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herself better qualified for a given position. Similarly, an institution of higher learning may deny acceptance to a member of America's ethnic majority in favor of one of a minority even though it was clearly choosing against the more qualified person.

When considering the 'role model' topic some questions should be asked. Is it necessary to advance potentially less qualified people across the board in order to create role models for minorities to look up to? Should the quality of those minorities in high positions be sacrificed for the quantity? Should the standards by which "white America" lives be lowered for minorities? One would hope not on all three accounts. By doing these things, role models are cheapened and the racial majority is repeatedly taunted when forced to watch less qualified and possibly less motivated candidates receive jobs that they didn't deserve.

On the whole, affirmative action has not improved the plight of minorities, but merely provides the illusion of fairness and equality. If it is to be credited for anything, it is for leading our nation's work ethic toward and into the waste receptacle. Instead of telling a son, "Work hard and more times than not your diligence, achievement, and quality of work will be recognized," a parent must now express this in different terms: "Work hard and be the best and even when you become the best, hope like hell that someone of a more underprivileged racial grouping doesn't barely pass the cut." A work ethic requires the hope that effort yields success or advancement. This hope can not be generated unless a more fair system is devised. If the government would like to aid

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minorities it should raise them by their bootstraps rather than drag them by their hair.

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# There's No Business Like Show Business: The Legal Implications of Hollywood's "New Math" and its Impact on Unsuspecting Artists

By Paris Hampton

*The Rockford Files*, one of the most successful syndicated shows in television history, did not make a dime according to the studio that made it. This is an example of the accounting procedures that have a significant bearing on the focus of this article, *Art Buchwald v. Paramount Pictures*. First, let us consider that consistent growth in revenues with the growth of ancillary markets (video, cable, and foreign television) has increased the percentage of studio films that break even or make a profit from about 20 percent a decade ago to up to 70 percent today. However, below the line costs (the increase of the daily production outlay on a studio film) and above the line costs (gross participation deals or inflated upfront salaries demanded by big talent) have rendered net profit, the pool of funds that pays the remaining talent pool (actors with less clout and writers), meaningless:

*All percentage participation is added to the studio's expenses on a film. So no matter how big a hit the film is, it never moves into "net profits"—the crux of the current Art Buchwald "Coming to America" case... The virtual non-existence of net profits, in turn, makes more players fight for upfront deals. Mindful of the diversified revenue stream, players like Eddie Murphy, Arnold Schwarzenegger, and Ron Howard have opted for much larger upfront cash outlays rather than for gambling with the backend or waiting the five to seven years for all sources of ancillary interest to be returned. This too has added to the overall budgets of films. (Natale)*

Art Buchwald learned about this gamble the hard way.

**BIG DEALS-SMALL PROFITS?**

Paramount Pictures Corporation released *Coming to America*, a big budget film that was found by the

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courts to be based upon Buchwald's manuscript *King for a Day*. Paramount asserted that the film, which has generated sales of almost \$300 million, garnered Paramount at least \$160 million, and cost less than \$40 million to make, has not only been unprofitable, but has run up an \$18 million deficit and will never turn a profit. Paramount retained \$73 million out of the \$160 million it received from the picture and their true cash profit was at least \$553 million, thus boosting the earnings of the parent company for 1988. (Plaintiffs' statement 1) Paramount's attorney, Charles Diamond, admitted on the *Michael Jackson Show* on KABC radio that:

*Coming to America was very profitable, it was a huge success, no one has ever denied that it's returned handsome profits. (Michael)*

According to standard Hollywood practice, Buchwald or any other writer is not promised a share of the true profits in a contract. Royalties to writers and other creative people under contract are paid out only after the movie company deducts from gross revenue their distribution fees (a percentage based on what the company thinks is appropriate—usually about 30 percent) leaving an adjusted gross revenue. Against roughly 70 percent of the revenues the studios apply 100 percent of the costs for purpose of determining the participation rights of writers and performers. Because there are essentially two categories created by this accounting system (what the studio makes and what the film makes), the studios profit handsomely while the film shows a loss—meaning no royalties for actors, directors, and writers. Using this formula, Paramount could claim that *Coming to America*, the second-highest grossing movie in 1988, was \$18,000 in the red and would never show a profit. This calls into question whether the system that is being used in the drawing up of movie contracts is fair and equitable.

Money ...Money ...Money!

Paramount's Richard Zimbert reflected on the major motivating force in the movie industry that influ-

ences dealmaking and negotiations with talent:

*Since the movie business boils down to one thing, money, everything in the deal revolves around that. As is frequently the case in a real estate transaction, the buyer—the studio in the motion picture business—wants as many rights and protections as possible for his money. The seller—the filmmaking or creative entities—frequently wishes to give as little as possible. (Squire 177-178)*

Zimbert goes on to explain that although some companies make money on their distribution fees, sometimes there is a loss. Paramount has not provided any specific information on the cost of distributing *Coming to America*, but a generous estimate would be \$7 million. Paramount has collected \$42 million in distribution fees for theatrical and cable distribution and another \$23 million for videocassette distribution—amounting to a grand total of \$65 million or 40 percent of all the money received. (Plaintiffs' Statement 61) Paramount's rationalization for this generous cut of the profits is that the movie business operates like a game of Russian roulette where there are so many box office bombs that the success of the winners must subsidize these losses.

Even if this were an economic reality, there is no legal stipulation in the contracts that the winners must pay for the losers. In fact, one could question the legitimacy of an unprofitable system when so many ancillary sources of revenue have made the industry more profitable in recent years. Paramount may be pleading poverty but their shareholders reports show impressive earnings. Don

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Simpson, a senior executive for eleven years and current top producer at Paramount said:

*The truth is that with ancillary sales...very few pictures lose money. Most break even...the studio can't lose. I've been at Paramount for eleven years, and I can only remember two pictures losing money...We always got our money back...[The studios] try to make Time and Newsweek believe in the poor beleaguered movie business. (Litwak 86)*

Taking these numbers and the variables into consideration, it is difficult to justify Paramount's denial of compensation for artistic ideas. When the plaintiffs Art Buchwald and Alain Bernheim filed a complaint against

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Paramount in November 1988, they claimed that the studio had based *Coming to America* on Buchwald's story *King for a Day* (which Bernheim brought to Paramount in

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1983) without acknowledging their contributions or compensating them. Pursuant to his contract, Buchwald was entitled to \$65 thousand plus 1.5 percent of the net profits from any motion picture based upon his story. Bernheim's contract with Paramount obligated Paramount to hire him as the producer of any motion picture based upon Buchwald's story and to pay him \$200 thousand dollars and 40 percent of the net profits. Net profits were to be computed according to Paramount's standard net profit formula. (Writ of Mandate 5) On 8 January 1990, Judge Harvey A. Schneider ruled that *Coming to America* was based upon Buchwald's *King for a Day*, that Paramount had breached its contract with Plaintiffs, and that Plaintiffs were therefore entitled to damages. According to the evidence of a net deficit, it seemed unlikely that Paramount would ever pay the creators anything under their standard definition of net profits.

### **Paramount Retaliates**

Using the concept of moviemaking as a game of Russian roulette, Paramount launched a media offensive insisting that one court ruling would change the structure of dealmaking in Hollywood for the worse. The studio defended the legality of their net profit formula by invoking a "risky business" defense, claiming that Paramount alone bore the risk of producing the picture and hence its success or failure was a product of their investment. This risk factor allows them to extract a large dividend from the overall profits, they argue. When the court and the Plaintiffs requested additional evidence concerning its profitability, Paramount withdrew the "risky business" defense. They declared the ruling on 21 December a "threat to the free market system" and called the judge "the Commissar of Industry contracts." (Writ of Mandate 18) Paramount claimed that the trial court's preliminary decision has had a devastating effect on the daily business of the motion picture industry. Remarkably, Paramount has not been able to get any other studio representative, agent, entertainment lawyer, or other executive to file a supporting declaration to substantiate their claim. (Writ of Mandate 25) Indeed, it seems that when Paramount

was choosing analogies to describe the movie system, a game might have been more appropriate—Monopoly.

### **The Undeniable Power of the Studios**

Motion pictures are primarily produced by seven major studios. It is understood that the potential for successful marketing is significantly enhanced if a picture is distributed by one of the major studios. Couple this with the intense competition in Hollywood to get one's ideas marketed and the result is incredible leverage for the studios over the creative community. The studios have used this power before for their financial benefit. In *United States v. Paramount Pictures* (1948), Paramount, Columbia, Twentieth Century Fox, Warner Bros., United Artists, and Universal, as film distributors, were found to have conspired to restrain and monopolize and to have restrained and monopolized interstate trade in the distribution and exhibition of films. (Plaintiffs' Statement 52) In the same spirit of antitrust, the studios have devised this standard net profit participation formula. These terms are non-negotiable unless one has the clout of a megastar, who would be able to draw from the true gross profits almost immediately. Otherwise, if one wants to work in the film industry, he or she must do so on the studio's terms—period.

Paramount rationalized that Buchwald's contract was the same as any other, and contracts had been drawn this way for many years. Buchwald's case is long overdue then and may be able to breathe new life into an industry riddled with inequitable traditions. In a town

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## An American Renewal

By Senator Bob Kerrey (D-NE)

### Biography

Senator Bob Kerrey, in his personal life and political career, is a study in overcoming odds and demonstrating inspiring leadership.

A Navy SEAL in Vietnam, Kerrey was severely wounded and earned a Congressional Medal of Honor for "Conspicuous gallantry and intrepidity." Home in Nebraska, he put his life back together, and built a successful business.

As Governor, Kerrey turned Nebraska's budget deficit into a surplus. With an eye for long-term needs, he insisted on improved access to health care, investment in technological development, environmentally sound farming, and creativity in education.

In the Senate, Kerrey is recognized leader on health care and education and is a respected voice on issues of the day.

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I want to lead a process of renewal which will open up new possibilities not only for Americans of this generation, but also for generations to come. I want to lead because I believe almost everyone but our present leadership knows what we must do. I believe Americans know deep in their bones that something is terribly wrong and that business as usual—the prescription for the 80s—cannot work for our future. What we need is a renewal, a willingness to act upon the idea of building for great -

ness.

When I graduated from high school in 1961, my classmates and I faced a future of great promise, the direct result of our parents' determination to make our lives

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better than their own. My parents' generation had taken this nation to the forefront of world leadership. They had defeated fascism, and were in the process of implementing a network of arms and alliances that would eventually contain communism.

My parents' generation was also doing great things for us at home. In 1961 they were in the midst of building a brand new interstate highway system to be paid for with cash. The schools they provided us with were respected throughout the world. They gave us a thriving economy that enabled us to double our standard of living within a single generation; to buy a house; to purchase health care; to afford higher education for our own children.

Next year, my own son will graduate from high school. What kind of legacy will he inherit? My generation understands that the power of those earlier gifts is dwindling because our leadership simply has not renewed them.

I am thankful that the threat of communism has receded, and that my son does not face the likelihood of war. But the benefits of this historic victory have not been brought home to the people who deserve to claim them and unless we do things differently now, he will assume title to a far different inheritance than I received in 1961.

It is time for leadership committed to posterity rather than popularity and focused on the next century instead of the next election. We can build a future full of promise and hope for the turn-of-the-century Americans. We can leave them a legacy of greatness. But it requires us to believe. It requires us to risk. Most of all it requires us to look towards and work for the future.

To begin building for the future, we must make certain our base is solid. After a decade of unchecked greed and cynicism, we must reaffirm our commitment to fundamental rights and values, including civil rights, quality education, and health care for all.

We must ensure that all Americans receive full protection of our laws. Extending to women the same legal protections received by other minorities was one of the most important aspects of the Civil Rights Bill we