle the Results and Proceeds into foreign languages and dialects. Network may produce the Program in whatever manner it chooses, including without limitation recording by means of motion picture camera, tape or other electronic device or for live broadcast and may from time to time change from one manner of production to another and Network shall also have the right, in its sole discretion, to change the title of the Program. Network shall have the right, without additional compensation to Talent, to (i) use and grant others the right to use the Program or any portion thereof, as a part of, or otherwise in connection with, any other television program or otherwise; (ii) use and reuse any portion of the Program, including without limitation any clip(s) or soundtrack(s) of Talent's services from the Program, in or as a trailer or spot advertisement in any medium to advertise, promote or publicize the Program, Network or any sponsor; and (iii) combine any episode of the Program, or any portion thereof, with any other episode of the Program or with any other television program or with any other material of any nature whatsoever and may exhibit such combinations on television, in motion picture theaters or otherwise. To the full extent permitted by applicable law, Talent hereby irrevocably assigns to Network (or irrevocably waives, in the event assignment is not permissible) any and all benefits of any provision of law known as "droit moral," "moral rights of authors" or any similar law in any and all countries of the world.

(c) The parties hereby agree that Network's rights in the Program and the Results and Proceeds, and all elements, versions (e.g., different formats) and variations and/or portions thereof, including, without limitation, any Program specials, or any thematic Program episodes, may be exploited by means of any and all media (now existing or hereafter devised) ("Media") throughout the universe ("Territory") in perpetuity commencing upon the earlier of the commencement of Talent's services hereunder or Talent's execution of this Agreement ("Exhibition Period").

3. **Trademark.** As between and among Network and Talent, all parties agree that (i) the Program marks, the Program logos, the title of the Program, the names, titles and logos of all Network programs and series, and any other trade names, trademarks, or other marks of Network ("Network Trademarks") are trademarks owned by Network and are the sole and exclusive property of Network, unless otherwise licensed to Network by third parties; (ii) Talent shall not acquire or own any right, title or interest of any kind or nature whatsoever in the Network Trademarks or the trademarks of Network's affiliated entities; (iii) Talent shall not use, or authorize or permit the use of Network Trademarks or the trademarks of Network's affiliated entities in connection with any product or service, including but not limited to books, or in connection with Talent's endorsement (either direct or indirect) of any product or service or for any other purpose whatsoever without the prior written consent of Network in each instance (which consent may be given or withheld by Network in its sole and absolute discretion). Any use of Network Trademarks by Talent without Network's prior written approval shall constitute a material breach of this Agreement, and, in addition to all other remedies Network available to Network for such breach, Talent shall pay to Network a royalty for such unauthorized use at a rate to be determined by Network in its sole but reasonable discretion. Further, Talent agrees that Network may deduct such royalty payments from any compensation due to Talent hereunder.

4. **Name and Likeness.** Talent hereby grants to Network the perpetual, exclusive right, but not the obligation, to use and authorize others to use Talent's name(s), voice, image, photograph, personal characteristics, signature, actual or simulated likeness, expressions, performance, attributes, personal experiences and biographical information (collectively "Name and Likeness") in and in connection with the production, distribution, advertising, publicity, promotion, merchandising, exhibition and other exploitation of all versions and formats of the Program (including its title) and the businesses, services, programs and/or products of Network, and their licensees, sublicensees and assigns (including all advertising, publicity and promotion and materials associated therewith) and in or in connection with any episode of the Program in which Talent does not appear, including without limitation in billing, cast credits, advertising, promoting or publicizing any such episode, in any manner, in any and all media and by any means now known or hereafter devised (including, but not limited to, use in and in connection with publishing, by-products, tie-ins, merchandise, commodities and services of every kind, as well as in connection with or on materials which package or enclose any such items) and no additional payment shall be required for any such uses, unless otherwise specified in this Agreement. Network may include photographs or other images or depictions of the likeness of Talent in or in relation to any exploitation of the Program and all documentaries, "behind-the-scenes," "the making of" featurettes, promotional films and videos of the Program in any manner and by any means throughout the universe. Talent acknowledges and agrees that any product placement(s) (or Talent's use of any product or verbal mention of any product) within the Program and any advertisements within or connected to the Program shall not constitute any endorsement or sponsorship by Talent of such product or service and is permissible under this Agreement.

5. **No Obligation to Use Talent's Services**. Network shall be under no obligation to actually use Talent's services, to use any of the Results and Proceeds, to produce or exploit the Program, to continue any of the foregoing if commenced or to otherwise exercise any of the rights granted to Network hereunder. Notwithstanding the foregoing, provided Talent fully performs all services required in the Additional Terms to the extent required by Network, and provided Talent is not in breach of this Agreement, Network shall have fully discharged its obligations hereunder by the payment to Talent of the applicable compensation set forth in the Additional Terms for any services actually rendered.

6. **Compensation.**

(a) Provided Talent is not in breach or default hereof, as full and complete consideration for all of Talent's services and for all rights herein granted and to be granted and for all warranties and agreements of Talent hereunder, Network shall pay Talent and Talent, agrees to accept, the Compensation set forth above.

(b) Talent's regular compensation shall be paid within thirty (30) days after Talent's completion of the relevant required services and receipt by Network of an invoice for the relevant amount. Invoices should be sent no more than once per month. Each invoice must contain: (i) name; (ii) remit-to address; (iii) the invoice number; (iv) the project name and the network name; (v) the milestone(s) completed; and (vi) the payment amount as contracted.

(c) Payment of all compensation hereunder is contingent upon mutual execution of this Agreement, Talent's completion of delivery to Network of an IRS Form W-9 and review and acceptance by Network of a biography and customary background and professional and/or company check of Talent and Talent's credentials. In furtherance of the foregoing, Talent may be required to complete and sign a release or other document(s) as required by the third party designated by Network to perform such check(s).

7. **Independent Contractor/Insurance**.

(a) Talent acknowledges and agrees that Talent is an independent contractor and that Talent is not an employee or agent of Network for any purpose and the Network is not responsible to Talent for any federal, state or local withholding or employer taxation obligations, social security benefits or unemployment compensation related to the services performed under this Agreement. Talent further represents and warrants that Talent qualifies as an independent contractor under the provisions of the Internal Revenue Code and its common law rules and will file all required forms and make all necessary payments appropriate to Talent's independent-contractor tax status. This Agreement shall not be interpreted or construed to create an employment relationship, an association, agency, joint venture or partnership between the parties or to impose any liability attributable to such a relationship upon either party.

(b) Talent agrees that, other than as set forth in the Additional Terms, Network is not responsible for any insurance coverage(s) for Talent and accordingly, Talent shall assume responsibility for obtaining all required insurance coverage(s) for Talent, which may include, but is not limited to, worker's compensation, health insurance and/or automobile insurance. Talent shall provide certificates of insurance evidencing all required insurance coverage promptly upon request of Network. Talent knowingly, willingly, freely and voluntarily releases Network from any claim, demand, suit or cause of action for workers' compensation benefits or any other benefit or claim arising from, attributable or related to Talent's services hereunder.

(c) Notwithstanding anything to the contrary in Paragraph 7(b) above, Talent shall be covered either under Network's insurance for television productions or as additional insured under Network's general liability and media liability errors and omissions insurance policies, but in either case, only with respect to the Program. Talent shall be solely responsible for the costs not covered by Network's policies, if applicable, unless covered by Network's indemnification. For purposes of clarification, and without in any way limiting Talent's indemnity under this Agreement, Talent's rights shall be limited by the terms and exclusions of such policy, and Talent shall have no recourse under the policy if Talent has, by way of illustration: (a) caused or contributed to the claim; (b) admitted liability or prejudiced the defense of the claim; (c) failed to comply with or breaches any term and/or condition of this Agreement; (d) failed to notify Network in writing of any potential problems with the Program immediately upon Talent becoming aware of any such potential problems; (e) failed to accept that the policy's carrier may control the claim investigation, defense and settlement, and/or (f) failed to provide the policy's carrier with the information and cooperation reasonably required to investigate and handle the claim. In the event that Network or the carrier defends any claim arising under the E&O policy for the Program (i.e., any claim for which Talent's indemnity applies), <u>and</u> any of the occurrences set forth in (a) through (f) herein become known to Network, then Talent will be obligated to refund to Network, as applicable, the full cost of defending the applicable claim, including but not limited to any damages, promptly upon receipt of written notice concerning such costs.

(d) At Network's expense and for Network's benefit, Network will have the right to secure cast insurance covering Talent, and Talent will have no right, title or interest in or to any such insurance. Talent agrees to cause Talent to furnish information (including vaccination records), complete forms, applications, and other instruments, and undergo medical examinations by physicians Network selects (at Network's expense), as may be required by any insurance Network (which forms, applications and other instruments Talent agrees to complete fully and truthfully). Talent may have Talent's own physician, at Talent's expense, present at any physical examination Network requires. If Talent fails or is unable to qualify for such insurance at Network's customary rates for the then-current Service Term, Network will have the right to terminate this Agreement During the Service Term (and any extension thereof), Talent will not travel on any chartered or other unscheduled airline or plane unless requested to do so by Network, or engage in any conduct prohibited by any policy of insurance obtained by Network in accordance with this Paragraph 7(d) (to the extent that Talent knows or should know of such prohibition), unless requested to do so by Network, or engage in any hazardous activity without the prior written consent of Network.

8. **<u>Talent Incapacity</u>**. An event of Talent incapacity shall be deemed to occur if Talent is unable to fully render services in accordance with the terms of this Agreement, as determined by Network (e.g., Talent's illness, injury or mental disability; or impairment of Talent's voice, appearance and/or mobility) ("Talent Incapacity"). Without limiting any other rights of Network under this Agreement, in the event of Talent Incapacity, (i) Network shall not be obligated to pay or credit Talent with any compensation during such Talent Incapacity and (ii) Network shall have the right to suspend this Agreement during such period of Talent Incapacity and shall have the right, but not the obligation, to extend this Agreement by the length of any such suspension. If any Talent Incapacity continues for at least seven (7) days in the aggregate, Network shall have the right to terminate this Agreement without any further obligation to Talent except for appropriate payment or adjustment with respect to any Talent services satisfactorily completed prior to such termination provided that Talent is not in breach of this Agreement. This Agreement shall terminate automatically on the death of Talent.

9. **<u>Termination.</u>**

(a) Network shall have the right to immediately suspend and/or terminate this Agreement in the event that Talent fails for any reason whatsoever to render services or fulfill their required obligations hereunder and Talent fails to cure such breach within a reasonable period of time, after which Network shall have no further obligations to Talent hereunder except for appropriate payment or adjustment with respect to any Talent services satisfactorily completed prior to such termination, provided that Talent is not in breach of this Agreement and/or this Agreement has not been terminated for cause.

(b) In furtherance of the foregoing, Network will have the right to terminate this Agreement for cause, which includes, without limitation, making disparaging remarks about the Program or any party involved with the Program, or Network, or their employees, agents or assigns, any breach of this Agreement, insubordination, dishonesty, intoxication, resignation, or failure, refusal, or neglecting to perform Talent's services at the times and places and in the manner required or to fulfill Talent's other obligations under this Agreement, significantly changing Talent's on-air appearance without Network's prior written consent, failure to conduct Talent's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Network in its sole discretion) or commission of any act (in the past or present) which degrades Talent, Network or the Program or brings Talent, or Network or the Program into public disrepute, contempt, scandal or ridicule. Upon termination for cause, Network shall not have no further obligation to Talent (including, but not limited to, any payment obligations).

(c) Any termination of this Agreement under any of the terms or provisions hereunder, or by reason of any legal right on the part of either party hereto, will not diminish, impair or otherwise affect any of the rights granted to Network herein or in the Results and Proceeds created up through the date of termination. Network's use of Talent's services after termination of this Agreement shall not be deemed a reinstatement or renewal of this Agreement without the written agreement of the parties hereto.

10. **<u>Representations and Warranties; Indemnity</u>**.

(a) Talent hereby represents and warrants that (i) Talent has the full right and authority to enter into this Agreement and furnish the services of Talent as required hereunder and grant to Network the rights granted hereunder including, but not limited to, in the Results and Proceeds; (ii) all material, suggestions and ideas of every kind furnished by Talent in connection with Talent's services (collectively, "Material") is and will be wholly original with Talent and no part thereof is or will be taken from, based upon, or adapted from any other work (other than material specifically furnished to Talent by Network or material in the public domain) and such Material, and all services rendered by Talent hereunder, shall comply with Network's rules and policies and shall not violate or infringe upon any right of any kind or nature whatsoever of any person or entity including, without limitation, any copyright or right of privacy or publicity; (iii) this Agreement is not and will not be subject to any claim against Network for fees or commissions by any agent or representative of Talent or any other person; and (iv) Talent has obtained and will maintain at all times during the Service Term (and any extension thereof) any and all work permits and immigration clearances necessary to enable Talent to perform Talent's services hereunder.

(b) Network hereby represents and warrants that it has full right and authority to enter into this Agreement and written materials supplied by Network to Talent shall not infringe upon the rights of any third party.

(c) Talent hereby agrees to at all times defend and indemnify Network and their respective parent companies, subsidiaries, affiliates, licensees or assigns, from any and all claims, damages, or other liabilities, (including, without limitation, reasonable counsel fees and disbursements) arising out of or in connection with any breach or alleged breach by Talent of this Agreement. Network hereby agrees to at all times defend and indemnify Talent from any and all third party claims, damages, or other liabilities, (including, without limitation, reasonable outside counsel fees and disbursements) arising out of or in connection with any breach or alleged breach by Network of this Agreement. If it so elects, the indemnified party shall have the rights at its sole cost to engage its own counsel in connection with such claims or may assume defense on its own behalf in the event the indemnifying party fails to adequately defend or if the indemnified party's insurance carrier requires that such carrier defends any claim as a condition of coverage. The obligations under this paragraph shall survive the termination or expiration of this Agreement.

11. **Rights and Remedies**. Talent agrees that the rights and remedies of Talent in the event of a breach of this Agreement by Network shall be limited to the right to recover money damages, if any, in an action at law and in no event shall Talent be entitled to terminate or rescind this Agreement or enjoin or restrain the exploitation of the Program and/or any Results and Proceeds. The rights granted by Talent under this Agreement shall not terminate by reason of any such breach hereof by Network. Talent agrees that the services provided by Talent are of a special, unique, unusual, extraordinary and intellectual value and character, the loss of which would cause Network irreparable harm and could not be adequately compensated by money damages in an action at law. Talent hereby expressly agrees that Network shall be entitled to seek injunctive and other equitable relief to restrain, enjoin or prevent any breach or threatened breach of any obligation herein by Talent, in addition to any other rights that Network may have in equity or at law. In the event Network incurs any damages as a result of any breach of this Agreement by Talent, Network shall have the right, in addition to any other remedies, to withhold and offset any payments due Talent under this or any other agreement between the parties in an amount reasonably necessary to cover Talent's indemnity obligations under this paragraph or to cover any damages incurred by Network.

12. **"Plugola," "Payola" and Logos**. Talent will not give or agree to give anyone directly and/or indirectly associated with the Program anything of value in exchange for Talent's engagement in the Program. Talent will not accept any money, services or other valuable consideration, other than Talent's compensation hereunder, for the inclusion of any matter in the Program or for the endorsement of any Network product or service in the Program. Further, Talent shall not visibly wear any product name or logo during the provision of Talent's services hereunder, without Network's prior written consent. If Network approves the inclusion in the Program of any logo or trademark, which logo or trademark is proprietary to Talent, then Talent hereby grants Network the right to include such logo or trademark in the exhibition, promotion, advertising, merchandising and other exploitation of the Program.

13. **Sponsorships/Endorsements**. Talent agrees and acknowledges that nothing herein shall limit Network's ability to sell sponsorships, product integrations, or advertisements of similar nature in connection with the Program. Talent shall disclose to Network on Exhibit A all active and former sponsorships, endorsements, or similar relationships Talent has with any third party. Talent shall use its best faith efforts to provide services customarily rendered by On-Camera Talent/Personality/Narrator/Voice-Over Talent/ Voice Talent in connection with a sponsorship, endorsement, and/or product integration as required by Network or its sponsor subject to any conflicts Talent may have as a result of a pre-existing relationship with a third party set forth on Exhibit A. Notwithstanding the foregoing, prior to the execution of any sponsorship, endorsement, or product integration, Network shall provide Talent with meaningful consultation regarding such endorsement, sponsorship, or product integration and Talent brand consistency; provided Talent hereby agrees and acknowledges that Talent shall not have final approval over Networks execution of such sponsorship, endorsement, or product integration.

14. **Fair Competition.** During the Exclusivity Period set forth in Section E of the Additional Terms, Talent shall not enter into any agreements, which in any way prohibit or limit any third party's rights to deal with Network.

15. **Confidentiality/Statements by Talent.**

(a) Talent and/or Talent's representative(s) agree that any information Talent and/or Talent's representative(s) learn during the course of, or in connection with, Talent's engagement hereunder concerning Network's business operations, strategies, future plans, financial affairs, or any other information concerning the Program, Network and/or their parent, subsidiary and/or affiliated companies, including the terms and provisions of this Agreement (collectively, the "Confidential Information"), is confidential and proprietary. Talent and/or Talent's representative(s) shall not disclose to any third party any information with respect to such Confidential Information, except: (i) where such information has already been released to the public by Network; (ii) to the extent necessary to comply with law or the valid order of a court of competent jurisdiction or government agency, provided Talent notifies Network of any request for such and/or any such law or order; or (iii) on a must-know basis to Talent's lawyers, accountants and other business representatives upon the express condition that Talent shall in such cases secure said representatives' agreement to comply with this confidentiality restriction.

(b) Other than as provided for in this subparagraph, Talent and/or Talent's representative(s) shall not issue any press releases nor make any other statements about Talent's services, the Program, Network, its affiliates, agents and/or employees, or any other party involved in the Program (e.g., the Program's sponsors) in any media (including, without limitation, any online or print communications) without Network's prior written consent. Further, Talent and/or Talent's representative(s) shall not use any name, logo, trademark or other proprietary mark of Network or their parents, subsidiaries, affiliates, licensees, sub licensees and/or assignees in any manner without the mark owner's prior written approval.

16. **Force Majeure.** If either party hereto is materially hampered from performing hereunder by reason of any law, natural disaster, labor controversy, war or any similar event beyond a party's reasonable control ("Event of Force Majeure"), failure to perform shall not be deemed a breach of or default under this Agreement and neither party shall be liable to the other therefore. Network shall have the right to suspend this Agreement during an Event of Force Majeure and shall have the right, but not the obligation, to extend this Agreement by the length of any such suspension. Network may terminate this Agreement in an Event of Force Majeure without further liability to Talent, except for appropriate payment or adjustment with respect to any Talent services satisfactorily completed prior to such termination. During any suspension due to an Event of Force Majeure, subject to the exclusivity provisions of this Agreement and provided Talent is not in breach of this Agreement, Talent may render services to any other person or entity or on Talent's behalf; provided, that Network shall have the right to recall Talent to render services hereunder on two (2) days oral or written notice, and Talent shall report to Network to render services at the expiration of said two (2) days. Network may invoke its rights under this paragraph as often as any Event of Force Majeure occurs.

17. **Applicable Law.** This Agreement shall be governed by the laws of New York. The parties agree to submit themselves to exclusive personal jurisdiction in the State of New York with venue

in the County of New York and waive any rights they might otherwise have to lack of personal jurisdiction and/or inconvenient forum.

18. **Assignment.** Talent's services are personal and unique in nature and Talent may not assign this Agreement or any of its obligations. Network may freely assign any and all rights and obligations under this Agreement in whole or in part to any other party, including without limitation any any other entity in the name of which Network contracts.

19. **Collective Bargaining Agreement.** This is a non-union agreement. The parties acknowledge and agree that this Agreement and Talent's services hereunder shall not be subject to the terms of any collective bargaining agreement (e.g., SAG, AFTRA). Talent acknowledges that neither Network nor Network is a signatory to any collective bargaining agreement covering Talent's services hereunder. Talent shall indemnify and defend Network from any and all claims asserted by any guild or union with respect to Talent's Services.

20. **Cameras/Audiovisual Devices.** Neither Talent nor any representative of Talent shall bring or use any cameras or audiovisual recording devices to any of Network's and/or the Program's offices, sets, or locations without Network's prior written consent, which Network may grant or withhold in its sole discretion. In the event Network has granted such written consent, the copyrights in all photographs and audiovisual recordings made by Talent or any representative of Talent at any of Network's and/or the Program's offices, sets, or locations shall belong solely to Network, and Talent shall not display, exhibit, or distribute, or authorize the display, exhibition, or distribution of, any such photographs or audiovisual recordings publicly for any purpose whatsoever.

21. **Waiver**. No waiver by Network of the nonperformance or breach of any term, condition or obligation to be performed or binding upon Talent under this Agreement will be a waiver of any other nonperformance or breach; nor will Network's exercise of any option (if applicable) hereunder be deemed a waiver by Network of any default preceding such exercise. No failure or delay by Network in exercising any right or privilege under this Agreement shall operate as a waiver thereof.

22. **Counterparts.** This Agreement may be executed in one or more separate counterparts, each of which, when so executed shall, together, constitute and be one and the same instrument. A signed counterpart transmitted by facsimile shall be deemed an original**.**

23. **Severability.** Any provision herein found by court of law or an arbitrator to be void or unenforceable shall not affect the validity or enforceability of any other provision of this Agreement. If there is any conflict between any provision of this Agreement and any present or future statute, law, ordinance or regulation, the latter shall prevail; provided, that the provision hereof so affected shall be construed so that it is enforceable to the fullest extent possible in order to meet the intent of the parties and limited only to the extent necessary to comply with such statute, law, ordinance or regulation, and no other provision shall be affected. The terms of this Agreement are severable, and the invalidity of any term in this Agreement shall not affect the validity of any other term.

24. **Notices.** All notices that Network is required or may desire to give to Talent will be given to Talent in writing by addressing the same to Talent at Talent's address or facsimile number as indicated in this Agreement, or at such other address or facsimile number as may be designated in writing by Talent to Network. All notices that Talent is required, or may desire, to give to Network will be given in writing by addressing the same to Network 1271 Avenue of the Americas, 35th Floor New York, NY 10020 to such other address as may be designated in writing by Network to Talent. All notices sent shall be in writing and delivered by personal delivery; first class certified or registered mail, return receipt requested; U.S. Express mail, or an express overnight service (such as Federal Express); or facsimile (with confirmation), with notice by email deemed acceptable for Notice of Option exercise under Paragraph C of Additional Terms and Conditions. Three (3) business days after mailing in the U.S. mail, the date of personal delivery (whether orally or in writing), or the date of facsimile transmission, of such notice shall be deemed to be the date upon which such notice is given; provided, however, that any notice from Talent that commences the running of any period of time for Network's exercise of any option or Network's performance of any other act will be deemed to be served only when actually received by Network. Notwithstanding any other provision of this Agreement to the contrary, any written notice from Network to Talent or to any agent or other representative of Talent which is actually received will be deemed, at Network's election, sufficiently given. The time in which any act provided by this Agreement is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or legal holiday, in which case such day shall also be excluded.

25. **Assumption of Risk.** Talent acknowledges that participation in a program of this nature and the services being rendered in and in connection with the Program may involve strenuous, physical, dangerous or hazardous activities. Talent further acknowledges that the services being rendered hereunder may take place in a location that is inherently dangerous due to disease, violent and/or non-violent crime(s) and political and/or social unrest and associated activities that may expose Talent to risk of loss of property, bodily harm, disfigurement or death. Talent voluntarily assumes any and all risks, known or unknown, associated with the services. Talent shall assume responsibility for obtaining all desired insurance coverage for Talent. Talent represents that Talent routinely engages in services of the nature contemplated herein, and hereby agrees to defend, indemnify and hold harmless and to voluntarily release, discharge, waive and relinquish any and all actions or causes of action against Network and its respective parents, subsidiaries, successors, officers, agents, employees and licensees (collectively, " Network Indemnified Parties") from any and all claims, demands, liabilities (including, but not limited to, personal injury, property damage and wrongful death) resulting in any manner from Talent's services, whether caused by negligence or otherwise.

26. **Wardrobe/Hair & Makeup.** Talent shall ensure Talent's wardrobe/hair & makeup shall not substantially conflict with social conventions, public morals, or public decency. Talent's wardrobe may not contain "adult" material (as determined by Network in its sole discretion), or material that brings Talent, or Network or the Program into public disrepute, contempt, scandal or ridicule.

27. **Entire Understanding.** This Agreement contains the entire understanding of the parties as to the subject matter hereof, and all prior communications and agreements, written or oral, express or implied, as to such subject matter are superseded hereby. This Agreement may not be modified, altered or amended in any way except by an instrument in writing signed by all parties. Paragraph and subparagraph headings as used in this Agreement are for convenience only and are not a part thereof and will not be used to interpret any provision of this Agreement. No officer, employee or representative of Network has any authority to make any representation, warranty or agreement not contained in this Agreement, and Talent acknowledges that Talent has not executed this Agreement in reliance upon any representation, warranty or agreement not expressly set forth in this Agreement. Each individual and entity executing this Agreement hereby represents

and warrants that he, she or it has the capacity set forth on the signature page(s) hereof with full power and authority to bind the party on whose behalf he, she or it is executing this Agreement to the terms hereof. The parties have read and understand this Agreement and have had the opportunity to consult with counsel and/or personal representatives with respect hereto. The parties acknowledge and agree that there shall be no presumption against any party on the ground that such party was responsible for preparing this Agreement or any part thereof.

**END OF STANDARD TERMS AND CONDITIONS**

**EXHIBIT A**
**Sponsorships and Endorsements**

In accordance with Paragraph 13 of the Standard Terms and Conditions, Talent shall disclose below all active and former sponsorships, endorsements, or any similar relationships Talent has with any third party:

**EXHIBIT B**
**Excluded YouTube Channels**

In accordance with Paragraph E of the Additional Terms and Conditions, Talent's exclusivity obligations shall not apply to those YouTube channels listed below, which Network agrees to Talent continuing to render services in connection with; provided Talent's Services hereunder shall be rendered on a first-priority basis in accordance with Paragraph C of the Additional Terms and Conditions: