Through the Looking Glass: Runaway Productions and "Hollywood Economics"

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Introduction

This paper uses the issue of runaway production as a looking glass into the complex world of Hollywood economics and politics. As such, a broad overview of Hollywood's business practices, history, and technology are discussed so the reader can understand how runaway production (a major issue itself) is one piece of the Hollywood puzzle. Specifically, this paper attempts to study runaway productions from the Law and Economics approach described in Judge Richard Posner's text on the subject. Events in 2006 illustrate the continuing importance of runaway productions.

At the 2006 Academy Awards, the motion picture industry praised itself its role in helping rebuild New Orleans and the Gulf Coast in the aftermath of Hurricane Katrina. Academy President Sid Ganis lauded six movies filmed in New Orleans, which created 600 new jobs.[1]

Hollywood's perceived altruism may be somewhat misplaced. While it's commendable that recent film production created 600 new jobs in New Orleans, it's naive to think that the film industry's presence in New Orleans is entirely altruistic. In 2005, before Katrina was on the radar, movies filmed in Louisiana had a combined budget of $550 million.[2] Filming in Louisiana is not about altruism, it's about economics.

Louisiana State House Bill 731 (signed by the Governor as Act No. 456), which took effect on July 1, 2005, allows any motion picture company that spends at least $250,000 in connection with filming a motion picture to be relieved from paying all state sales and use tax.[3]

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[1] Schwartz, Missy. "*Southern Comfort; After Katrina, Hollywood Rushed into Louisiana*," ENTERTAINMENT WEEKLY, March 24, 2006.
[2] Susan Roesgen, "*Filming in New Orleans*," CNN AMERICAN MORNING, March 20, 2006.
[3] H.B 731, Regular Session 2005, (La. 2005).

Further, a motion picture production company that spends $1 million or more on payroll for Louisiana residents receives a 20% employment tax credit. Any Louisiana taxpayer who invests in a production with a total base investment of less than $8 million will be allowed a tax credit of 10% for their actual investment. If the total base investment exceeds $8 million, a Louisiana taxpayer is allowed a 15% tax credit for their actual investment.[4]

With Louisiana's generous incentives in place, 10 films were in production for 2005, up from four in 2004 and only one production in 2002.[5] Although Hurricane Katrina gave Hollywood the chance to spin itself as part of the rebuilding effort, it seems Hollywood executives were truly motivated to film in Louisiana because of tax credits. Indeed, Louisiana's previous legislative incentives had dramatic results for the state. From 2002 to 2004, production budgets for movies, television shows and commercials grew from $11.8 million (2002) to $355 million (2004)—an increase of 2,850%.[6]

Louisiana's growth in movie production in recent years is, arguably, positive for the state (and perhaps Hollywood's image too), lawmakers in Baton Rouge should be wary. Movie productions can flee as quickly as they come. Laws expire and other states and nations may offer a better incentives to lure away movies. If Louisiana loses its touted position as "Hollywood South," it will become a victim of runaway production.

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[4] H.B 731, Regular Session 2005, (La. 2005).

[5] Los Angeles Times, *Hollyworld: Runaway Production Map*, [hereinafter Runaway Production Map] *Available at http://*www.latimes.com/business/custom/cotown/la-hollywoodmap-fl,1,7837298.flash?coll=la-headlines-business-enter

[6] The Center for Entertainment Industry Data and Research, *The Global Success of Production Tax Incentives and the Migration of Feature Film Production From the U.S. to the World: Year 2005 Production Report* 63, [hereinafter 2005 CEIDR Report].

Scope of Paper

This paper is not an exhaustive discussion of runaway production, which is continuously studied by many sources (many of which are biased and critique each other). Huge amounts of industry data has been compiled and complex economic models have been applied to reach varying conclusions. This paper only examines runaway production of theatrical movie productions; runaway production as it pertains to television shows, mini-series, movies of the week and commercials is not discussed. Since runaway production is a hot button issue in Hollywood (and around the world), it serves as an excellent starting point for a newcomer to the movie industry or a future entertainment attorney seeking to understand the policy issues runaway production presents and how local, state and national governments have responded.

This paper is split into five parts. Part I provides an overview of the movie business and how revenue streams and content delivery have changed. Part I also explores the impact of movie piracy, DVD's and how Wal-Mart has usurped Blockbuster video and the rental business in general.

Part II explains what runaway production is, its causes, and the problem of studying its economic effects. Specifically, Part II analyzes the most recent (from 2006) data on runaway production, which (along with other evidence) lends weight to the main argument of this paper: runaway productions are draining the U.S. economy of a vital, quintessentially American industry. Motion picture employment is surveyed and the negative cultural impacts of runaway productions is also raised. A discussion of two less recent reports, which differ on the economic effects of runaway production, is also included to highlight the ongoing tension surrounding the issue.

Part III provides an overview of the major players, such as the major studios and labor unions, in the runaway production battle and the differing methods they employ to curb it. Specifically, the two main methods to stop runaway productions, which are the subsidy to fight subsidy approach or getting the WTO to rule film subsidies illegal, are discussed in detail.

Part IV looks at how globalization and runaway productions pose negative societal costs to certain nations. Part IV also explores and critiques Judge Posner's Law and Economics approach to global poverty, the role of labor unions, and crime as it relates to inequality of wealth.

Part V includes a discussion of legislation enacted to fight runaway production, often with success, and suggests proposals the United States Federal Government could take to further combat the loss of the U.S. motion picture industry.

I. Hollywood Today

The Overall State of the Motion Picture Industry

In 2001, the U.S. Department of Commerce issued a report lauding the motion picture industry as "one the most economically important industries in the United States."[7] For example, The Commerce Report claimed the film industry employed "more than the number of workers employed in the steel industry."[8] In 2003, Robert B. Zoellick, then-Ambassador of the Office of the United States Trade Representative, said the U.S. copyright industry (which includes the motion picture industry, theatre owners, videogame programmers etc.) employed "4.7 million Americans" and accounted for 5% of the U.S. GDP.[9]

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[7] U.S. Department of Commerce, *The Migration of U.S. Films and Television Production* 5, (March 2001) [hereinafter The Commerce Report].

[8] The Commerce Report, *supra* note 7, at 5

[9] The Office of the United States Trade Representative, *Zoellick Joins Entertainment Industry Launch of*

Industry figures[10] show that 2005 domestic box-office sales (tickets sold at the movie theatres) "remained near $9 billion" (compared to $7.66 billion in 2000).[11] Global box-office sales (including the U.S.) were "over $23 billion…46% higher than the 2000 mark of $16 billion."[12] The number of movies released in 2005 reached "another all time high of 563" (compared to 528 in 2004 and 411 in 1995).[13]

Whilel domestic box-office revenues increased substantially over the past five years[14], the number of tickets sold (called admissions) has not. In 2000, U.S. admissions were 1.42 billion. In 2005, however, domestic admissions (while remaining steady overall[15]) dropped to 1.4 billion.[16] Compared to other recreational alternatives such as theme parks and major sporting events, with admissions of 334 and 134 million respectively, a night at the movies is a preferred

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Free Trade Coalition, Press Release 1 (May 13, 2003), *available at http://www.ustr.gov/Document_Library/Press_Releases/2003/March/Zoellick_Joins_Entertainment_Industry_Launch_of_Free_Trade_Coalition.html?ht=*.

[10] The MPAA is the main source for these numbers, which are in accord with other sources. The MPAA, however, is not always a reliable source of numbers. For example, in September 2005, *The New York Times* issued the following correction: "Hollywood's global revenue in 2004 was $44.8 billion, not $84 billion. Of the total, $21 billion, not $55.6 billion, came from sales of DVDs and Videos." According to Richard Epstein, the MPAA "sent bogus figures. Hollywood's DVD revenue alone was inflated by more than $33 billion, possibly to make the MPAA's war against unauthorized copying appear more urgent." *See* Richard Epstein, *Pushing the Reality Envelope*, SLATE MAGAZINE, October 31, 2005. Another example of the MPAA's so-called "bogus figures" is a claim found on the MPAA web site and in testimony presented before Congress that reads "Nationwide, movies employ over 750,000 people." The 750,000 number is drastically higher than the MPAA's own figures from 2004, when it projected 367,000 jobs. *See Testimony Before House Energy and Commerce Committee: Subcommittee Committee on Commerce, Trade and Consumer Protection*, 108th Cong. (2006) (Statement of John Feehery, Executive Vice President for External Affairs, MPAA) *Available at* http://mpaa.org/piracy_Economies.asp.

[11] Motion Picture Association Worldwide Market Research, "U.S. Theatrical Market: 2005 Statistics," p. 2 [hereinafter MPA 2005 Statistics].

[12] *Id.*

[13] *Id*.

[14] While the box office gross did increase from to 2000-2005, hitting $9 billion in 2005, author Richard Epstein's access to the "All Media Report" reveals that when the box office gross from 1948 is adjusted for inflation it was $7.8 billion in 2004. *See* http://www.edwardjayepstein.com/mpa2004.htm.

[15] In 1985, for example, total U.S. admissions were 1.056 billion and, in 2002, hit a 20-year high of 1.6 billion. *See Id.*

[16] While admissions have remained relatively stable over the last 20 years (1985-2005), the U.S. box office has endured drastic drop-offs over its entire history. In 1947, 90 million Americans (the total U.S. population was 151 million) paid to go see a movie on weekly basis and 4.7 billion movie tickets were sold for the entire year. Eleven years later, in 1958, most American homes had TV sets (a "rarity" in 1947) and the number of tickets sold plunged to 2 billion. *See* Richard Epstein, *The Vanishing Box Office*, SLATE MAGAZINE, July 5, 2005.

and affordable activity for many Americans.[17] In 2005, the average price of a movie ticket was $6.41 (compared to $4.35 in 1995).[18] Despite relatively stable admissions since the 1980's, the number of screens doubled from 17,590 in 1980 to 35,594 in 2004.[19]

The tremendous growth of movie screens in the U.S. and the modest increase of admissions over the same period is perplexing. In 1947, the box office admissions (tickets sold) was 4.5 billion tickets and the U.S. population was 150 million. By 2005, the population doubled, yet box office admissions was just 1.4 billion. Why are there so many screens? Megaplexes. The growth of megaplex theatres doubled the number of screens since 1980, but from 1995 to 2003 the number of theatres (which house the screens) decreased from 7,744 to 6,012 .[20] For historical contrast, in 1945 there were 18,413 movie theatres.[21]

Internationally, U.S. films dominate the markets of every major first-world nation. Foreign governments (and their populations?) fear U.S. dominance and have attempted to foster local film industries. Thus far, Hollywood is winning the battle. In 2002, 70% of moviegoers in the European Union spent their money on U.S. films.[22] Conversely, foreign language films only

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[17] MPAA 2005 Statistics, *supra* note 11, at 7.
[18] MPAA 2005 Statistics, *supra* note 11, at 25.
[19] *Id.* at 23.
[20] *Id.* at 25.
[21] MICHEAL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 48 (University of California Press 1960). [Hereinafter Conant].
[22] Mark Litwak, *Features: Runaway Home: Production Incentives From Foreign Jurisdictions are Playing and Increasing Role in Determining Where Films are Made*, LOS ANGLES LAWYER, May 2004.

drew one-half of 1% of the U.S. box office.[23] In 2002, Jack Valenti, then-president of the Motion Picture Association of America (MPAA), proudly reported to Congress that the "movie industry alone has a surplus balance with every single country in the world. No other American enterprise can make that statement."[24]

When Hollywood Comes to Town

Determining the importance of the movie industry in terms of employment is difficult because of conflicting numbers from a variety of sources. Job numbers are explored in detail later in this paper, but they range from 127,000 (1996) to 750,000 (2006). Examining a movie's impact, therefore, is perhaps more insightful (and maybe more accurate) if done at the community level.

Most of the benefits communities receive from filmmaking are occasionally mentioned in newspapers and law review articles as anecdotal evidence. There are too many stories splintered across too many sources.

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[23] In the 1970's, the percentage of foreign films accounted for 10% of the U.S. box office; in the mid 1980's foreign films accounted for roughly 7% of the U.S. box office. The fact that foreign films now account for less than 1% of the U.S. box office is discussed by Robert W. McChesney, a research professor at the Institute of Communication Research at the University of Illinois at Urbanana-Champaign. McChesney claims the drop of foreign films as a percentage of the U.S. box office was a result of the dominance of "chain owned megaplex movie theatres." The megaplex's, according to McChesney, have "far lower" costs than one screen theatres that "had specialized in foreign fare." McChesney argues that the loss of small theatres and the disappearance of foreign films refutes the "popular mythology" that media giants "in their pursuit of greed" will "give the people what they want." McChesney asserts:

> In fact, corporate media are hardly the obedient servants of this mythology…As much as demand creates supply, supply creates demand. Media conglomerates are risk-averse and continually return to what has been commercially successful in the past. Over time, this probably creates a demand in the fare that is commonly presented. There is little incentive in the system to *develop* public taste over time.

ROBERT MCCHESNEY, RICH MEDIA, POOR DEMOCRACY 32-33 (The New Press 2000).

[24] *If You Cannot Protect What you Own, You Don't Own Anything: Hearing on Internet Piracy Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong. 147 (2002) (statement of Jack Valenti, President and CEO, Motion Picture Association of America).

What follows is a compilation of some of these anecdotal stories that, when viewed in total, may leave the reader with a greater sense of the impact a movie can have on a local economy:

- The film "Tin Cup," a movie about golf starring Kevin Costner, filmed in the Woodlands, Texas for ten weeks. Production expenses included $22,000 for dry cleaning, $121,000 for hardware and lumber, and $498,000 for location fees to private business.[25]

- Kevin Costner's "Field of Dreams" has been a boon for Iowa. The Iowa baseball field has drawn 800,000 tourists since the film was nominated for best picture 15 years ago.[26]

- Clint Eastwood's "Bridges of Madison County," which also filmed in Iowa, increased tourism by 20% during one year.[27]

- In 2003, the Mississippi Film Office created "The Movie Map of Mississippi" to guide visitors to film locations in the state.[28] More than 40 movies and 24 television programs have filmed in Mississippi.[29] Several years ago, the big screen adaptation of John Grisham's (a native of the state) novel "A Time to Kill" filmed in Mississippi and the production issued 10,000 paychecks to Mississippi residents.[30]

- In 1997, Arthur Anderson examined the economic impact of a $14 million movie made in Chicago, Illinois, over a 90-day period. The study found a "direct economic impact of over $12.5 million and an indirect of more than $21 million."[31]

- A study by the Dallas Film Commission found that "an average of 300 different non-film businesses" benefited by providing services to film productions. Expenditures for an unnamed motion picture included "$420,000 on car rentals, $136,000 on the rental of a private residence, $66,000 on cell phones, $50,400 on janitorial services, $22,000 on freeway tolls, and $6,000 on local transportation."[32]

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[25] Article and Essay, *Hooray for…Toronto? Hollywood, Collective Bargaining, and Extraterritorial Union Rules in an Era of Globalization*, 6 U. PA. J. LAB. & EMP. L. 55, 63 (2003).
[26] Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 LOY, L.A. ENT. L.J. 1 (1996).
[27] *Id*.
[28] Press Release, Mississippi Film Office, *Mississippi Film Office Unveils First Mississippi Film Tourism Map* (January 28, 2003) (on file with author).
[29] *Id*.
[30] *Id*.
[31] Martha Jones, *Motion Picture Production in California*, California Research Bureau, March 2002 at 21 [hereinafter Jones] (citing Arthur Anderson Report).
[32] Commerce Report, *Supra* note 7, at 22.

- New Zealand's government dubbed the nation as the "home of middle earth" and Air New Zealand painted its planes with scenes from the three "Lord of the Rings" movies.[33] As a result, the number of foreign visitors jumped 16%.[34]

- The 2006 blockbuster "Superman Returns" filmed in Australia and injected $80 million into the local economy, created 800 new jobs, and employed 10,000 people over its eight-month shoot.[35]

The decision to shoot "Superman Returns" in Australia did not sit well with some in Hollywood, who point out that Superman stands for "Truth Justice and the American Way." One director quit the production claiming, "When I flew to New York to scout, I became enamored with our greatest American city. It was clear to me that this was Metropolis. As a filmmaker, I felt it was inappropriate to try to capture the heart of America on another continent."[36]

Hollywood's "Real Numbers"

The impressive box office returns domestically and worldwide, the growth of admissions (though modest the past 20 years), the proliferation of movie screens, and the dominance of U.S. films in foreign markets paints a rosy picture of the movie industry to the casual observer. What is shocking (at least to this author) is that Hollywood routinely loses money at the box office. For example, if a film makes $100 million over its opening weekend at the box office, 50% or

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[33] Commerce Report, *Supra* note 7, at 22.
[34] *Id.*
[35] Geoff Boucher, *Up, up ... and away; Superman may be quintessentially American, but it's cheaper to film him in Australia*, LOS ANGELES TIMES, December 31, 2005, at E1.
[36] *Id.* In the same article, the film's producers claimed the director quit the production because he is afraid of flying over large bodies of water. To be fair, the 1978 Superman film was also shot internationally in Canada and England.

more of the "gross" goes to the theatre.[37] The theatre then remits the balance to the studio, which in turn makes payments to other groups.[38]

Edward Jay Epstein, who writes about Hollywood economics, explains the harsh reality box office economics:

> The cost of prints and advertising for the opening of a studio film in America in 2003 totaled, on average, $39 million. That's $18.4 million more per film than studios recovered from box-office receipts. In other words, it cost more in prints and ads—not even counting the actual costs of making the film—to lure an audience into theaters than the studio got back.[39]

This begs the question: how does Hollywood make money? Epstein claims the studios "spoon-feed" their box office numbers to the press, "but they go to great lengths to conceal the other components of their revenue streams from the public, as well as from the agents, stars, and writers who may profit from a movie."[40]

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[37] Edward Epstein, *Gross Misunderstanding*, SLATE MAGAZINE, May 16, 2005.
[38] Edward Epstein provides an example of the so-called "gross" misunderstanding: "Touchstone's *Gone in 60 Seconds*, which had a $242 million box-office gross. From this impressive haul, the theaters kept $129.8 million and remitted the balance to Disney's distribution arm, Buena Vista. After paying mandatory trade dues to the MPAA, Buena Vista was left with $101.6 million. From this amount, it repaid the marketing expenses that had been advanced—$13 million for prints so the film could open in thousands of theatres; $10.2 million for the insurance, local taxes, custom clearances, and other logistical expenses; and $67.4 million for advertising. What remained of the nearly quarter-billion-dollar 'gross' was a paltry $11 million. (And that figure does not account for the $103.3 million that Disney had paid to make the movie in the first place.)" *Id.*
[39] *Id*.
[40] *Id.*

The major studios secretly[41] supply their "real numbers" (their revenue streams) to their trade association, the MPAA. Each major studio provides the MPAA with a "detailed breakdown of the money they actually receive, country by country, from movie theaters, home video, network television, local television, pay television, and pay-per-view."[42] The MPAA then compiles the information into a "strictly confidential" document called the "All Media Revenue Report."[43]

According to authors Jonathan Bing and David Hayes, a new Hollywood "culture" exists, which would explain the confidential revenue reports Epstein gained access to:

> It's a culture of pollsters and statisticians obsessed with obscure socioeconomic data. It's a culture of distribution executives obsessed with screen counts, rental terms and fucking the competition. And it's a culture of third-generation exhibitors obsessed with movie theatre finances…[44]

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[41] Actor Tom Cruise, however, was in on the secret revenue streams—specifically, he knew how much money there is to be made from DVD sales. Cruise's recent break with Paramount pictures, Epstein opines, was not about the actor's off-screen antics. Rather, it was Cruises pay structure that led to the break, according to ex-paramount executives Epstein interviewed. In the past, the goof news for Paramount is that Cruise did not demand an upfront payment, which is around $35 million for a big star. According to Epstein:

> The bad news is that Mr Cruise gets 22% of the gross revenues received by the studio on the theatrical release and the television licensing. Even worse, from the studio's point of view, is Mr Cruise's 12% cut of Paramount's total DVD receipts. What most stars and other Hollywood participants get is a cut not of the DVD revenue itself but of a 20%"royalty". The other 80% goes to a subsidiary of the studio…So, usually stars and other participants get their share of just the 20% royalty. For example, if a star has a 10% participation, he gets 10% of only the 20%, or just 2%. But not Mr Cruise. He insisted – and gained – in his first *Mission: Impossible* deal '100% accounting', which means that the studio, after deducting the manufacturing expenses, paid Mr Cruise his 22% share of the total receipts. As a result, Mr Cruise earned more than $70 million on *Mission: Impossible*. Mr Cruise (after DVD's took off) revised the deal with Paramount. His cut of the gross was increased to 30% and, for purposes of calculating his share of the DVDs, he accepted a 'royalty' but it was doubled to 40%. So, he would get his whopping 12% of DVD receipts with no expenses deducted by Paramount. From the DVDs alone, Mr Cruise gained more than $30 million on *Mission: Impossible II*. With *Mission: Impossible III*, Mr Cruise still got his huge percentage of the gross. Both he and Paramount were, however, disappointed with the theatrical gross – $393 milllion – even though it has been Paramount's highest grossing film in 2006.

Thus, because Cruise refused to renegotiate his contract after "Mission Impossible III," his days at Paramount ended. *See* Edward Jay Epstein, *Paramount v. Cruise: Countdown to the Killer Cut*, FINANCIAL TIMES, August 24, 2006 at p.13.

[42] *Id.*

[43] *Id.*

[44] DADE HAYES & JONATHAN BING, OPEN WIDE 14 (Miramax Books, 2004) [hereinafter HAYES & BING].

Hollywood Economics 101: DVD Sales and Wal-Mart

As Epstein's access to past "All Media Revenue Reports" reveals, DVD sales, which increased dramatically in recent years, are the real bread and butter for the movie industry.[45] In 2000, 13 million American households owned DVD players and 174.4 million films sold on the then-new format. In 2004, 65.4 million households owned DVD players and the number of DVD titles sold exploded to 1.3 billion.[46] The price of an average DVD title decreased slightly from $22.63 in 2000 to $20.52 in 2004 and the average cost of DVD players decreased from $204 in 2000 to $90[47] in 2004.[48]

Not surprisingly, by 2003 home entertainment sales, most of it from DVD sales, totaled $33 billion and studios "were taking in almost five times as much revenue from home entertainment as from theatres."[49]

In 2005 alone, Americans spent $16.3 billion on DVD sales and $6.5 billion on DVD rentals, a total of $22.8 billion.[50] Conversely, in 2005, the box office gross (the amount people

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[45] Thus, while Touchstone (a subsidiary of Disney) lost money at the box office, Disney's SEC filings in 2005 reported, "Revenues increased 18%, or $1.3 billion, to $8.7 billion, due to increases of $1.4 billion in worldwide home entertainment and $151 million in television distribution, partially offset by a decrease of $215 million in worldwide theatrical motion picture distribution. Worldwide home entertainment revenues increased due to higher DVD unit sales in fiscal 2004." Walt Disney Corporation, *Form 10-K Annual Report* 47, (October 1, 2005) *available at* http://sec.gov/Archives/edgar/data/1001039/000095014805000128/v14978e10vk.htm#102

[46] MPAA 2005 Statistics, *supra* note 11, at 30.

[47] While the "average cost" of a DVD player was $90 in 2005, retail giant Wal-Mart sold DVD players as low a as $25. The provider of Wal-Mart's $25 DVD machines was California-based APEX Digital Inc., which trailed Sony, the number one provider of U.S. DVD players. Also in 2005, however, Chinese authorities arrested a top APEX executive in China and alleged the company of fraud. Fraud charges aside, it's doubtful APEX could turn a profit in the long-term. One firm estimates APEX's cost of materials is $25, "tops." To keep assembly costs low, APEX, like many manufacturers, went to China. Workers at one APEX's largest Chinese facilities earned about $55 a month. *See* Prachi Patel Predd, *The Price is Wrong*, SPECTRUM MAGAZINE (August 2005).

[48] MPAA 2005 Statistics, *supra* note 11, at 33-35.

[49] EDWARD EPSTEIN, THE BIG PICTURE 20 (Random House Inc, New York, 2005) [hereinafter EPSTEIN]

[50] DVD News Press Release, *Consumer Spending Reaches $24.3 Billion For Yearly Home Video Sales*, DVDinformation.com, January 6, 2006, *available at* http://www.dvdinformation.com/News/press/CES010506.htm

spent at theatres) was $8.99 billion.[51] From 1999-2005, the combined sales and of rentals of DVD totaled $81.7 billion[52]; from 2000-2005, box office revenues $53.61 billion.[53]

The data in the preceding paragraph tends to rebut the argument that runaway production (i.e. offshoring or outsourcing) lowers costs to consumers. Globalization and free trade, according to its proponents, lowers prices for the American consumer. The cost of movie tickets, however, continues to rise and the price for an average DVD title decreased just $2.00 in four years (according to the MPAA, whose numbers are not always grounded in reality).

Bringing doubt to the MPAA report on modest price declines of DVD titles is their "everyday low price" at retail juggernaut Wal-Mart. Wal-Mart is responsible for 30 to 40% of all DVD titles sold in the U.S. and is in position to lower the price of DVD titles dramatically for the American consumer.[54] Wal-Mart did not earn its position as a DVD powerhouse by any evil corporate practices, which critics would have us believe. Rather, Wal-Mart benefited from the mistake of media mogul Summer Redstone, the head of Viacom, a massive conglomerate that used to own Blockbuster Video.[55]

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[51] MPAA 2005 Statistics, *supra* note 11, at 4.

[52] *See supra* note 50. DVDinformation.com uses data gatherred by the Digital Entertinment Group (DEG). According to *The Economist*, "DEG's numbers ignore the fact that stores return unsold DVDs. Nor do its numbers reflect the fact that studios have lowered DVD prices for some categories, such as classic films. Sanford Bernstein, an investment research firm, predicts that the rate of growth of DVD sales in dollars (as opposed to units) will slow to 9% in 2005 and 4% in 2006." The slow growth rate in DVD sales in recent years is mostly attributable to slow slaes of "Shrek 2" and "The Incredibles." According to an unnamed executive at a rival media firm, however, the declines "were specific to them ("Shrek 2" and "The Incredibles"), and should not be extrapolated to the whole DVD market. Although the market is maturing, he says, '6% growth now is still worth a huge amount in dollar terms because the market has got so big.' *See* The Economist, *The Way We Were*, August 25, 2005.

[53] MPAA 2005 Statistics, *supra* note 11, at 33-35. Again, keep in mind that only half of the box office gross goes to the studios. The studio's profit margin on DVD sales and rentals are, on the other hand, substantially higher.

[54] Richard Epstein, *The Last Days of Blockbuster*, SLATE MAGAZINE, January 9, 2006.

[55] Effective as of 2006, Viacom split into two publicly traded companies: CBS Corporation and Viacom. The new CBS Corporation consists of CBS, UPN, CBS Radio, Simon & Schuster, Paramount Parks, Viacom Outdoor, Showtime, and most television production assets. The "new" Viacom is comprised of MTV Networks, Paramount's movie studio, Paramount Pictures' home entertainment operations, and Dreamworks. Redstone controls 71 percent of the voting stock of both companies and is also the chairman of both companies. Viacom controlled Blockbuster Video until 2004, when it was spun off into a seperate company.

Blockbuster Video's Mistake and Decline

In 1998, Warren Lieberfarb, then chief of Warner Brothers home-video division, offered Blockbuster Video CEO John Antioco a proposal that would have made the transition from video rentals to DVD rentals an easy one—nothing would change except DVD's would replace tapes. Lieberfarb offered the creation of a rental window for DVD's, during which new movies released on DVD would not be available for purchase.[56] In what may be one of the biggest acts of corporate hubris, Blockbuster rejected Lieberfarb's proposal.

At the time of the offer (1998), the video rental business provided the studios with $10 billion in revenue, half of which Blockbuster generated.[57] In turning down the rental window offer, Blockbuster spurned the opportunity to rent new DVD titles before they went on sale to the public. Warner Brothers (which launched the DVD format with Sony) wanted 40% of the rental revenues that Blockbuster received from DVD rentals, which was the same percentage the studios received from VHS rentals.[58] Several years before the DVD format arrived, Redstone arrogantly claimed, "The studios can't live without a video rental business—we (Blockbuster) are your profit."[59]

Enter Wal-Mart. The retail giant seized on the opportunity to use DVD's as an "enormous traffic-builder for its stores" and it began selling DVD's "like hot cakes."[60] By 2003, Wal-Mart replaced Blockbuster as the studios' single largest source of revenue.[61] Other retailers followed Wal-Mart's example and often priced newly released DVD's below wholesale price to

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[56] Richard Epstein, *The Last Days of Blockbuster*, SLATE MAGAZINE, January 9, 2006.
[57] *Id*.
[58] *Id*.
[59] *Id.*
[60] *Id.*
[61] *Id.*

attract customers who, the retailers hoped, would buy additional products with much higher profit margins.[62]

Sell thru DVD's decimated Blockbuster's rental business. In its heyday, Blockbuster opened new stores on a weekly basis. By 2005, Blockbuster's 4,000 brick and mortar locations proved a liability.[63] Blockbuster was losing money: $1.62 billion in 2002, $978.7 million in 2003, and $1.24 billion in 2004.[64] By 2006, Blockbuster had an estimated market value of under $700 million; Redstone purchased Blockbuster in 1994 for an astounding $8.4 billion.[65]

With the arrival of downloading movies on demand and other technologies, Epstein is doubtful Blockbuster can survive, "[downloading movies] is the Holy Grail for Hollywood, since it both cuts out the middlemen like Blockbuster and leaves the studios in control over their own products."[66]

Epstein sums up Blockbuster's future as follows:

> As far the studios are concerned, other than collecting the money that Blockbuster owes them for past movies, the video chain has little relevance to their future. Viacom perspicuously divorced itself from Blockbuster by spinning it off to its shareholders, and, as one Viacom executive told me, 'Blockbuster will certainly not survive and it will not be missed.' It is another zombie in Hollywood.[67]

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[62] Richard Epstein, *The Last Days of Blockbuster*, SLATE MAGAZINE, January 9, 2006.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id.*
[67] *Id*.

Movie Piracy: Hollywood's Great Concern

In addition to devastating Blockbuster, DVD's also threaten the motion picture industry in terms of movie piracy.[68] Indeed, a 2005 report commissioned by the MPA claimed, "Piracy is the biggest threat to the U.S. motion picture industry."[69] In 2005 alone, the major studios lost $6.1 billion to piracy worldwide, with 80% of the piracy coming from overseas and 20% in the U.S.[70] Of the $6.1 billion loss, 62% came from so-called "hard piracy" which primarily involves burning illegal DVD's, and 38% of the loss came from internet piracy.[71] If the loss is expanded to include the entire spectrum beyond the major studios to include foreign and domestic producers, theatres and video stores etc., the total loss to the industry in 2005 grows to $18.5 billion.[72]

Hollywood's major nemesis, at least in the long-term, in the piracy battle is China, where 90% of the estimated revenue is lost to piracy.[73] In terms of dollars lost to piracy in mature international markets, the major offenders are Mexico ($483 million loss in 2005), the United Kingdom ($406 million) and France ($322 million).[74] Thus, while there was a greater loss in actual dollars from Mexico, England and France, China (and to a lesser extent Russia and

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[68] Fox's SEC filings explain the importance of DVD's, "The home entertainment market, more specifically DVDs, has emerged as the fastest growing revenue stream in the filmed entertainment industry. Industry analysts expect this growth to continue over the next several years. Consistent with industry trends, the Company's DVD revenues rose approximately 58% for the year ended June 30, 2004 over the prior year, with 78% and 22% of DVD revenues generated from the sale and distribution of film titles and television titles, respectively." *See* Fox Entertainment Group, *Form 10-K Annual Report* 24, (June 30, 2004) *available at* http://sec.gov/Archives/edgar/data/1068002/000119312504154960/d10k.htm

[69] LEK Company, *The Cost of Movie Piracy* 3, (2005) [hereinafter LEK Piracy Report]. The report claims to be the "most comprehensive picture of film piracy to date."

[70] *Id.* at 4.

[71] *Id.*

[72] *Id.*

[73] LEK Piracy Report, *supra* note 69. Other major offenders include Russia with 79% of estimated revenue lost to piracy, Thailand (79%), Hungary (76%), Poland (65%) and Mexico (61%). In the U.S., however, the estimated revenue lost to piracy is 7%.

[74] *Id.* at 7. Mature markets return greater income to the U.S. motion picture industry than "still developing" international markets such as China and Russia.

Eastern Europe) pose a greater long-term threat to the industry because of rapid growth in their national economies and the high rates of piracy taking place in those locations.

Since most consumer electronics such as DVD players[75] and disks are manufactured in China, copyright pirates can burn professional grade DVD's from digital masters of the movie title. These pirated copies come with the same sound quality, picture quality and DVD extras contained on the original. High quality DVD's sell in China for roughly $1.25, which is less than the price of movie ticket in Shanghai.[76] Much to the dismay of the major studios, the Chinese population rarely goes to movie theatres; they buy carts full of illegal DVD's instead.[77] DVD's priced at $15, the official non-pirated retail price in China, do not sell well in China, but the $1.25 illegal copies sell an estimated 1.3 billion copies per year.[78]

In the United States, the Executive Branch acting under authority of the President, has the ability bring trade complaints to the World Treaty Organization (WTO). Unfortunately, the Bush Administration has done little to pressure China into cracking down on piracy. From 2000 to 2004, the Bush Administration brought just 10 WTO cases against nations accused of violating trade rules. By contrast, in the 41-month period before Bush came to office, the Clinton Administration brought 33 (triple the number of cases filed under Bush) WTO complaints against other nations.[79] Only one WTO complaint filed by the Bush Administration was against China and concerned semiconductors.[80] In 2006, the Office of the U.S. Trade

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[75] In 2001, for example, China was the world's largest manufacturer of DVD players. *See* China.org, *Domestic DVD Makers Urged to Pay Fees*, (October 10, 2001) *available at* http://www.china.org.cn/english/20357.htm
[76] Richard Epstein, *Wal-Mart and the Shanghai Pirates*, SLATE MAGAZINE, March 13, 2006.
[77] *Id*.
[78] *Id*.
[79] AFL-CIO Issue Brief, *The Bush Record on Shipping Jobs Overseas*, (August 2004) (on file with author). As of September 2006, the number of cases brought to the WTO jumped to 17. Telephone Interview with U.S. Trade Office, Research Department (September 18, 2006).
[80] Telephone Interview with U.S. Trade Office, Research Department (September 18, 2006).

Representative reported "China's share of infringing goods seized at the border is more than ten times greater than that of any other U.S. trading partner."[81]

China is also linked to Hollywood revenues because of its ties to Wal-Mart, which is expanding operations (as a retailer and purchaser) in China.[82] Overall, 70% of all products sold by Wal-Mart are made in China and 80% of the 6,000 factories that supply Wal-Mart are Chinese.[83] By purchasing manufactured goods (like DVD's) in China for resale in its retail operations in the U.S., Wal-Mart can offer low prices because of cheap labor and the unregulated nature of the Chinese manufacturing sector. Moreover, the success of pirated copies sales in China has not gone unnoticed by Wal-Mart, which wants to turn pirating into a business model (legally, of course).

Wal-Mart wants to make DVD's cheaper in the U.S. by placing kiosks in its stores that could burn DVD's on demand to meet a consumer's request.[84] Unlike the pirates Hollywood detests, Wal-Mart would pay a licensing fee to the studios for each copy it burns.[85] The advantage to the consumer is that he could choose the title, specify the format, bonus extras, and pay less. Studios would benefit by eliminating the cost of manufacturing, packaging and warehousing DVD's, which Wal-Mart would handle. Wal-Mart just needs to work out one detail: how much in licensing fees per copy they pay the studios. According to Epstein, Wal-Mart's current proposal is $3 to $4 for older movies, which is not much below what the studios currently

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[81] Office of the United States Trade Representative, *2006 Special 301 Report* 17, (2006) *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.
[82] China's sixth largest export partner was not a country but Wal-Mart. *See* PriceWaterHouseCoopers, *Redefining Intellectual Property Value: The Case of China* 63, (October 2005) (on file with author).
[83] AFL-CIO, *Paying the Price at Wal-Mart*, AFL-CIO Web Site *available at* http://www.aflcio.org/corporatewatch/walmart/walmart_5.cfm
[84] Richard Epstein, *Wal-Mart and the Shanghai Pirates*, SLATE MAGAZINE, March 13, 2006.
[85] *Id*.

receive by selling DVD's to Wal-Mart.[86] The danger for the studios is that once a licensing scheme is established, in the future they could come under pressure from Wal-Mart to reduce the licensing fee.[87]

The Changing Hollywood Business Model

Given the astronomical growth in DVD sales and profits in the last 10 years, there is reason to believe that Hollywood movies, in terms of their content, audience and (maybe) profitability are on the verge of a major shift. From 1984 to 2004, the cost of making and marketing (note they are separate costs) movies increased dramatically. First, the actual cost of making a movie (referred to as negative costs in the industry) rose from $14.4 million (1984) to $63.6 million (2005), an increase of 341%. Second, the cost of marketing a movie rose from $6.7 million (1984) to $34.4 million (2004), an increase of 413%. Given that box office revenue (only about half of which the studio gets) rose 134% over the same period, the sharp rise in negative and marketing costs appears inexplicable.

Beginning in 1985, the studios' receipts from home video rentals/sales (mostly VHS rentals) doubled every five years until the mid-1990s.[88] In 2000, studio receipts from home video and DVD (which arrived in 1997) sales and rentals were $11.67 billion (for 2003 inflation adjusted dollars).[89] In 1985, (again in 2003 inflation adjusted dollars) studio receipts from home video sales and rentals were $2.34 billion.[90] In 2003, studio receipts (now most of them from DVD sales) from home video and DVD sales and rentals soared to $18.9 billion.[91] Most significantly, until the late 1990's, most of these receipts were from home video rentals, not sales.

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[86] Richard Epstein, *Wal-Mart and the Shanghai Pirates*, SLATE MAGAZINE, March 13, 2006.
[87] *Id*.
[88] Richard Epstein, *Hollywood By the Secret MPA Numbers, available at* http://www.edwardjayepstein.com/mpa2004.htm.
[89] *Id.*
[90] *Id.*
[91] *Id.*

When the video rental business was booming, the studios employed an interesting economic model to maximize profits. For many years, the studios charged a wholesale price of $60 to $80 or more on most videos because: (1) it reduced the likelihood of piracy; (2) the studios thought they could make more money selling a few expensive copies to video stores than they could by selling lots of inexpensive copies to retail consumers[92] and; (3) keeping the wholesale price high protected the then-valuable video rental business.[93]

The result of this model, according to Epstein, was:

> Video chains like Blockbuster mechanically pegged their orders, which could range from 1,000 copies to 300,000 copies for a single title, on the results of the theatrical opening. So did pay-TV channels, such as HBO. And, since movies were typically released overseas many months after their American debuts, studios could use impressive U.S. box-office numbers to wrangle more advantageous play dates in foreign markets.[94]

Since the studios knew the business model employed by rental chains, they spent massive amounts of money on marketing movies and booking them on thousands of screens to maximize opening weekend revenue. In 1997, only 27% of a movies total box office gross came on the first week of release, in 2003, however, that number jumped to 41%.[95] Thus, the 413% increase in marketing costs from 1984 to 2004, paid off because receipts from video sales and rentals increased 707% over roughly the same period (1985-2003).

Epstein questions whether high marketing costs are still justified. Wal-Mart and other mass retailers replaced Blockbuster and the rental business as the studios' single largest source of revenue in 2003, and, unlike video stores, Wal-Mart does not peg their orders to box office revenues.[96]

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[92] Richard Epstein, *Wal-Mart and the Shanghai Pirates*, SLATE MAGAZINE, March 13, 2006

[93] Harold L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis 84 (Cambridge University Press, 1990) [hereinafter Vogel].

[94] Edward Epstein, *Dumb Money: The Madness of Movie Advertising*, SLATE MAGAZINE, June 6, 2005.

[95] HAYES & BING, *supra* note 44, at 8.

[96] Edward Epstein, *Dumb Money: The Madness of Movie Advertising*, SLATE MAGAZINE, June 6, 2005.

New technology makes coming to market make Hollywood's future revenue streams even more difficult, arguably impossible, to predict. First, Blu-Ray and HD-DVD players are competing to replace the DVD format and there is no consensus on which technology will prevail. If consumers hesitate to purchase one of the new formats, it could hurt movie sales. Second, the emergence of video on demand may entirely usurp movie sales be they DVD, HD-DVD or Blue-Ray.

Box Office Decline and Hollywood's Changing Demographic

From 1947 to 1958, box office admissions dropped precipitously from 4.7 billion (1947) to 2 billion (1958).[97] Admissions continued to drop until the mid 1980's. In recent years, however, admissions have trended back up to the 1958 level. Two conventional reasons widely cited for the box office drop are: the advent of television and the United States Supreme Court Decision in United States v. Paramount in 1948.

The penetration of television into a majority of homes clearly impacted the number of people going to the movies, but other factors may have helped foster the decline. In 1960, Professor Michael Conant, of the University of California, studied the attendance drop and claimed that, in addition to television, the "large postwar sale of automobiles permitted" leisure activities that were formerly inaccessible without a car.[98] Furthermore, Conant argued, the "sharp increase in the birthrate following the war kept a significant sector of the younger adults [at home] caring for babies."[99]

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[97] Richard Epstein, *The Vanishing Box Office*, SLATE MAGAZINE, July 5, 2005.

[98] CONANT, *supra* note 21, at 48. Ironically, Conant suggests that the automobile helped counteract declining attendance. From 1946 to 1956, the number of drive-in theatres in the U.S. increased from 102 to 4,494. As a result of this increase, drive-in theatres took in an estimated 22% of all domestic theatre admissions. In fact, in June 1956, more people attended drive-in theatres than "four-wall theatres for the first time in the history of the industry." This fact becomes more astonishing because it changed the "whole seasonal pattern of attendance." Prior to the advent of the drive-in, motion picture attendance was at its lowest in the summer months. *Id.* at 15.

[99] CONANT, *supra* note 21, at 12.

The Supreme Court's decision in Paramount, however, did not contribute to the declining attendance at the movies. Rather, the Paramount decision affected the studios revenues. Prior to the Paramount ruling, the major studios, in addition to making films, owned their own theatre chains. The Supreme Court held that the studio's distribution scheme violated anti-trust laws. In effect, the studios "could either make pictures or operate theatres—they couldn't do both."[100]

Before the Paramount decision in 1948, the American box office accounted for almost all of the studios' revenue. In 1947, "the six major studios earned over 95% of their revenue from their share of ticket sales."[101] This revenue amounted to $1.1 billion, which made movies America's third largest retailer behind grocery stores and automotive sales.[102]

According to former President Ronald Reagan[103], the government's decision to break up the studio system was "wrong":

> They (the studios) didn't have a monopoly; there was intense competition that worked well for everybody. You had seven companies who were always competing with each other to turn out a better movie than the guy down the street, and if people didn't like a picture, they'd show it by voting with their feet.[104]

Reagan claimed that owning theatres guaranteed studios a way to recoup some of their money "if they guessed wrong on a movie."[105] Allowing the studios to own theatres "allowed them to take risks on people and stories."[106] As President, Reagan supported free and fair trade but cautioned, "for the free market to work, everyone has to compete on an equal footing."[107]

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[100] RONALD REAGAN, AN AMERICAN LIFE 117 (Simon & Schuster 1990) [hereinafter REAGAN] .
[101] EPSTEIN, *supra* note 49, at 3
[102] *Id.*
[103] Reagan was SAG's President from 1947-1952 and 1959-1960. In his book, Reagan supported Hollywood unions because of unbearable working conditions before the creation of the guilds. Before World War 2, another union, the International Association of Theatrical and Stage Employees (IATSE) was taken over by members of the Chicago Mafia who were paid off by studio heads to compete with SAG and keep prices and benefits down. The plan failed and the Chicago Mafia members in Hollywood were successfully charged with tax evasion. REAGAN, *supra* note 100, at 117.
[104] REAGAN, *supra* note 100, at 117.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 355.

Unfortunately, President Reagan did not define "fair trade" and "equal footing." Clearly, runaway production involves offshoring and outsourcing overseas by the American movie industry. It is true that filming abroad purports to reduce costs, leaving a larger profit margin for the studios, but it is not clear that there is "equal footing" in the movie industry global labor pool.

People aged 12-24 years old comprise the overwhelming demographic of the movie theatre audience.[108] Hence, the most profitable movies target this demographic. Interestingly, the age of Hollywood's key demographic is frequently pointed to as a reason for the changing nature of films artistic expression, which is commonly perceived as a negative development. This argument, however, is not persuasive because the age demographic of movie audiences today is not substantially different from 1957, when 52% of the audience was under 20 years old and 72% was under 30.[109]

No doubt there has been a shift in the nature of filmmaking. This shift, however, has not been the result of audience demographics. Rather, the demographic change affecting modern filmmaking comes from the transformation of the major Hollywood studios.

From the 1930's to the early 1970's, the major studios were perceived as goliaths. Since that time, multinational corporations and media conglomerates have taken over major studios, turning Hollywood into a true corporate town. Academy Award winning actor and producer Michael Douglas explained the shift as follows:

> Well, as huge as we thought, or even my father thought, the studios were back in the 1940s and 1950s and how powerful they were, it's taken us this amount of time to realize that they were just a little tiny cottage industry.
>
> Now you've got a bunch of huge multinational corporations trying to cannibalize each other to a fair degree in the movie business. You know, you have to have your movie open on the opening weekend. A picture like "Cuckoo's Nest," could play for week after week with only maybe a 7 percent drop, as opposed to some of the dramatic drops that are now. So it's much more a business.

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[108] Arbitron Company, *The Arbitron Cinema Advertising Study* 12, (2003).
[109] CONANT, *supra* note 21, at 5.

> It was always a struggle between art and commerce. And now, I think, commerce is winning out, big time. We're seeing a dramatic reduction in producers associated with studios. Just today there was in the papers a list, my company included, of the huge number of very prestigious production companies that are not associated with studios directly now. So you're seeing a quarterly profits mentality creeping in, more and more. There's talk of this vertical integration -- acquisitions of all different types of companies under one umbrella. It's a much riskier business now, and so big business is trying to make it much more cost-efficient. We'll see.[110]

Douglas' observations are echoed by Peter Bart, a former film executive for MGM and Paramount and the editor in chief of *Variety*, Hollywood's leading trade magazine:

> It's only in relatively recent years that Hollywood became the playground of multinational corporations which regard movies and TV shows as a minor irritant to their overall activity. So it's become a corporate town, reduced to one sentence, "a very corporate town." It was not a corporate town 10, 15 years ago.
>
> The decision-making process for movies has become so complex that producers and even agents and directors are all thrown. The best way to describe it is what they call a "green-light" meeting. A green-light meeting is when the decision is made finally whether or not to make a given picture.
>
> The green-light meeting, when I first started at Paramount, would consist of maybe three or four of us in a room. Perhaps two or three of us would have read the script under discussion. And people said stupid things like, "I kind of like this movie." Or, "I look forward to seeing this movie." Inane things like that.
>
> The green-light decision process today consists of maybe of 30 or 40 people. There's one group there to discuss the marketing tie-ins. How much will McDonald's or Burger King put up? There's somebody else there to discuss merchandising toy companies and so forth. Someone else is there to discuss what the foreign co-financiers might be willing to put up. So everyone is discussing the business aspects of this film. And it's sometimes unusual for someone actually to circle back and talk about the script, the cast, the package -- whether the whole damn thing makes any sense to begin with.[111]

How and why Hollywood went from a cottage industry to a corporate town is not the subject of this paper, but a brief explanation is useful. The birth of the blockbuster, starting with Steven Spielberg's film "Jaws" and followed by other blockbusters such as "Star Wars" and "Superman" showed the world an unprecedented a level of financial success in the movie business. Big business saw that there was big money to be had in Hollywood.

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[110] PBS Frontline, *The Monster that Ate Hollywood: Interview with Michael Douglas*, (June 2001) [hereinafter Frontline] *Available at http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/picture/corptown.html*

[111] Frontline, *supra* note 110, *Interview with Peter Bart.*

Peter Guber, a former studio chief at Columbia Pictures, claimed corporations were drawn to the movie industry like "the moth drawn to the flame":

> What is the attraction of a French water company, [Vivendi], to buying a movie studio in Hollywood? What is the attraction of multinational consumer electronics companies -- two of them, Panasonic and Sony -- to buying companies in Hollywood? What is the attraction of a Canadian spirits company, Seagrams, to buying a company in Hollywood?
>
> I think it's like the moth drawn to the flame. There's something that you can't get quite anywhere else. It's the reason for programs like this. It's the attraction of the storyteller. There's something in the magic of the lights that is inextricably true for all human beings. There's something about the magic of the shaman, the storyteller in front of the flickering images of the campfire that forever in our species have wowed us, from the very, very beginning. [112]

Further altering demographics of the movie industry was the fallout from the Supreme Court's decision in Paramount, which forced theatre owners to find new revenue streams. Since movie theatre owners split their proceeds with the studios, their largest source of profit is from popcorn, which has a 90% return (candy, soda and other concessions have similar returns).[113] Popcorn also has the added benefit of making people thirsty, "forcing" them to purchase oversized beverages. The oversized drinks, in turn, causes bathroom breaks, which lead the customer back by the concession stands. The effect of this, Epstein says, is that "theater owners don't benefit from movies with gripping or complex plots, since that would keep potential popcorn customers in their seats."[114] Furthermore, Epstein explains:

> Theater owners prefer movies whose length does not exceed 128 minutes. If a movie runs longer than that, and the theater owners do not want to sacrifice their on-screen advertising time, they will reduce the number of their evening audience "turns" or showings from three to two, which means that 33 percent fewer people pass their popcorn stands.[115]

Given the profits from concessions, theatre owners have little incentive to raise ticket prices, which they would have to split. There is a consensus among industry experts that most Americans dislike going to movie theatres because of commercials, rude audiences and cell

[112] Frontline, *supra* note 110, *Interview with Peter Guber*.
[113] Edward Epstein, *The Popcorn Palace Economy*, SLATE MAGAZINE, January 2, 2006.
[114] *Id.*
[115] Edward Epstein, *The Popcorn Palace Economy*, SLATE MAGAZINE, January 2, 2006.

phones.[116] Some theatres have installed devices to block cell phones, but if the primary demographic is the one using the phones, blocking their use might shrink attendance. Lastly, with the rise of megaplexes, it's not uncommon for customers to pay for one movie and stay for two or more, which is essentially piracy, but again: theatre owners have little incentive to crack down on theatre hopping because it increases concession sales and prevents the customer from going to a competing theatre.

The point of the preceding section is to illustrate how the fundamental structure of Hollywood has changed from privately owned movie studios to a corporate town. The decline in theatre attendance with the advent of television and other factors. The Supreme Court's ruling in Paramount drastically altered the studios revenue streams and changed the operations of theatre chains. New dynamics are at play in the era of globalization and the discussion of Blockbuster's decline, the importance of DVD's and Wal-Mart's presence in the industry showcase the uphill battle facing runaway production opponents. Their cause, in the corporate arena, is almost irrelevant when compared to piracy. The fact remains, however, that the economics of Hollywood rest on the creation of movies. Thus, the creation of a movie is what makes the industry tick and runaway production cannot be ignored.

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[116] In June 2005, according to poll conducted by the Associated Press and AOL found that 73 percent of Americans preferred to watch movies at home rather than at a movie theatre. The poll also found that 47 percent of Americans thought movies were getting worse, compared to 33 percent who said they were getting better. When asked if movie stars were positive role models for children, 69 percent of Americans thought they were negative roles models, compared to 24 percent who thought they were positive role models. *See* http://www.ipsos-na.com/news/client/act_dsp_pdf.cfm?name=mr050614-4toplinerevised.pdf&id=2712.

II. Runaway Production

What Is Runaway Production?

Although there is no official definition of runaway production, Dr. Martha Jones, who works for the California State Legislature's Research Bureau, provided a succinct definition:

> Runaway production refers to films that were conceptually developed in the United States, but filmed somewhere else. If the conversation is at the federal level, runaway production goes to other countries. If at the state level, production that goes to other states is runaway.[117]

Many in Hollywood think that runaway production is a Hollywood problem-- a problem for California at most. For Hollywood residents fearful of runaway production, a film shot in Louisiana or New York is as much a runaway as one shot in Canada or Australia. This Hollywood-centric view of the runaway production problem (if we assume runaway production is a problem) clouds the issue. Filmmakers and industry employees in major filming centers such as Vancouver, Toronto, London and Prague etc. are just as concerned about losing productions to other locales as their counterparts in Hollywood.[118]

Runaway Production Is Not New to Hollywood

While runaway production has become a larger and more contentious issue facing the motion picture industry in recent years, it is certainly nothing new. In 1957, the Hollywood American Federation of Labor (AFL) Film Council, composed of 28 AFL-CIO unions, commissioned a report on the economic state of the motion picture industry. According to the AFL report, prior to 1949 only an "insignificant" number of motion pictures filmed outside of

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[117] Jones, *supra* note 31, at 10.

118 In all fairness, the fact that filmmakers across the globe fear runaway productions seems to weaken their arguments to end it. Movies are an international commodity owned, in many cases, by multinational corporations. Actors, directors, producers, studio executives and industry tradesman are often from different nations and cultures. It must be admitted that this international reality weakens nationalistic arguments made by opponents of runaway production whether they are from Hollywood or Eastern Europe.

the United States.[119] From 1949 to 1957, however, the report claimed that of the 314 films produced by the four major studios at that time, 159, or 50.6%, filmed in other nations such as the United Kingdom, France, Germany, Italy, and Mexico [120]

In 1961, actor Charlton Heston (who would go on to become the president of the National Rifle Association) testified alongside the Screen Actors Guild (SAG) before a Congress on the impact runaway production on employment in the U.S.[121] At the hearing, foreign subsidies were identified as the primary cause of runaway production so Heston and SAG officials urged Congress to "fight subsidy with subsidy."[122] The appeals to Congress failed and the runaway production remains. Indeed, in 2006, runaway productions again represent about 50% of theatrical releases.[123]

The Problem of Quantifying Runaway Production

It is essential to acknowledge that traditional economic theories employed to study traditional American industries (the automotive industry for example) are not well suited to dissect the entertainment industry. Since runaway production is essentially outsourcing, it is tempting to equate it to the offshoring of the automobile industry. Economist Harold Vogel offers the following caveat:

> Industries that require sizable capital investments, like feature films, can normally be expected to evolve into purely oligopolistic forms with only a few very large firms, such as in steel and automobile manufacturing. Movies, however, are not a homogeneous product but are each uniquely designed and packaged. The result is a combination of large oligopolistic organizations that interface with and depend on small, specialized service and production firms.[124]

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[119] Pamela Ulich & Lance Simmens, Symposium, *Selected Issues in Labor Relations in the Motion Picture and Television Industries: Motion Picture Production: To run or Stay Made in the U.S.A.*, 1321 LOY. L.A. ENT. L.J. 357, 359 (2001).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] 2005 CEIDR Report, *supra* note 6, at 4.
[124] VOGEL, *supra* note 93, at 34.

The unique nature of the entertainment industry poses obstacles to economists and students of law and economics. Movies are not made in manufacturing plants and they do not offer stable employment because filming a movie is a short term project lasting an average of three months. The difficulty of studying and explaining Hollywood economics is further compounded by statistics and reports from a vast variety of sources that reveal, as Jones terms it, "astounding imprecision." Thus, the impact of runaway production and gathering accurate economic data on the motion picture industry as a whole is difficult, to say the least.

Jones illustrates this difficulty:

> Although there is no doubt that motion picture production is of major economic importance in California, attempts to quantify that importance are troubled by remarkable variation and statistical softness. For example, the Motion Picture Association of America estimates that the entertainment industry generated $27.5 billion in California in 1996, compared with a U.S. Bureau of Economic Analysis estimate of $13.1 billion. Estimates of the number of people employed in motion picture production in California in 1996 vary from 127,000 to 480,000.[125]

Jones notes the difficulty of gathering reliable data on runaway productions, which is essentially a subset of the overall Hollywood economic black hole:

> Data collection methods vary, resulting in different estimates. Feature film production often takes place in multiple locations, so keeping track of productions accurately is a challenge. Moreover, the ups and downs of the industry mean the numbers vary considerably from year to year, making it difficult to infer long-term trends.[126]

Dueling Reports on the Impact of Runaway Production

Since the impact of runaway production on the Unites States and studio numbers are imprecise and contested, it is useful for newcomers to compare impact data of runaway productions compiled from the widely cited Monitor Report and a newer, less cited, report by Neil Craig and Associates. The Monitor Report was commissioned by SAG and the DGA, which are prominent labor unions in Hollywood opposed to runaway production. The Craig

[125] Jones, *supra* note 31, at 9.
[126] *Id.* at 10.

Report was commissioned by a variety of Canadian labor unions that favor runaway production, so long as it goes to Canada.

The Monitor Group, which produced the Monitor Report, is a large management and consulting firm with many offices, including a branch in Santa Monica, California. From 1990 to 1998, the share of all "U.S. developed" film and television programs identified as runaway productions increased from 14% (1990) to 27% (1998).[127] In 1998, according to the Monitor Report, the U.S. suffered an economic loss (composed of lost production spending and tax revenue) of $10.3 billion, compared to $2 billion in 1990. In 1998 the U.S. lost "more than 20,000" full time jobs.[128] Using the divergent employment statistics noted by Jones in 1996 (which covered only industry employment in California), a loss of 20,000 jobs (if accurate) out of 127,000 or 480,000 is significant.

At the other end of the spectrum is the 2004 report by Neil Craig Associates, a consulting firm based in Toronto. The Craig Report claims the economic impact in 1998 on the U.S. was not $10.3 billion (as claimed by the Monitor Report) but rather $1.7 billion (which is still considerable).[129] The Craig Report is unapologetic to opponents of runaway production in the U.S. noting that Canada has been an asset to Hollywood over the years and that "they have earned their role in the global industry."[130]

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[127] The Monitor Company, *The Economic Impact of U.S. Film and Television Runaway Film Production* 8-13, (June 1999) [hereinafter The Monitor Report].

[128] Of the 20,000 lost in 1998, 11,000 were positions "usually filled by SAG members," including supporting actors, stunt and background performers. 600 of the lost jobs would have been filled by DGA members, which include directors, assistant directors, unit production managers, associate directors and stage managers. The balance of the lost jobs would have gone to workers in other trades like set design. *See Id.*

[129] Neil Craig & Associates, *International Film & Television Production in Canada 1*, (March 2004). [hereinafter The Craig Report].

[130] The Monitor Report, *supra* note 129 at 7.

A strong argument made by the Craig Report is the Monitor Report's failure to recognize the balance of trade and the revenue repatriated by the U.S.:

> In 2003, more than $1.3 billion flowed out of Canada to the U.S. as net revenues from cinema admissions, sales and rental of video cassettes and DVDs, broadcast license fees and other revenues. This is what Canadians spent for the right to view U.S. movies and television programs, net of distribution expenses. Between 1998 and 2003, the amount repatriated to the United States from the distribution of U.S. movies and television programs in Canada was more than $6.5 billion.[131]

To be fair, Canadian workers are not being "exploited" by Hollywood. Movie production has not shifted to Canada so studios can maximize profits by using slave labor, which is common among manufacturing industries in third world nations. Canadian film workers are well compensated and value their jobs. In sum, outsourcing jobs to Canada has not perpetuated the economic disparity between the first and third world that benefit large corporations, which (from a cost savings perspective) would prefer to keep the status quo in impoverished nations to keep production costs down. If we assume that all nations should have comparable standards of living, then Canada might serve as a model for outsourcing.

The Craig Report implies that runaway production is more desirable than moving automobile production to China because of cheap labor and little government regulation. The report touts the benefits of Canada's tax incentives and subsidies:

> These measures help to attract work in an economic sector that is generally high wage, high profile, involves leading edge technologies and is environmentally benign.[132]

The Craig report indirectly makes the point that Canada is no different from the U.S. states with their own incentives to lure Hollywood productions, like Louisiana. The assumption, however, is flawed: Canada, as a nation, has greater economic footing than U.S. states.

Despite the differences between the two reports, there are several considerations to keep in mind. First, the reports duel on the issue of runaway productions to Canada, not other

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[131] The Monitor Report, *supra* note 129 at 3.
[132] The Craig Report, *supra* note 131, at 7.

international locations. Second, while the reports differ on numbers, the disagreement is one of degree. The Craig Report does not claim that runaway production is minimal or nonexistent.

Causes of Runaway Production

While there are many factors that cause runaway production, it is important to recognize that a decision to film abroad or domestically is highlighted by Hollywood's transformation from a cottage industry to a corporate town. As one law journal observed:

> Lone movie moguls no longer run the studios, as in the days of Chaplin, Selznick, Fox, and Mayer, among others. Instead they are run by corporate executives who work for media conglomerates - News Corp., Viacom, America Online-Time Warner, and Disney.[133]

Hollywood has changed over the years, and the studios are now owned by multinational corporations which owe no duty to the U.S. or any other nation. Further, these corporations do not depend on the studios as "the principal way any of them made their money":

> Even when all the earnings from movies' theatrical releases, video and DVD sales, and television licensing—both domestic and international—were included in their movie businesses, they accounted for only a small part of each company's total earnings. In 2003 Viacom earned 7% of its total income from its movie business; Sony, 19%; Disney, 21%; News Corporation, 19%; Time Warner, 18%; and General Electric, if it had counted Universal Pictures as part of its conglomerate that year, less than 2%. So while the film business may have held great social, political, or strategic significance to each company, it was no longer the principal way any of them made their money.[134]

Several factors commonly used to explain why runaway production occurs include tax incentives, favorable exchange rates, rising costs in the U.S., and globalization. Some of these factors appear to have weight and some appear to be educated guesses. The recent increase of movie production in Louisiana, aforementioned, provides weight to the argument that tax incentives and rebates are the primary cause of runaway productions.

While the motion picture industry claims rising production costs in the U.S. is a factor leading to runaway production, it's not clear what these rising "costs" are. In fact, corporate data

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[133] Heidi Sarah Wicker, Note, *Making a Run for the Border: Should the United States Stem Runaway Film and Television Production through Tax and other Financial Incentives*? 35 GEO. WASH. INT'L L. REV. 461, 463 (2003) [hereinafter Wicker].
[134] EPSTEIN, *supra* note 49, at 13.

obtained from MGM from 2006 shows overhead and distribution costs significantly declined in recent years. From 1997 to 2001, MGM decreased overhead and distribution costs from 24.6% (1997) to 10.8% (2001) through corporate restructuring and distribution methods.[135] Thus, couldn't it be argued that corporate inefficiencies caused rising production costs and further corporate restructuring could resolve the runaway production problem?

Steven Katz, an Academy Award winner for the co-development of Dolby Stereo and author of all CEIDR reports on runaway production, predicts that major Hollywood stars will see their salaries shrink as studios seek to control costs. As Epstein claims, there are fewer "desirable stars" than film projects and, as a result, their compensation skyrocketed.[136] In 2003, top Hollywood stars received between $20 and $30 million in fixed compensations and a percentage of the films total revenue after paying for cash outlays.[137] If studios refused to pay such high salaries, and paid $1 to $5 million for top talent, it would more than wipe out the cost savings of shooting abroad. Indeed, if salary cuts happened, the U.S. would be more affordable to film in even without tax incentives or subsidies.

Perhaps the most quantifiable factor influencing runaway productions are favorable exchange rates in other nations, specifically Canada. In the past 20 years, the value of the U.S. dollar has increased in relation to the value of the Canadian dollar. As a result, production costs in Canada reduced as much as 23% in the past 10 years.[138] The argument that favorable exchange rates help cause runaway production are not often challenged by law review journals

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135 MGM Power Point Presentations for 2006 (on file with author).
136 EPSTEIN, *supra* note 49, at 18.
137 *Id.*
138 Wicker, *supra* note 135, at 469.

and news articles. The Craig Report, however, found the relationship between exchange rates and levels of movie production to be "far from conclusive."[139]

The Craig Report studied the exchange rate between the U.S. and Canada from 1997-2003. When the Canadian dollar was at its strongest (with a .723 cents exchange rate in 1997), production spending in Canada was $561 million, the lowest of the period studied.[140] By contrast, when the Canadian dollar was at its second highest peak (.683 cents in 1999), studios spent $977 million on Canadian production. Moreover, when the Canadian exchange rate increased from .640 in 2002 to .653 in 2003, production spending increased from $1.06 billion (2002) to $1.17 billion (2003),[141] thus illustrating that the exchange rate factor may not be a strong argument. Further weakening the exchange rate argument on lowering production costs is the failure to consider how weaker currencies affect profitability at foreign box offices, which account for half of the studios box office revenues. According to Vogel, a strong dollar is associated with lower foreign ticket revenues and studio profitability.[142]

Another argument is that cheap labor in poor nations lures Hollywood productions. Like the exchange rate argument, however, the availability of cheap labor and its relationship to an increase of movie production is also "far from conclusive," considering that labor friendly Canada is the number one destination for runaway productions. On the other hand, according to labor statistics from 1987, residents from right-to-work states (where workers are not forced into joining unions) employed on movie and television projects earned roughly 83% less than

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[139] The Craig Report, *supra* note 131, at 14.
[140] The Craig Report, *supra* note 131, at 14.
[141] *Id.*
[142] VOGEL, *supra* note 93, at 43. The discussion in Vogel actually refers to a weak dollar, "Although there is some countervailing effect from the higher costs of shooting pictures in strong-currency countries and from maintaining foreign-territory distribution and sales facilities in such locations, a weakening dollar exchange rate will, on balance, noticeably improve movie industry profitability."

residents in non-right-to-work states.[143] Moreover, the level of fringe benefits in right-to-work states was 3% of the payroll compared to 32% in Southern California.[144] Based on the discrepancies in pay and benefits between U.S. states, economic incentives based on cheap labor alone cannot be ignored. Indeed, as Vogel claims, "it is possible to produce a film with no noticeable qualitative differences for up to 40% less in nonunion or flexible-union territories outside of Hollywood."[145]

Vogel's claim that a film can be produced for 40% less in nonunion areas does not weaken the argument against runaway production from the U.S. perspective. The workers may receive less pay, but the jobs remain domestic. The troubling development now is producers who are seeking savings by going abroad, but not to locations where labor costs (i.e. slave labor) offset production costs by 40%. The majority of all runaway productions from the U.S. go to Canada, the United Kingdom and Australia.[146] According to *The Los Angeles Times*, from 2001 to 2005, 147 U.S. feature films were produced in Canada, which is the location of choice for major Hollywood studios.[147] The minimum weekly salary of an assistant director in Canada is $2,927; in the U.S., it is $3,285 (a savings of 11%).[148] Thus, if cheap labor in Canada and other industrialized nations has been the motivating factor that drives runaway productions, it is because of tax incentives that make labor cheap.

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[143] Jones, *supra* note 31, at 47.
[144] Will Tusher, *High Labor Costs Hold Key to Runaway Filming*, DAILY VARIETY, June 5, 1990..
[145] VOGEL, *supra* note 93, at 72-73.
[146] Jones, *supra* note 31, at 24.
[147] Runaway Production Map, *supra* note 5. During this same time period, 19 went to the United Kingdom, 13 to Australia, 13 to Mexico, 11 to the Czech Republic, 8 to Romania, 7 to France, 5 to Bulgaria, 4 to Hungary, and only 2 to China. According to the most recent statistics available from CEIDR, the increase of feature film production spending in Canada increased 179% from 1998-2005. Production spending in the United Kingdom increased 66% from 2001-2005. Production spending in Australia and New Zealand increased 531% from 2001-2005.
[148] Carl DiOrio & Dave McNary, *H'wood's Runaway Train*, VARIETY, Feb. 4-10, 2002..

Low wages, *thus far*, have not been a major cause of runaway productions. In Romania, for example, labor costs can be 80% cheaper than American labor.[149] According to one film executive, a driver working on a movie in Los Angeles can earn as much as $470 a day; in Bucharest the daily rate for the same job may be as low as $9.52.[150] There is anecdotal evidence that workers in Romania are highly skilled and there is "no noticeable qualitative differences" in their work, as Vogel predicted.[151] While movie production in Romania has increased recently, only eight U.S. movies filmed there from 2001 to 2005.[152] That said, third-world nations, such as Romania and Morocco, have cheap labor because their standard of living and national economies are miniscule compared to those of the U.S. or Canada. Indeed, while the overall number of films shot in Romania is small, the overall increase of production spending in Eastern Europe as a whole increased by an astonishing 927% from 2001 to 2005.[153] Cheap labor in such nations is a given and incentives to lower labor costs are not needed. If movie production continues to shift to such nations, the U.S., Canada and others industrialized nations ability to compete will greatly diminish, even with generous tax incentives. The good news is that Romania will join the European Union in 2007. As a result, labor standards, worker safety, minimum wage laws and the introduction of the Euro as the new currency should end the burst of film productions in Romania as living standards increase along with film production costs.

[149] John Horn, *Filmmakers Are Swept Away by Romania; The relentless quest to lower costs shifts productions to this Eastern European venue -- until an even cheaper location emerges*, LOS ANGELES TIMES, October 2, 2005, at A1 [hereinafter Horn].
[150] Horn, *supra* note 151.
[151] *Id.* The anecdotal evidence from the article included the following: "By traveling 6,500 miles, producer Greg Hoffman of Twisted Pictures was able to fill two sound stages with tunnels so intricate that even the "Catacombs" construction crew -- a few dozen carpenters eager to work for $20 a day -- would get lost in them."
[152] Runaway Production Map, *supra* note 5.
[153] 2005 CEIDR Report, *supra* note 6.

In sum, the recent CEIDR report eschews most of the explanations for why runaway production occurs and concludes subsidies are the "unassailable" cause:

> There are obviously many factors that influence the choice of location for feature film production. Sometimes the decision is based on artistic factors and the exchange rate and applicable labor rates can also play a significant role. However, the connection between the advent of Canadian Production subsidies in late 1998 and the dramatic increase in production that occurred in the following year (as reflected by the 144% increase in dollar volume for the 2000 release year films) appears unassailable as there were no appreciable changes in exchange rates or labor rates to justify this dramatic shift from one year to the next, other than the subsidy programs.[154]

Is Runaway Production Even an Issue?

Some commentators argue that runaway production is not a monolithic issue. In 2002, Allen Scott[155], the Director of Globalization and Policy Research at the University of California, Los Angeles, persuasively argued against overreaction to runaway production:

> So far, runaway production has not seriously undermined the vitality of the Hollywood film industry, and it may well never become life threatening, at least in the more creative segments of the industry. This inference is based on a presumption (a) that the towering competitive advantages of Hollywood in pre- and post-production work will continue to prevail, and (b) that films requiring close supervisory control and complex customized inputs at all stages of production will continue to constitute a significant core of the industry's product range. Accordingly, and even though the great flow of shooting activities to Canada has unquestionably given a developmental boost to the motion picture industries of Toronto and Vancouver where most of the work takes place , there seems little reason to suppose that the locational attractions of Hollywood are on the point of dissipation.[156]

Scott's inferences rest on several presumptions that may have been true in 2002. In 2006, however, the landscape has changed. The Commerce Report discusses the rise in technology and digital transmission, which is a primary reason why "close supervision," as Scott suggests, at "all stages of production" are refutable presumptions. Furthermore, the rise of massive production facilities and sound stages in Australia and elsewhere further weaken Scott's presumption that Hollywood will remain the epicenter for a "significant core of the industry's product range."

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[154] 2005 CEIDR Report, *supra* note 6, at 4.
[155] Scott's scholarly work is meticulous and, for the most part, salient in 2006. I criticize Scott not for lack of respect for his writings, for which I have an abundance of, rather the criticism attempts to illustrate that even the brightest minds are unable to predict the future in Hollywood.
[156] Allen J. Scott, *A New Map of Hollywood and the World* 23-24, Center for Globalization and Policy Research, UCLA (2002) [hereinafter Scott].

From a historical perspective, arguing that Hollywood will not lose its power ignores the very growth of the motion picture industry in California. Filmmakers went to California for a host of reasons, not the least of which included: (1) leaving New Jersey (yes New Jersey) as the primary filming location in the U.S. to avoid enforcement actions by Thomas Edison, the patent holder on motion pictures, and (2) the availability of then-cheap land and labor. Thus, Hollywood was, in a sense built on runaway productions. In the 1930's, 90% of all feature films shot in Southern California.[157]

History is replete with analogous examples of nations and industries that thought their power and dominance in the world was supreme. Why is Hollywood different from Ancient Rome, London (when the British Empire controlled one fourth of the world's population, or Detroit (which loses more control of the world automobile business on a daily basis)? Enron was once a top 10 Fortune 500 company and just 10 years ago Kodak had little reason to believe that digital cameras would decimate its bottom line. Perhaps Hollywood will remain the center of the motion picture industry, but it is equally possible that it has its head in the sand.

The outdated thinking or lack of foresight by Scott is illustrated by his following claims:

> Its (Hollywood's) current vibrancy is all the more assured when we add to these advantages, the benefits that it derives from its unparalleled distribution system. Accordingly, the pronouncements to the effect that 'Hollywood is now everywhere … production now moves almost at will to find its most ideal conditions, and with it go skills, technicians, and support services,' and of Hozic (2001, p. 153) who talks about 'Hollywood's exodus into worldwide locations,' are both exaggerated and premature.[158]

As Epstein illustrates with the Wal-Mart example discussed earlier, the major studios would save time and money by using technology to retire Hollywood's "unparalleled distribution system."

Scholarly rejection of a runaway production problem for Hollywood is well reasoned, though, in hindsight, incorrect. Juxtaposed to such well-reasoned arguments are the words of

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[157] Judith Cummings, *Plea From Los Angeles: Big Films, Come Home*, THE NEW YORK TIMES, August 17, 1986.
[158] Scott, *supra* note 158, at 23.

former MPAA chief Jack Valenti. In April 2004, Valenti responded to a letter from Congresswoman Diane Watson (D-CA), which was co-signed by 27 Members of the House, on the filming of "Cinderella Man" (a story about a New York boxer during the Great Depression) and runaway production, "or outsourcing in the entertainment industry."[159] In what the *Hollywood Reporter* called a "four-page missive," Valenti responded, "There has been no 'outsourcing' of U.S. motion picture jobs. Although some studio's films are shot in whole or in part outside the U.S., no permanent jobs have been exported."[160] The exact meaning of Valenti's words are open to interpretation (i.e. how does Valenti define "outsourcing," what are "permanent jobs" etc.), his response ignores the reality that the rate of filming outside of the U.S. has increased dramatically in the last 10 years.[161]

There is a valid argument that runaway production, at some level, is healthy for the motion picture industry in terms of free trade and competitiveness. Scott and Valenti, however, do not make such an argument. Rather, Scott and Valenti erroneously argue that there is no argument. They are wrong.

[159] Letter from Congresswoman Diane Watson (April 5, 2004) (on file with author).
[160] Peter Kiefer, Valenti Defends the Right of U.S. Firms to Film O'seas, HOLLYWOOD REPORTER, April 19, 2004
[161] It's worth noting that neither a copy of Valenti's letter or a press release addressing the issue is not posted on the MPAA's press archives. Furthermore, the MPAA's history of honest numbers (some of which Valenti used) is less than sterling.

Runaway Production's Negative Effects on U.S. Production Spending

The Commerce Report provides a general overview of the economic impact runaway productions (to foreign nations) have on the U.S.:

> Even the relatively small portion of the U.S. film industry that began to move abroad in the early 1990s had an economic impact that was not immediately obvious. Production facilities and production-related services gradually began to lose the advantages of the economies of scale they had enjoyed when they were operating at full capacity. Many of the specialized trades involved in film production, particularly in the post-production phase, as well as many of the secondary industries that depend on film production, such as equipment rental companies, require round-the-clock, year-round demand in order to operate profitably. When sound stages in California, New York, Illinois, Texas, Florida, North Carolina, and other parts of the country began to operate at less than full capacity, not only did the production companies experience higher costs, but a whole host of secondary and tertiary companies hit upon hard times. The impact was felt especially by small and medium-sized companies, many of which went out of business as the decade wore on.[162]

It is ludicrous to claim that the U.S. is an effective competitor for capturing movie productions in comparison to Canada and other countries. True, much film production is performed in the U.S., but complacency could lead to Hollywood's downfall. According to CEIDR's 2001 report, 90% of surveyed films total budgets was spent in the U.S. in 1998[163]. In 2001, however, that number dropped to 76%.[164] Canada, on the other hand, received just 10% of the total film budgets in 1998, but that number jumped to 24% in 2001.[165] Hence, when the Craig Report claims that Canada has not "stolen" film production from the U.S., it did benefit at the expense of the U.S.

The most recent statistics are even more sobering. In August 2006, CEIDR released its latest report on the impact of runaway production, which claims the worldwide geographic shift of theatrical productions is "nothing short of astounding."[166] While the amount of money spent on theatrical releases worldwide rose from $5.5 billion in 1998 to $7.2 billion in 2005, the share

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[162] Commerce Report, *supra* note 7, at 3-4.
[163] Stephen Katz, *The Migration of Feature Film Production From the U.S. to Canada, Year 2001 Production Report*, The Center for Entertainment Industry Data and Research, (2002).
[164] *Id.*
[165] *Id.*
[166] 2005 CEIDR Report, *supra* note 6, at 2.

of that money spent on productions in the U.S. declined 14%.[167] The U.S. market share of production dollars on theatrical releases "plummeted" from 71% in 1998 to 47% in 2005.[168] The number of theatrical releases filmed in the U.S. dropped from 127 in 1998 to 99 in 2005, while the number filmed abroad rose from 67 in 1998 to 104 in 2005.[169] Even more disconcerting was the reports following conclusion:

> Using standard industry metrics of a 3.3 multiplier[170] for direct expenditure and 400 jobs per $10 million in production expenditures, the decrease in U.S. production of Theatrical Releases represents a cumulative loss to the U.S. economy of $23 billion.[171]

Runaway Production's Impact on U.S. Jobs

Getting accurate statistics on motion picture employment is the most perplexing and challenging task of data collection on runaway production. The numbers vary greatly from one source to another and some reports have conflicting numbers collected from the same source for the same year. Be that as it may, a survey of these numbers is essential.

Numbers reported by the MPAA reveal the imprecision of employment statistics. In 1992, the MPAA reported, 164,000 Californians were directly employed in entertainment production.[172] In 1996, the number of Californians employed in entertainment production rose to 226,000.[173] In 1996, when the number of California jobs indirectly generated by the

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[167] 2005 CEIDR Report, *supra* note 6, at 2
[168] *Id.*
[169] 2005 CEIDR Report, *supra* note 6, at 3.
[170] While the Craig Report criticized the 3.3 multiplier, Neil Craig recently said the CEIDR multiplier number was generally accurate. Craig disputed the 3.3 multiplier in his 2004 report, claiming the Monitor Report should have used a multiplier of 1.9 for California. Now that films produced in the U.S. are shot at a greater rate than when the Monitor Report was published, it's possible he felt the 3.3 multiplier used in the 2006 CEIDR report was now more accurate. Phone interview With Neil Craig, September 15, 2006.
[171] 2005 CEIDR Report, *supra* note 6, at 2.
[172] Motion Picture Association of America, *State of the Industry: The economic Impact of the Entertainment Industry on California* 8, (April 1998) (on file with author). The total direct and indirect employment numbers for 1992 were 348,000. *Id.* at 10. The employment numbers reported by the MPAA were gathered from the U.S. Bureau of Labor Statistics (BLS).
[173] *Id.*

entertainment industry (estimated between 233,00 to 253,100) were included, the "industry's total employment" was "well over 450,000."[174]

In addition to the 450,000 direct and indirect jobs claimed for 1996, the MPAA's 1998 report claimed entertainment production generated $27.5 billion in economic activity in California.[175] The astonishing economic growth between 1992 and 1996, the MPAA claimed, "exploded" for two reasons: (1) the growth of multiplex theatres, cable and a general demand for more media and; (2) "the possibility that this new production activity would occur outside California , or in other countries, did not materialize."[176]

In 2004, the MPAA published a report that contained employment numbers for the entire U.S., which were broken into three categories of employment: production and services, theatres and video tape rental, and "other."[177] In 1995, the total number employed was 283,700 (135,200 in production and services P&S); in 1997, total employment was 323,000 (159,600 P&S); in 2000, total employment was 351,600 (182,800 P&S) and; in 2004, total employment was 367,900 (198,300 P&S).[178] Hence, in 1997 (according to the MPAA 2004 report) total U.S. motion picture employment of 323,000 represents a huge discrepancy from the MPAA's claim that the industry employed over 450,000 California worker in 1996 alone. The Commerce Report, which also used BLS figures claimed 236,152 people were employed in motion picture production and allied services.[179]

In August 2005, the Los Angeles Economic Development Corporation (LAEDC), released a report commissioned by the California Film Commission on the economic impact of

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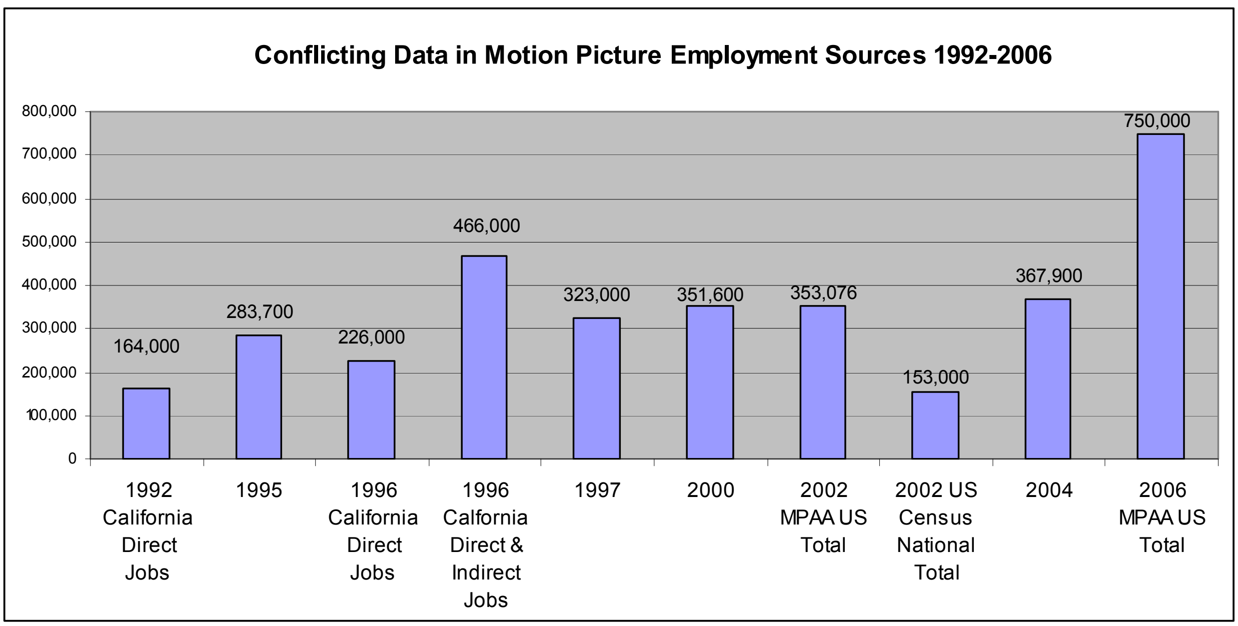
[174] Motion Picture Association of America, *State of the Industry: The economic Impact of the Entertainment Industry on California* 8, (April 1998). The MPAA used a multiplier of 2.03 to calculate indirect employment.
[175] *Id*. at 17.
[176] *Id.* at 12.
[177] Motion Picture Association Worldwide Market Research, "*U.S. Theatrical Market: 2004 Statistics* 27," (2004). Again, the MPAA used numbers from BLS.
[178] *Id.*
[179] Commerce Report, *supra* note 7, at 18.

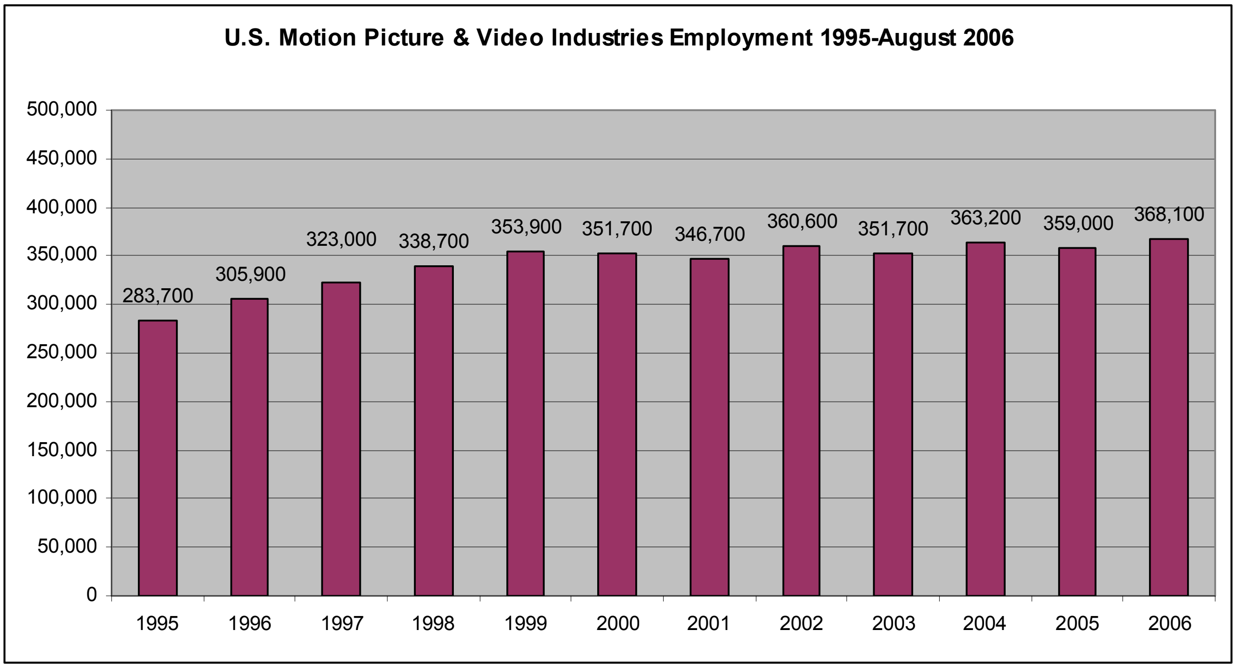
runaway productions. The report compared motion picture employment numbers from the MPAA and the U.S. Census for the same year, 2002. The data from the two sources were divided into two categories: overall motion picture employment in the U.S. and the amount of motion picture employment in California (i.e. how much California captures of the total U.S. figures. In 2002, the U.S. Census reported 153,000 people worked for the motion picture industry in the entire U.S. and, of that amount, 88,500 worked in California.[180] The MPAA data for 2002 was 353,076 workers in the motion picture industry, with 245,900 of those jobs in California.[181] Due to the many confusing employment numbers reported from the above sources over the years, the following chart is meant to provide a simplified visualization of some of the major data:



(Data for 1995, 1997, 2000 and 2004 is from the MPAA 2004 Market Statistics Report (citing BLS data) on total U.S. employment; Data for 1992 & 1996 is from the MPAA 1998 State of the Industry Report, which also used BLS numbers; Data for 2002, as reported by LAEDC's California Film Commission Study, is from the U.S. Commerce Department, Bureau of the Census and the MPAA (note, however, that the 2002 MPPA number cited by LAEDC (353,076) conflicts with the MPAA 2004 Market Statistics Report (which reports 2002 employment at 360,700); Data for 2006 is from MPAA executive John Feehery's Congressional Testimony from 1996 and the MPAA website. *See supra* note 10.)

[180] California Film Commission Study, *What is the Cost of Runaway Production?* 2, Prepared by LAEDC (August 2005).
[181] *Id.*

Martha Jones used figures provided by the California Economic Development Department (EDD). In 1992, EDD claimed 122,000 Californians worked in the motion picture industry, and the number grew to 185,000 in 2001.[182] The following chart is probably the most accurate representation of total motion picture employment in the U.S.:



(Source: BLS NAICS Code 5121. These numbers match those used in the MPAA 2004 Economic Review.)

While the employment data above appears healthy, the overall trend from 1997 to 2006 is relatively stable; there were some slight dips and some slight gains. However, dramatic jumps in employment over small periods of time (the 36% increase from1992 to 1996 for example) are over.

The LAEDC also compared the payroll spending as reported by the U.S. Census and the MPAA in 2002. The U.S. Census reported total payroll spending in the motion picture industry

[182] Jones, *supra* note 31, at 7.

for the entire U.S. at $9.3 billion (of which $6.4 billion was spent in California).[183] The MPAA reported payroll spending at $21.2 billion for the U.S. ($17.2 billion of it spent in California).[184]

In 1992, according to the MPAA, the industry payroll for California was $7.4 billion.[185] In 1996, industry payrolls jumped to $12 billion, an incredible 62% rise in only four years.[186] In 2002, industry payrolls in California were $17.2 billion, a 43% rise over a 6-year period.[187] Thus, while payroll spending in California has seen healthy increases in recent times, the gains are not as spectacular as they once were. So while there are still gains in employment and payroll spending in California, the gains are slowing, a slowdown that coincides with Canada and other countries enactment of film subsidies and tax incentives. The result of this slowdown, according to the 2006 CEIDR report, is a cumulative loss of $23 billion to the U.S. economy from 1998 to 2005 and 47,000 U.S. jobs lost for each of those years or 329,000 lost jobs in seven years.[188] The assertions in the 2006 CEIDR report, while probably accurate, are misleading. As the BLS figures in the chart above indicate, the U.S. motion picture industry is not "losing jobs" per se. Rather, a more accurate assertion is that the U.S. is not adding new jobs that would otherwise exist domestically but for the tax incentives pioneered by Canada and now being duplicated by numerous countries. The great loss for the U.S. economy was and is the failure to capture production spending and job creation that could help stimulate the domestic economy and allowing U.S. supremacy over the motion picture industry to be chipped away at.

If the job losses reported by the Monitor Report and CEIDR are accurate, film employment in Canada would rise. It did. Employment data collected from Canadian sources

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183 *Id.*
184 *Id.*
185 Motion Picture Association of America, *State of the Industry: The economic Impact of the Entertainment Industry on California* 15, (April 1998).
186 *Id.*
187 Motion Picture Association Worldwide Market Research, "*U.S. Theatrical Market: 2004 Statistics* 27," (2004).
188 2005 CEIDR Report, *supra* note 6, at 2.

show a dramatic increase from 1994 to 2003. In 1994, 24,100 Canadian workers were involved in direct film and television production and 38,000 workers were indirectly employed.[189] In 2002, those numbers jumped to 51,300 and 82,100 respectively.[190] Film and television location spending in Canada was $1.96 billion in 1999, an increase of 34% from 1998, and an almost five-fold increase since 1996.[191] In 1994, by comparison, foreign location spending in Canada was just $318 million.[192]

In 2004, foreign film and television production in Canada was $1.9 billion and the number of jobs was 52,000 (20,000 direct and 32,000 indirect).[193] In 2005, however, those numbers plummeted to 38,900 (15,000 direct and 23,900 indirect).[194] The following chart illustrates the dramatic increase in motion picture employment after the first Canadian tax incentives took effect in 1998:

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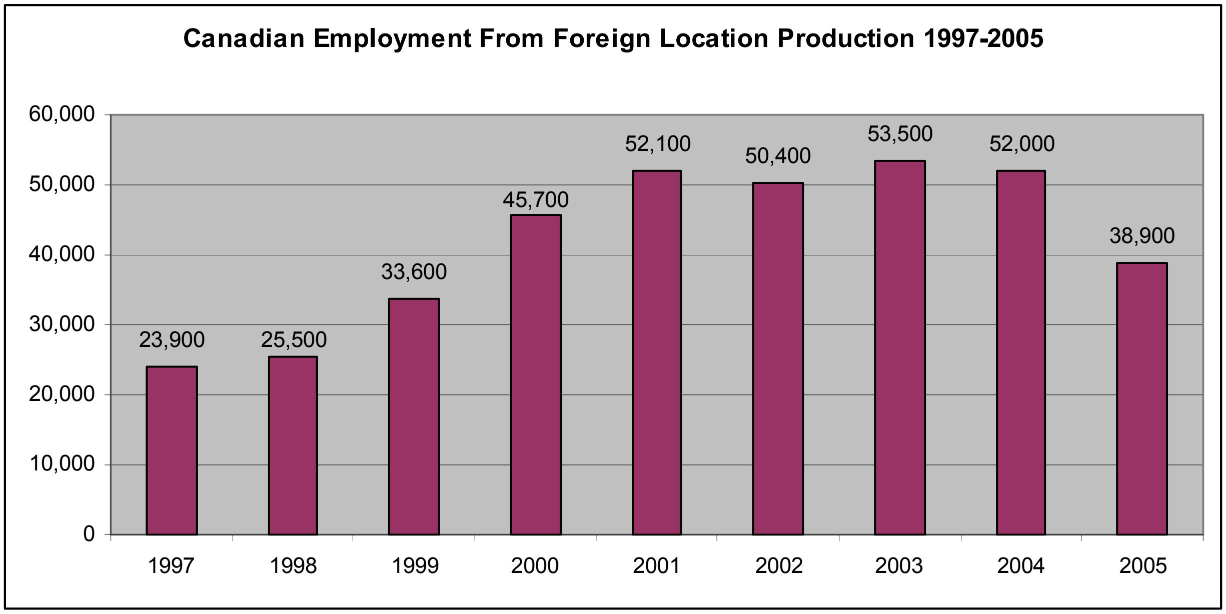
[189] The Employment Development Department (EDD), *Report to the Legislature on the Motion Picture Industry In California* 24, (June 2005) (citing figures collected from various Canadian sources).
[190] *Id.*
[191] Commerce Report, *supra* note 7, at 1 (Citing PricewaterhouseCoopers profile on Canadian film industry for 2000).
[192] Department of Canadian Heritage, *An Economic Report on the Canadian Film and Television Production Industry* 5, (February 2006) *available at* http://www.cftpa.ca/newsroom/pdf_profile/profile2006-english.pdf
[193] *Id.* at 53.
[194] *Id.*



In 2005, the Canadian film and television industry was facing an uncertain future:

> Let's not forget about Canada's filmmakers. While film represents a smaller portion of the production pie, it has been hit hardest. Foreign-location production, which accounts for 33% of total production activity, dropped by 23% to $1.46 billion. While both Ontario and Quebec bounced back from a decline in the previous year, a severe downturn in British Columbia erased their gains. Once again, the oscillation in the volume of activity illustrates the uncertainty of depending on offshore sources as an industrial base.[195]

Furthermore, if television production is removed from the equation, the actual amount of foreign location spending on feature films alone was $789 million in 2005, compared to $1.16 billion in 2004.[196] Lastly, it must be acknowledged that U.S. films accounted for 86.7% of the Canadian box office.[197] The Department of Canadian Heritage attributes the decline in foreign location spending and employment on the rise of the Canadian Dollar and the "proliferation of tax incentives outside Canada."[198]

Since motion picture employment in Canada, while high, has not experienced a gain of employment on par with U.S. job losses. U.S. job losses cannot be attributed to Canada alone.

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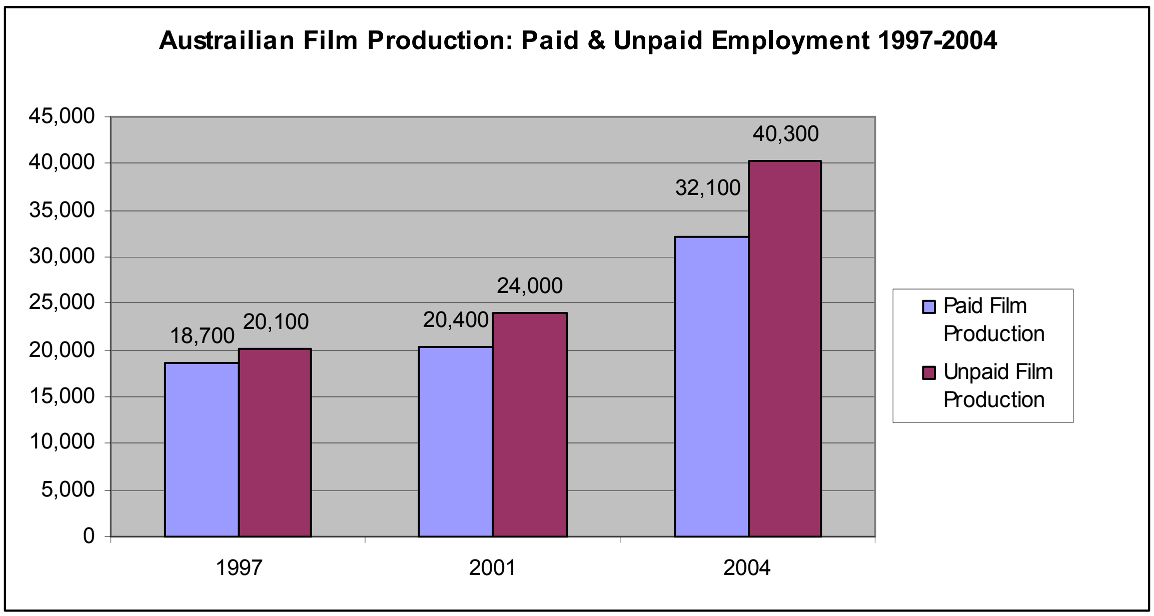
[195] Department of Canadian Heritage, *An Economic Report on the Canadian Film and Television Production Industry* 17, (February 2006) *available at* http://www.cftpa.ca/newsroom/pdf_profile/profile2006-english.pdf
[196] *Id.* at 55.
[197] *Id.* at 45.
[198] *Id.* at 52.

Other nations like Romania, Great Britain, New Zealand, Morocco, South Africa etc, must also contribute to U.S. jobs losses. With the exception of Australia, employment data for other nations is beyond the scope of this paper. Indeed, as Canada predicted, other jurisdictions, like Australia, have enacted tax incentives for the motion picture industry. Australia passed its first film incentives in 2002 and major motion pictures such as *The Matrix, Star Wars Episode II and Episode III,* and *Superman Returns*, all box-office hits filmed there.[199]

The following chart illustrates the large number of new film employment:



(Source: Australian Film Commission, *Get the Picture* 12, May 9, 2005, *available at* http://www.afc.gov.au/gtp/pdfs/employment.pdf. The report provides not explanation on why there are such large numbers of unpaid workers.)

Clearly, there are problems with the employment numbers in the motion picture industry. How many people are employed by the motion picture industry, given the confusion between direct and indirect employment and the use of multipliers? Based on the information above, it's

[199] California Economic Development Department, *Report to the Legislature on the Motion Picture Industry in California* 16, (June, 2005) (on file with author).

safe to assume that roughly 400,000 people in the U.S. make their living in the motion picture industry.[200]

In sum, the U.S. is rapidly losing its position as the filming location for so-called U.S. films. The exodus of U.S. films to foreign nations increased rapidly in the last 10 years. Since American consumers are not benefiting from the alleged cost savings of shooting abroad, why should the U.S. allow a profitable industry that employs hundreds of thousands of well compensated workers to migrate to other nations? Globalization is not needed to maintain U.S. competitiveness in the movie industry because there is no threat of foreign competition. To keep Hollywood in Hollywood, so to speak, state and federal law makers must move quickly to enact legislation that provides studios the incentive to stay in the U.S.

Runaway Production's Negative Cultural Impact on U.S. Films

Movies are perhaps the most significant cultural production that the United States has, for better or worse, produced and offered to the world. Though many people feel that there are too many "bad movies," movies are a form of art. Indeed, the United States Supreme Court said, "it cannot be doubted" that motion pictures posses elements that "characterizes all artistic expression":

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[201]

[200] *But see supra* n.10. Where the MPAA testified before Congress and claim on their web site that movies employ 750,000 nationwide.
[201] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

James Mangold, who wrote and directed 2005's highly acclaimed film "Walk the Line," a movie about Johnny Cash, claims that runaway production causes filmmakers to "lose the ability to capture part of our own culture":

> One of the things that's getting very lost in the business of movies, where people go, you know, very often to Canada to shoot films to save money is that we lose the ability to capture part of our own culture. And this film, Kathy Conrad (producer) and I are really proud that we shot this film in the places that it happened, mainly in Memphis, Tennessee, Nashville and its surroundings. And you get more than just the scenery when you do that…you get a lot more. You get the people. You get the people working on the film that are from the area. And, in this case you also get people that love Johnny Cash who work their heads off. In every scene we did, in every concert scene we did, the extras were so passionate. You cant imagine what a trying experience it is to be an extra in one of these scenes and how long your waiting in a hot room waiting to play the song again and again and again to be shot from a new angle and these people gave their all and the actors on stage really felt that excitement from the crowd….These people really came to be part of this movie and part of a man's life that they really respected and loved and you can feel that energy in the scene.[202]

This same sentiment is echoed by director and producer Ivan Reitman who extolled the benefits of filming on location in New York City for 1984's blockbuster "Ghostbusters":

> Ghostbusters was the first movie I shot in New York. And people were telling me how rough it was to shoot there, but I actually fell in love with the experience because—it's a cliché—but the whole place is like an extraordinary set and the people, the extras, give you so much more than you would get anywhere else.[203]

Thus, when audiences watch "Ghostbusters," they see actual (not stand-in) locations such as Columbia University, New York City Hall and Central Park's Tavern on the Green.

Other quintessentially American films made abroad include the aforementioned "Cinderella Man," "Capote," "The Day After Tomorrow," "New York Minute," and "Wicker Park." And these films barely begin to scratch the surface.

Clearly, studios can save money on labor in other nations. In Canada, the labor savings stem from government tax breaks and incentives. In Romania, labor is cheap because it is essentially third-world slave labor. Despite these savings, Jack Green, the acclaimed cinematographer who received an Academy Award nomination for 1992's "Unforgiven," claims

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[202] James Mangold, Directors Commentary, "Walk the Line" 20th Century Fox (2005)
[203] Ivan Reitman, Directors Commentary, "Ghostbusters,: Columbia Pictures (2004). Rietman recorded the commentary for the film for the 1999 DVD release of the film.

that filmmakers are leaving the U.S. unnecessarily.[204] First, Green says, you get what you pay for; American movie crews cost more because they know how to do things faster and better. Second, Green thinks filming abroad is unethical. For example, Green declined to work for "Miracle," a film about the 1980 U.S. Olympic hockey team that shocked the world by defeating the Soviet Union's vaunted team. Green said, "Here was a film about the American Dream, and they were shooting it in Canada. It just really disturbs me."[205]

Former President Ronald Reagan credits the start of his political career to the speeches he made as president of SAG, in which he "tried to emphasize how important the movies were to American culture."[206] Reagan claimed his ties to Hollywood during World War II helped General Hap Arnold in creating an independent air force (which was still part of the army at that time).[207] Reagan was tasked with making air force training videos and documentaries. Because of the movie industry and his ties to it, Reagan recruited technicians and artists from the industry who were not eligible for combat.[208] Finally, Reagan credits Hollywood (its technology, camera operators, technicians etc.) with capturing and preserving film footage taken at Germany's concentration camps.[209]

Expanding on Reagan's point that movies are an important part of American culture is the idea that American movies helped affect world culture in positive ways.

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[204] Mary McNamara, *Down-home directing; Joss Whedon used every cost-cutting trick he knew -- or could invent -- to keep production of the sci-fi feature 'Serenity' in L.A.*, LOS ANGELES TIMES, October 9, 2005, at E1 (hereinafter McNamara).
[205] McNamara, *supra* note 204.
[206] REAGAN, *supra* note 100, at 119.
[207] *Id*. at 97.
[208] *Id.* at 86.
[209] *Id* at 119.

Meryl Marshall, a former member of the Academy of Television Arts and Sciences, wrote on the values that American movies exported to the rest of the world:

> America exported stories defining a system of government that could withstand open criticism and still grow stronger (Mr. Smith Goes to Washington, Gentleman's Agreement); stories demonstrating that talent and hard work could surpass birth into a social class as determinants of wealth or fame (Rocky); stories about one person's ability to make a difference (Norma Rae), and to overcome persecution and prejudice (To Kill a Mocking Bird); stories exploring the impact of American slavery and prejudice and the struggle to transform society into one of equal rights for all (Roots). Many of these American films and television programs have helped promote freedom and democratic values, the same values that encouraged throngs of people throughout the world to rise up and challenge repressive governments, contributing to the end of the Cold War, the destruction of the Berlin Wall, and the events in Tiananmen Square before the crackdown.[210]

[210] Commerce Report, *supra* note 7, at 8 (citing Marshall's essay on American films).

III. Major Players in Runaway Production Debate

The Runaway Production Players

The primary beneficiaries of runaway production are the major studios seeking to reduce costs. To say studios “like” or “dislike” runaway productions misses the point—they like the cost savings offered abroad. If it were cheaper to film in the United States, the studios would make movies here. Filmmaking is a very expensive undertaking that involves high risk.

Because of market uncertainties, decisions on who to cast, what genre to film, and where to film are all based on the bottom line. Time-Warner, for example, a publicly traded company, has a fiduciary responsibility to its shareholders to increase shareholder value. If the company can save 30% on production costs by shooting a big budget film in Vancouver instead of Los Angeles, Time-Warner has a fiduciary duty to its shareholders to do so. 20th Century Fox executive vp Fred Baron, speaking at an industry panel on runaway production, claimed, “What we’re trying to do right now is fighting to keep film in America. But in our process, we are forced to go offshore because of prices” Baron cited “Fantastic Four” and X-Men 3” as examples of movies too expensive to film in the U.S.[211] If a big budget film flops, then a savings of 30% on production could save the company from insolvency. In short, there is no “bad guy” in the runaway production battle. It is quite possible that the executive who decides to shoot a film abroad would prefer to keep the production in the United States.

There are many groups and organizations in the U.S. opposed to runaway production. Leading the charge to curb, if not end, runaway production, are a variety of labor unions, actors and politicians at all levels of government. Opponents to runaway production in the U.S., however, are not a unified front and there is constant bickering between various factions.

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[211] Tatiana Siegel, *Online Report*, THE HOLLYWOOD REPORTER, August 1, 2005.

The Directors Guild of America and the Motion Picture Association Approach

The Directors Guild of America (DGA) claims a membership of 12,700.[212] The importance of the DGA stems from the guild's Basic Agreement with the major Hollywood studios, virtually all of which are signatories to the agreement (the list of signatories is extensive and includes such major studios as 20th Century Fox, Paramount, Universal, Dreamworks, TriStar, and United Artists). Per the DGA agreement, directors who are not members of the guild cannot direct films for the major studios.[213]

Not surprisingly, the DGA's most important supporters are the major studios represented by the MPAA. The MPAA was established in 1922 "as the trade association of the American film industry."[214] Today, the MPAA represents the world's major media conglomerates--Disney, Sony, 20th Century Fox, Paramount, Universal, Warner Brothers and MGM.[215]

The strategy that the DGA and MPAA employs to combat runaway production is the "subsidy to fight subsidy" approach, which involves lobbying for the establishment of state and local tax incentives, similar to those in Canada and elsewhere.

The Film and Television Action Committee Approach

At odds with the DGA and MPAA is the Film and Television Action Committee (FTAC). FTAC was formed in 1998 with the sole purpose of "recovering American film jobs."[216] FTAC claims it's "supported and endorsed" by a variety of entities, including SAG. According to their website, the rest of the FTAC coalition includes:

> FTAC is supported and endorsed by these unions: IATSE Locals 695, 871, 44, 728, 720, Laborers International Union of North America (LIUNA), Studio Utility Employees Local 724 (LIUNA), International Brotherhood of Teamsters International, and Local's 399, 355, 391, 509, 592, IBEW Local 40, Plasterers Local 755, UA Plumbers Local 78. In addition, the Florida Motion Picture

[212] David Apted, *Welcome Page*, *available at* http://dga.org/index2.php3?chg=
[213] David Apted, *Welcome Page*, *available at* http://dga.org/index2.php3?chg=
[214] MPAA, *About* Us, *available at* http://www.mpaa.com/about
[215] *Id*.
[216] FTAC, *About Us, available at* www.ftac.net/html/about.html.

> and Television Association, the cities of Burbank and Santa Monica CA, Pittsburgh PA, Jersey City and Clifton NJ, Hollywood Center Studios, Michaelsons Catering, Fantasy II Film Effects, International Studio Services, History for Hire, Jackson Shrub Supply.[217]

FTAC believes the subsidies employed by foreign nations, specifically Canada, are illegal under international trade agreements. In short, FTAC plans to file a petition with the U.S. Trade Representative (USTR), whose office would conduct an investigation of foreign (specifically Canadian) subsidies. Obviously, FTAC hopes the USTR would confirm that foreign subsidies do violate trade agreements and negotiate for their elimination. If trade negotiations failed, the WTO could intervene to settle the dispute.

FTAC faces major obstacles by filing a complaint with the U.S. Trade Representative. First, the government has total discretion in deciding whether or not it pursues a trade dispute with any member of the WTO.[218] Given the minimal trade disputes the U.S. files with the WTO, FTAC bears a level of persuasion of astonishing levels to overcome U.S. apathy in this area.[219] Second, it's hard to accuse other nations of violating trade agreements since many states (and now the Federal Government at a minimal level) have film incentives of their own. This argument carries weight given the current political climate of states rights and national sovereignty espoused by the Republican-controlled government. Moreover, FTAC's complaint, which has yet to be filed, targets Canada specifically—not other countries.

The DGA and the MPAA argue that FTAC's plan would result in a trade war with Canada and other countries, which might cause foreign nations to block the importation of U.S. films. Such a trade war, the DGA and MPAA argue, would cause even more job loss in the United States.

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[217] *Id.*
[218] 19 U.S.C. § 2412(b) (2005).
[219] *See infra* Section I (Movie Piracy: Hollywood's Great Concern).

Although the DGA/MPAA preference for subsidies may be the more effective means of preserving U.S. jobs, their attack on the FTAC plan may be disingenuous and over exaggerated. In the era of globalization and free trade, it's highly unlikely that a trade war of such magnitude would cause foreign governments to block the importation of U.S. films. Blocking the importation of a U.S. film ignores the reality that, thanks in part to runaway production and globalization, it become increasingly difficult to define a "U.S. film." Entertainment Attorney and producer Mark Litwak explained the dilemma of defining "U.S. films":

> It can be difficult to characterize films according to nationality in an age of multinational corporations and producers with dual citizenship. For example, the Harry Potter movies are based on a book by an English author and shot in the United Kingdom with a British cast. Even so, they are produced by a U.S.-based studio and, therefore, considered to be U.S. films. Twentieth Century Fox is considered to be a U.S. company, but it is controlled by Rupert Murdoch, an Australian.[220]

Since the MPAA represents media companies that want to increase profits and lower production costs, they, by corporate design have a self-interest in pursuing the "subsidies to fight subsidies" approach. But the MPAA approach has an inherent flaw: as city, state and national governments pass more incentives to lure film production, it could create a "race to the bottom" phenomenon that primarily, if not exclusively, benefits the industry itself.

The Achilles heel facing FTAC is the presumed legality of Canadian subsidies. In 2001, Stephen Katz, of the CEIDR, reported the following:

> There appears to be no legislative prohibition against Canadian production subsidies. The U.S. Office of Management and Budget classifies the production of motion pictures and television as a Service Industry. We have been advised that, as such, there are no protections from a trading partner who chooses to subsidize an Economic Sector such as the film and television production industry under the current General Agreement on Trade in Services (GATS). If the production of motion pictures and television, however, were classified as a Manufacturing Industry, the Canadian subsidies would fall under the dispute settlement provisions of the World Trade Organization (WTO).[221]

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220 Mark Litwak, *Runaway Home: Production Incentives From Foreign Jurisdictions are Playing an Increasing Role in Determining Where Films Are Made*, LOS ANGELES LAWYER, March 2004.
221 Stephen Katz, *The Migration of Feature Film Production From The U.S. To Canada Year 2000 Production Report* 5, Center For Entertainment Industry Research and Data, (2001).

While FTAC's claims of unfair trade may have merit[222], the consensus is that the Canadian subsidies would be upheld. Finally, it appears that many of the labor unions, including SAG, have implicitly abandoned the FTAC approach. The 2005 CEIDR report received funding from SAG and other unions that ostensibly support the FTAC. CEIDR's 2005 report, however, downplays the FTAC approach as "well intentioned," but rife with potential problems:

> There are groups and individuals that are challenging the legality of foreign production subsidies by seeking a Section 301 filing126 with the United States Trade Representative. While well-intentioned, many believe this approach could present unintended consequences and difficulties for the U.S. production industry.[223]

Finally, even if the U.S. Trade Representative chooses to pursue FTAC's forthcoming filing and the WTO rules in favor of the U.S., Canada can appeal the ruling and keep the issue from complete resolution for years. And as a last resort, Canada can simply choose to ignore such a ruling.[224]

The Screen Actors Guild's Stance

As aforementioned, SAG's outspoken resistance to runaway production dates back to the 1950s. SAG is a large force in Hollywood with a membership that exceeds 100,000. SAG is an affiliate of the AFL-CIO with a long history of improving working conditions for actors. A major limitation (arguably a benefit) on SAG members is they cannot work on non-union productions. Despite the abhorrence of organized labor by many large companies (Wal-Mart comes to mind[225]) and the vilification of labor unions by the Republican Party, it is worth noting

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[222] *See e.g* Claire Wright, *Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 Akron L. Rev. 739 (2006).
[223] 2005 CEIDR Report, *supra* note 6, at 73.
[224] Indeed, the U.S. makes this argument for itself. According to a 2005 document from the U.S. Trade Representative, "Trade panels cannot overturn or change…federal, state or local laws." *See* UTSR, *Trade Facts*, (April 2005) *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file870_7578.pdf.
[225] *See e.g.* the observations of Judge Posner and Gary Becker's web blog. On July 20, 2006, Becker addressed labor unions and their efficacy, claiming, "companies like Wal-Mart…do not have unions, and aggressively oppose them." Posner apparently agrees with this assertion, claiming he "had little to add" to the discussion. Posner, however, added:

that two past presidents of SAG—former President Ronald Reagan and Charlton Heston—are icons in the Republican Party. There may be a popular perception that SAG is populated by highly paid, high profile members—elite liberal actors from Hollywood. The reality is that 70% of it members received less than $7,500 in 2001.[226]

Given the stature of some of its past leadership and its entrenched position in the entertainment industry, SAG has shown signs of weakness. In 2000, for example, SAG staged a strike because major movie studios and cable companies refused to pay actors residual payments from pay-for-play movies. SAG considered the strike a success. The strike saved the pay-for-play residuals and also increased the amount of residual payments from cable television. Notwithstanding the consensus among SAG that the strike was a success, the strike was financially damaging to the members who did not work during the six-month strike. SAG reported that its members lost over $100 million in income during the strike.[227] And while SAG members abhor runaway production, the union's leadership may fail to acknowledge that such strikes may increase the incentive for movie studios and advertisers to establish and grow international production centers to compensate for any future strikes that grind production to a halt. The suggestion that labor union strikes would increase runaway production is, however, speculative.

For the past several years, the political infighting of SAG's leadership has raised questions as to whether the guild's loyalty lies with its membership or with the major studios.

> The first-order economic analysis of minimum wage laws shows that they reduce employment by raising the price of labor; the Law of Demand teaches that an increase in the price of a good reduces the quantity of it that is demanded. A second-order analysis complicates the picture. Price affects supply as well as demand. An increase in the price of labor might attract into the labor force individuals who, at the existing price, prefer to go to school, engage in crime, work part time, or subsist on welfare.

For the complete exchange *see* "The Posner-Becker Blog," *available at* http://www.becker-posner-blog.com/archives/2006/07/

[226] Lynda Gorov, *Labor Talks Cast Shadow Over Star-Studded LA*, THE BOSTON GLOBE, February 12, 2001 at A1.

[227] *Actors Strike Took Big Bite of Earnings,* THE TORONTO SUN, March 26, 2001.

Specifically, SAG's internal leadership struggles have led it to flip-flop on the two conflicting legislative methods pursued by the FTAC and the DGA/MPAA.

In 2001, SAG's board of directors named Bob Pisano as its National Executive Director. Pisano, an entertainment attorney, came to SAG with 30 years of experience in the entertainment industry, having served as a senior executive at Paramount Pictures and MGM. Pisano's prior positions with Paramount and MGM presented a conflict of interest. How could a former senior executive of the motion picture industry, which would prefer the non-existence of labor unions, effectively represent SAG? Who was Pisano loyal to?

According to FTAC member Gene Warren, winner of the Academy Award for Best Visual Effects for "Terminator 2" and owner of Fantasy II Film Effects, SAG's leadership has two factions: one supporting FTAC and one in favor appeasing the MPAA.[228] SAG's general membership, Warren claims, overwhelmingly supports FTAC.[229] Warren took issue with Pisano's appointment to SAG and Pisano's instance that his title was that of CEO, not National Executive Director.[230] The decision to hire Pisano as SAG's "CEO," was, according to Warren, an effort by the MPAA, and those in SAG's leadership opposed to FTAC, to destroy opposition to runaway production amongst members whose views paralleled those of FTAC.[231]

Warren's comments on Pisano are not baseless. Pisano opposed SAG's general support of the FTAC. In October 2005, (after Pisano's tenure at SAG ended) SAG's national board voted unanimously to support FTAC and its approach to end runaway production.[232] Moreover, worries that Pisano's position at SAG represented a conflict of interest were realized in 2005,

228 Author's telephone interview with FTAC member Gene Warren (September 13, 2006).
229 *Id.*
230 *Id.*
231 *Id.*
232 SAG Press Release, *Screen Actors Guild Supports Film and Television Action Committee*, November 1, 2005 (on file with author).

when the MPAA named Pisano president and, unsurprisingly, CEO for Los Angeles operations.[233]

Evidence of SAG's factional leadership continues. SAG contributed $10,000 of the $50,000 needed to produce the 2005 CEIDR report, which calls the FTAC approach "well intentioned" but rife with problems.[234] According to Warren, "it's all politics."[235] Stephen Katz, author of the 2005 CEIDR Report, claims SAG's internal politics did not influence the report, which generally supports subsidizes in some fashion.[236]

Katz shares FTAC's concerns and agrees that runaway production must end. The difference between the two is how to end runaway production. Katz, for example, points to the numerous U.S. state level incentives, which may be as culpable for runaway productions from California as Canada's subsidies.[237] As subsidies for the motion picture industry proliferate, declaring a subset of them (here Canada's) may not be practical.

Others Who Fight Runaway Production: Saints or Selfish?

There is anecdotal evidence that a major motion picture having the "look and feel" of a $100 million budget can film in the U.S. for only $39 million. This was the case with Universal's 2005 film "Serenity." Executives at Universal liked the pitch for "Serenity," and they loved Joss Whedon, the creator, writer, and director (Whedon's popularity stemmed from writing and directing the television series "Buffy the Vampire Slayer" and "Angel"). Universal Executives estimated that "Serenity" would require a $100 million budget, which was "just too much" for a film with no name recognition.[238] Whedon promised Universal that he could shoot

[233] Dave McNary, *Split Decision for MPAA*, VARIETY, September 22, 2005.
[234] Author's telephone interview with FTAC member Gene Warren (September 13, 2006); 2005 CEIDR Report, *supra* note 6, at 74.
[235] Author's telephone interview with FTAC member Gene Warren (September 13, 2006)
[236] Author's telephone interview with Stephen Katz (September 13, 2006).
[237] Author's telephone interview with Stephen Katz (September 13, 2006).
[238] McNamara, *supra* note 204.

the film half the $100 million estimate.[239] Whedon became a hero in the eyes of the FTAC, which hailed "Serenity" as a model of efficiency that did not require running away to Canada or Romania.

According to one Universal executive, Whedon was "so eager to show that you make a movie in L.A., we never thought of going anywhere else."[240] Whedon's decision to film in Los Angeles, however, did not stem from altruism. Whedon said his "reasons were completely personal."[241] Whedon's wife is an architect in Los Angeles and he has two young children that he did not want to "uproot." Labeling Whedon as a champion of keeping jobs in America may be premature as his next project, a big screen version of "Wonder Woman," is scheduled to film in Australia.[242]

Similarly, U.S. labor unions should think twice about praising Jodie Foster, the star of 2005's "Flightplan." The movie was scheduled to be filmed abroad until Foster refused to leave Los Angeles. The specifics of Foster's salary are unknown, but she said her contract "made it worth their while" to keep the film in Los Angeles.[243]

California Governor Arnold Schwarzenegger refused to join the cast of "Terminator 3" unless production was moved from Vancouver to California. Arnold's solidarity with the U.S. worker, however, is disingenuous. Politics, not altruism, seems to have been Schwarzenegger's motivation; when he demanded the film to shoot in California, he was preparing to run for Governor.[244] "Terminator 3" had a budget around $170 million and Schwarzenegger patted himself on the back for taking an $8 million pay cut to get production moved to California.[245]

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[239] *Id.*
[240] McNamara, *supra* note 204.
[241] *Id*.
[242] *Id*.
[243] *Id*.
[244] *The Roar of Greasepaint,* THE ECONOMIST, March 9, 2002.
[245] Ian Edwards, *B.C. Industry Must 'Reinvent" Itself*, PLAYBACK, September 15, 2003.

The pay cut, however, is not praiseworthy when details of his contract are examined. Among the goodies in the 33-page contract was a "pay or play" fee of $29 million, meaning Arnold would get paid even if the film was never made, and a per package of $1.5 million for personal bodyguards, use of a private jet, a fully equipped gym trailer, and 24-hour limousine service.[246] Further, Arnold's "film in California" rhetoric is hypocrisy; many of his past films shot in Canada and Mexico. And despite his promises to fight runaway production from California, the state's budgetary problems have precluded the legislature from passing tax breaks.

To be sure, there are some in the film industry that refuse to film overseas (Clint Eastwood, Harold Ramis, M. Night Shayamalan and Spike Lee are all good examples), but an overall sampling of productions that relocated from abroad to the U.S. reveals the motive was personal, not social.

IV. Applying Law & Economics To Runaway Productions, Poverty, and Globalization

Social Costs: Runaway Production in Third World Nations

As aforementioned, Romania is fast becoming a primary filming location for the major studios. Although Romanian workers are eager to work on movies, the working conditions in Romania begin to highlight the darker side of runaway production not present in Canada or Australia. Union workers in the U.S. often guarantee overtime wages after eight hours in a day. In Romania, however, workers typically do not collect overtime wages until they work 72 hours in a week.[247] Furthermore, according to *Los Angeles Times* reporter John Horn, the "work environment encountered overseas is often unsafe and unregulated," an advantage that "studio

[246] Edward Jay Epstein, *Budget for T*-3, *available at* http://www.edwardjayepstein.com/budget.htm
[247] Horn, *supra* note 151

executives are loathe to say aloud."[248] In Romania, there are few, if any, unions or watchdog groups to enforce safer working conditions.[249] Perhaps the saddest comment on the welfare of Romanian film crews is that livestock used in a recent film cost more than local actors.[250]

There is an argument that runaway productions enable studios to make "good" movies when they otherwise would not be able to. Evidence for this argument is weak (and needs further study), but it does exist.[251] In 2003, "Cold Mountain," a movie about the American Civil War was the "first major mainstream American movie" to be shot in Romania.[252] The story of "Cold Mountain" is set in North Carolina. Albert Berger, the film's producer, claimed, "Without the savings that Romania offered, 'Cold Mountain' absolutely would not have gotten made."[253] "Cold Mountain" received numerous Academy Award nominations and Actress Renee Zellweger won an Oscar for best supporting actress.

By contrast, runaway production also leads to the creation of what many would consider "bad" films. An interesting example of this involves a film whose producers wanted to film in New Mexico. Producers of the 2006 movie "The Hills Have Eyes" filmed in Morocco because New Mexico was too expensive and "religious Saudis" owned the land they wanted to use and thus demanded to read and censor the script.[254] Morocco's Islamic government, because it wants

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[248] *Id*.
[249] Horn, *supra* note 151. As Horn reports, "Darren McLean, a gaffer on "Bloodrayne," told of Romanian electricians putting up ungrounded, poorly secured lights above a water tank with actors in it -- arguably more chilling than the vampire tale being filmed. "They d*id*n't have any [ground fault interrupters] in the country, so I had to go get them," McLean said. "I went back on the next day to retie all of their knots."
[250] *Id*. In 2007, Romania officially joins the EU and must comply with the union's labor an monetary policies. Thus, poor working conditions and low pay may vanish.
[251] The following is a list of recent films that earned the Best Motion Picture at the Academy Awards and their filming locations: Crash (2005), filmed in Los Angeles; Million Dollar Baby (2004), filmed in Los Angeles; Return of the King (2003), filmed in New Zealand; Chicago (2002), filmed in Toronto, Canada; A Beautiful Mind (2001), filmed in New York and New Jersey.
[252] Horn, *supra* note 151.
[253] *Id*.
[254] Megan K. Stack, *Down, Dirty in Morocco*, LOS ANGELES TIMES, October 16, 2005, at E1

to lure the film industry, does not "tamper with film content."[255] And coming in 2007, "The Hills Have Eyes II," filming in Morocco, of course.

On the other hand, Morocco was able to lure Academy Award winning Director Oliver Stone to film much of 2004's "Alexander" there.[256] Despite several suicide bombings in Morocco in 2003, Stone insisted on using Morocco as the backdrop for his story, then the most expensive independent movie shot outside the U.S.[257] The makers of "Alexander" knew the benefits of Morocco's "main attraction," the movie extras working for $1.80 an hour.[258] Without such savings, "Alexander" would have cost much more to make, if at all.

And despite "increasing evidence of Islamic Fundamentalism" in Morocco, Director Sir Ridley Scott elected to shoot scenes for "Kingdom of Heaven," which for some Muslims was a religiously sensitive film about the Crusades.[259] Security for the film was tightened after rumors surfaced that one scene featured a crusader "stamping on the Koran."[260] Finally, Islamic fundamentalism, ironically, was embraced by the makers of Universal's "United 93," which captured the horror of 9/11. According to "United 93" Director Paul Greengrass, an alternate opening of the film was shot in Morocco (standing in for Afghanistan) depicting the meeting between the 9/11 hijackers and Osama bin Laden.[261]

The Romanian and Moroccan examples provides weight that runaway productions can be good for the studios because they cost less and are capable of reaching high levels of artistic quality, if they want to. On the other hand, runaway production has the ability to exploit foreign

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[255] *Id.*
[256] *Relocation, Relocation, Relocation*, THE ECONOMIST, July 8, 2004.
[257] *Id.*
[258] *Id.*
[259] *Id.* Other films shot in Morocco that seemingly conflict with Islamic fundamentalism include: "Black Hawk Down (2001);" "The Nativity Story (2006);" and "The Last Temptation of Christ (1988)." *see e.g. IMDB.com Pro*
[260] *Id.*
[261] Paul Greengrass, Director's Commentary, "United 93" Universal Pictures (2006). Most of the principal photography was shot in the United Kingdom. Oliver Stone's "World Trade Center" filmed on location in New York and New Jersey.

labor and expose workers--human beings--to unsafe working conditions that do not seem to offset cost savings to the production. Economics aside, is all this a good thing?

To this writer, there is something inherently wrong when a movie about the U.S. Civil War films in Romania. There is something wrong when Superman, a tale of a superhero born and raised in Kansas that stands for "truth justice and the American way," films in Australia. Most Americans are completely unaware of this deceptive filmmaking. Would learning the truth about where studios make films outrage Americans? Maybe not. In another context, if the millions of Americans who grace their cars with yellow ribbon magnets reading "support our troops" learned that the magnet was made in China[262], it would probably make them mad, to say the least. Purchasing the magnet from Wal-Mart supports Chinese workers (and perhaps their troops) more than it does ours.

At some point, students of law and economics have to separate themselves from the efficiency and benefits that Hollywood and other multinational corporations receive from runaway productions or offshoring. At some point, students have to ask, "is this ethical?"

Judge Posner on Globalization and Free Trade

Should the United States take protectionist measures against what Posner calls "allegedly 'unfair' trade practices?" According to Posner, "in general the answer is no, if the maximand is taken to be world economic welfare as a whole."[263] Posner concedes, however, that if the maximand "is the protecting the nation's welfare, then protectionism may occasionally be

[262] In researching this paper, I purchased a "Support our Troops" magnet from Wal-Mart that was made in China. I called Wal-Mart press relations to ask how and why they sold the magnets but they did not comment.
[263] RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 315 (Sixth Edition, Aspen Publishers 2003) (hereinafter POSNER).

justified."[264] Any discussion of free trade and globalization is sorely lacking in Posner's work and he fails to define "world economic welfare as a whole."

Posner's concession that protectionism may be justified in certain cases seems to imply that globalization and free trade pose social and economic problems. Indeed, there are problems with globalization. On his web blog, Posner recently delved into the global labor market with the following observations on how corporations act "draconian" when they seek to avoid government standards (in this case minimum wage laws):

> One especially draconian way of doing this is by relocating the firm's plants or other facilities from the jurisdiction imposing the high minimum wage to a jurisdiction that has a lower minimum wage. Becker points out that this may be a consequence of the Chicago ordinance because it does not reach Chicago's suburbs. It is a reason for believing that state minimum wages are likely to have fewer disemployment effects that local minimum wages, and the federal minimum wage fewer disemployment effects than state minimum wages.[265]

In 2006, *The Economist* published a 19-page "special report on the world economy."[266] According to the report, so-called "rich countries" (i.e. G10 countries) are democracies "so continued support for globalization will depend on how prosperous the average worker feels."[267] The average G10 country worker's "share of the cake" (in terms of wages as a percentage of national income), however, is "the smallest it has been for at least three decades."[268] Corporate America, on the other hand, almost doubled its share of national income from 7% in 2001 to 13% in 2006.[269] In sum, globalization has redistributed income by lifting corporate profits relative to wages.

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[264] *Id*.
[265] The Posner-Becker Blog, *available at* http://www.becker-posner-blog.com/archives/2006/07/. In his blog, Posner shows signs that the minimum wage in Illinois, which is higher than the federal level, nevertheless reeks of injustice. Posner opined, "At the current minimum wage in Illinois of $7.75 an hour, an employee who works 2000 hours a year (a 40-hour week with two weeks of annual vacation) and is paid the minimum wage earns only $15,500 a year. This is a pittance…"
[266] *A Survey of the World Economy*, THE ECONOMIST, September 16, 2006.
[267] *Id.*
[268] *Id.*
[269] *Id.*

Critics of globalization in rich countries fear the loss of jobs to low-cost foreign competitors, but the "real threat" is to wages, not jobs.[270] It's commonly asserted that, free trade and offshoring should not effect total employment in rich countries; rather trade with emerging economies "can have a big impact on both average and relative wages."[271] According to *The Economist*, real wages, over a long period of time, tend to track average productivity growth but so far this have decade, workers real pay in developed economies increased more slowly than labor productivity.[272] For example, the real weakly wage of "a typical American worker fell 4%" since 2001 while their productivity rose by 15% over the same period.[273] Thus, according to *The Economist*:

> [T]he usual argument in favor of globalization—that it will make most workers better off, with only a few low-skilled ones losing out—has not so far been borne out by the facts. Most workers are being squeezed.[274]

Over time, the report claims, worldwide competition should:

> [R]educe profit margins and distribute benefits back to consumers and workers in the form of lower prices. But downward pressure on wages in rich countries could continue for a long time.[275]

Countering the fears of outsourcing are statistics, thus far less than 1 million American service-sector jobs have been lost to offshoring.[276] Forrester Research forecasts that by 2015 a total 3.4 million service-sector jobs will move abroad, a tiny number, *The Economist* claims, compared to the 30 million jobs "destroyed and created in America every year."[277] Princeton University economist Alan Blinder, however, thinks many economists, including those at Forrester

[270] *Id.*
[271] *Id.*
[272] *A Survey of the World Economy*, THE ECONOMIST, September 16, 2006.
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* Citing Forrester Research reports.

Research, underestimate the damaging effects of offshoring and implies that at least 30% of all jobs might be at risk.[278]

It could be argued that opponents of runaway production were overreacting to films that went to Canada and other industrialized nations. Globalization, free trade and offshoring adherents thus prevailed in opening Hollywood's floodgates. That said, if runaway production starts shifting to locations like Romania, Morocco, Bulgaria, and one day even China, globalization cheerleaders will be ignoring the human costs in favor of the economic savings. As Reagan said, free trade should also be fair trade.

Perhaps union militancy exasperated runaway production and union leaders should have made reasonable concessions and loosen strict demands in their contracts. Moreover, lawmakers in California and across the United States at the state and federal level failed to recognize the resurgence of runaway production. Lawmakers should be proactive in enacting any legislation to address a foreseeable problem, especially when a vital U.S. industry is at stake. Unfortunately, as is usually the case, most U.S. legislation is reactive rather than proactive.

Judge Posner on Inequality in the United States

If, as Posner says, the goal of free trade is to improve world "economic welfare as a whole," globalization needs to make some improvements. Posner admits that income in the United States is unevenly distributed.[279] Since Posner's recent edition of "Economic Analysis of the Law" was published in 2003, it's questionable why he uses data from 1986 to measure income inequality.[280] Recent, more pertinent, data on inequality is available. In 1986, the poorest 20% of U.S. households had no more than 4 or 5% of the nation's personal income and

[278] Alan S. Blinder, *Offshoring: The Next Industrial Revolution?*, FOREIGN AFFAIRS (March/April 2006). Blinder also served on the White House Council of Economic Advisers from 1993 to 1994 and as Vice Chairman of the Board of Governors of the Federal Reserve from 1994 to 1996.
[279] POSNER, *supra* note 262, at 468.
[280] *Id.*

the richest 20% had about 47%.[281] Even in 1986, the United States had the most unequal distribution of income among the wealthy nations of the world.[282] Posner's position on income inequality is ambiguous. In any event, income inequality has increased dramatically. In 1997, the richest 1% of Americans controlled 40.1% of the nation's wealth.[283] The 1997 figures were measured by the Gini Index, which is a "comprehensive standard of inequality."[284] In 1979, the richest one 1% of Americans controlled 20.5% of the nation's wealth.[285]

While the income studies Posner cites may differ from the Gini Index's conclusions, they both agree that disparities in wealth shrink precipitously after 1945 and have risen since the 1980's. The period between 1945 and the 1980's saw a host of social, federal and state initiatives that diminished economic inequality. Labor union membership hit their peak in the mid 1950's, when the unionized portion of the work force was 32.5%.[286] By 1975, union membership dropped to just 14.1% of the workforce, a level not seen since the period before the Great Depression. Unions helped increase wages and improve working conditions. The G.I. Bill sent millions of servicemen to college after Word War II. New Deal programs helped build the nation's infrastructure. Former President Lyndon Baines Johnson waged his war on poverty and African Americans received the right to vote. Social Security was established, minimum wage was set at the federal level, Medicare and Medicaid were established and the list goes on. Posner ignores these factors.

It is quite possible that the establishment of the laws and regulations correlated with the reduction of inequality. Does Posner fail to address these issues because he opposes them on

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[281] *Id*.
[282] *Id*.
[283] THOMAS FRANK, ONE MARKET UNDER GOD 6, (Anchor Books 2001).
[284] THOMAS FRANK, ONE MARKET UNDER GOD 6, (Anchor Books 2001).
[285] *Id*. at 8.
[286] ROBERT D. PUTNAM, BOWLING ALONE 81 (Simon & Schuster 2000).

political or economic grounds? Does Posner omit a discussion because others (and Perhaps Posner himself) have found that laws and regulations (or entitlements as some prefer to label them) listed above were the major forces that reduced inequality? Students of law and economics can only guess.

Posner implies that the solution to economic inequality in the United States is a transfer of wealth from the rich to the poor, which would involve high transaction costs. Again, Posner hurries his discussion of what he assumes will be redistribution of wealth. He makes wealth redistribution sound like Robin Hood. Why does wealth need redistributed? Is redistribution the only solution to reducing inequality? Is wealth a limited resource? The nature of investments is to grow wealth into more wealth; the Dow Jones has no cap. Thus, we could reduce inequality without redistributing what people own. Rather, we could implement policies to increase future wealth of the poor.[287] It is ironic that those in favor of free trade flout Posner's concerns about wealth redistribution and its transaction costs. Many free traders claim it's beneficial because it raises living standards across the world and more fairly redistributes wealth.

Posner also claims that since people's marginal utility curves are "probably unknowable," there is a "plausible assumption" that marginal utility curves are the same across income groups. Given this assumption (which Posner may or may not agree with), equalizing incomes would "probably increase utility." Conversely, Posner asks the following:

> Yet mightn't income and the marginal utility thereof be, within limits anyway, positively correlated—on the theory that the people who work hard to make money and succeed in making it are, on average, those who value money the most, having given up other things such as leisure to get it?[288]

Posner's so-called theory above (which he may not agree with) does a disservice to the millions of Americans working hard to earn a living. The working poor of this nation work hard for their

[287] As a student of law and economics, it is not easy to question Posner's claims. My attempt is to point out the deficiencies of Posner's work. The questions I raise, it seems to me, are obvious and should have been anticipated.
[288] POSNER, *supra* note 262, at 470.

income and give up leisure time to earn it. Suggesting that they do not value money because they may not "succeed in making it" is insulting. It's a myth that anyone can work hard, make money, and be successful. It happens, but not very often.

Posner on Inequality and Crime in "Poor Countries"

Posner also discusses the impact of income inequalities on crime. Again, Posner's position is ambiguous:

> The opportunity costs of crime could be increases, and thus the incidence of crime reduced , by reducing unemployment, which would increase the gains from lawful work. The benefits of theft, and hence its incidence, might be reduced by a redistribution of wealth away from the wealthy. However, redistributing wealth might increase the incidence of theft, because the costs of protecting wealth may be smaller per unit of wealth, if wealth is concentrated, and also because it is easier to fence goods in common use and they are more widely possessed in an egalitarian society, and because a welfare system reduces the opportunity costs of crime by taxing legitimate income heavily…[289]

Whatever Posner is trying to say about crime and inequality becomes more clear almost 200 pages later in his book. Posner claims:

> It is true that crime rates frequently are low in poor countries, even though inequality of wealth is often much greater in those countries than in wealthier ones…It is where wealth is more widely distributed that criminals are presented with an abundance of attractive targets.[290]

Author Eduardo Galeano documents case after case on the effects of poverty. Galeano would argue with Posner's assertion that "crime rates frequently are lower in poor countries." In Africa, for instance, children are recruited by force and make up half the victims of recent African wars.[291] Latin America, Galeano claims, is a "slave economy masquerading as postmodern: it pays African wages, it charges European prices, and the merchandise it produces most efficiently is injustice and violence."[292] Statistics from Mexico City from 1997, show 80%

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[289] POSNER, *supra* note 262, at 219-220.
[290] *Id.* at 476 n.4.
[291] EDUARDO GALEANO, UPSIDE DOWN: A PRIMER FOR THE LOOKING-GLASS WORLD 16 (Picador USA 1998) (hereinafter GALEANO).
[292] GALEANO, *supra* note 290, at 29.

of the population poor, 3% rich, and "the rest in the middle."[293] Every year, according to Galeano, poverty kills more people than the entire Second World War.[294] In 1997, the murder rate in Latin America was six times the world average.[295] How trustworthy are crime statistics from Brazil when "the majority" of Rio de Janeiro's police force admitted to taking bribes in 1996?[296]

In 1997, there were 1.8 million prisoners in U.S. jails, which is twice the number of prisoners in 1986.[297] If, as Posner admits, economic inequality has grown (now to pre Great Depression levels) why are there so many prisoners? Under Posner's hypothesis, shouldn't the number of prisoners shrink as wealth becomes more concentrated? In the U.S. alone, personal debt is at record levels and real wages have remained stagnant. Galeano suggests that perhaps it's anxiety people feel about buying "and the anguish of paying," that explains why the U.S. population consumes half the "sleeping pills, tranquilizers, and other legal drugs sold in world, as well as half the illegal drugs."[298] If these numbers are accurate, they are deeply troubling for a nation that makes up only 5% of the world's population.

Most people, Posner notes, are risk averse. Why then, should people in the U.S. place trust in a global economy that may or may not be raising living standards around the world? Jobs in the movie industry (SAG members aside) are generally high wage, highly unionized, and usually provide good benefits like health insurance. There is a case for keeping film jobs in the U.S. not only because of the gross inequality in other nations such jobs might go to, but for the growing inequality in the U.S. and the decline of work safety and standards of living.

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[293] *Id.* at 29-30.
[294] *Id.* at 30.
[295] *Id.* at 80.
[296] GALEANO, *supra* note 290, at 82. In 1996, Rio de Janeiro's chief of police said, "The police were created to be corrupt."
[297] *Id.* at 107.
[298] *Id.* at 251.

Posner on U.S. Labor and Unions

In 1998, author Barbara Ehrenreich (who has a Ph.D. in Biology), inspired by the rhetoric surrounding welfare reform, wanted to find out if an American could prosper on jobs that paid above the minimum wage.[299] With this goal in mind, Ehrenreich spent the year by moving from Florida to Maine to Minnesota, where she lived in the cheapest available lodgings while working as a waitress, hotel maid, house cleaner, nursing home aide, and Wal-Mart salesperson. Ehrenreich provided the following evaluation of her jobs, which were "physically demanding":

> All of these jobs were physically demanding, some of them even damaging if performed month after month. The fact that I survived physically, that in a time period well into my fifties I never collapsed or needed time off to recuperate, is something I am inordinately proud of.[300]

In January 2004, the conservative Heritage Foundation conceded that real wages had been stagnant for some time and that the average real hourly earnings were slightly below $8.40 and in 1998 (the year of Ehrenreich's research) it was about $7.80.[301] Achieving economic success, Ehrenreich learned, was not realistic and even basic survival was difficult. Indeed, survival in the workplace is an issue for many U.S. workers.

When Ronald Reagan became President in 1980, the Occupational Safety and Heath Administration (OSHA) had only 1300 inspectors for ensuring the safety of over 5 million workplaces across the country.[302] By 1981, Reagan slashed the number of OSHA inspectors by 20%.[303] Furthermore, OSHA adopted a "voluntary compliance" policy, under which OSHA inspectors had to inspect a company's injury log before entering their plant.[304]

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299 BARBARA EHRENREICH, NICKEL AND DIMED 2 (Owl Books 2001) (hereinafter EHRENREICH).
300 *Id.* at 195.
301 Tim Kane, *The Real Story on "Stagnant" Wages*, (April 27, 2004) *available at* http//:www.heritage.org/Research/Economy/wm491.cfm.
302 ERIC SCHLOSSER, FAST FOOD Nation 179 (Houghton Mifflin Company 2001) (hereinafter SCHLOSSER).
303 *Id.*
304 *Id.*

As author Eric Schlosser noted, "OSHA's voluntary compliance policy did indeed reduce the number of recorded injuries in meatpacking plants. Id did not, however, reduce the number of people getting hurt."[305] Over a three-month period in 1985, the Iowa Beef Packing company (IBP) kept two injury logs: one for the slaughterhouse (located in Dakota City, Nebraska) and one for OSHA.[306] The first log recorded 1800 illnesses and injuries at the Nebraska plant. The log given to OSHA recorded only 160—"a discrepancy of more than 1,000%."[307]

A contributing factor to the mounting numbers of injuries (other than fraud and the diminishing threat from OSHA) was, according to Schlosser, a decline in union membership:

> In the days when labor unions were strong, workers could complain about excessive line speeds and injury rates without fear of getting fired. Today only one-third of IBP's belong to a union. Most of the nonunion workers…are generally employed 'at will.' That means they can get fired without warning, for just about any reason.[308]

Posner does give a balanced discussion on the pros and cons of labor unions. Posner's analysis of labor unions, however, does not comport to unions in the motion picture industry. For instance, Posner says, "losers from the effect of unionization on wages are consumers in unionized industries" because "those industries will pass along to their consumers a portion, at least, of their higher labor costs."[309] As aforementioned, the increasing pace of runaway production due to government incentives or cheap labor has not resulted in cheaper DVD's or movie theatre tickets or even cheaper movie t-shirts, which (of course) are also made abroad. Worse yet, new technology like HD-DVD and Blu-Ray players are not affordable to average consumers, who have spent billions on DVD players and titles.

There is little support that free trade/globalization reduces prices for consumers in the movie industry specifically. Furthermore, even those in favor of free trade admit its drawbacks:

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[305] *Id.*
[306] SCHLOSSER, *supra* note 201, at 180.
[307] *Id*. at 180.
[308] *Id.* at 174.
[309] POSNER, *supra* note 262, at 336.

> According to historical data, a sizable portion of workers who lose their jobs because of free trade do not easily find new ones or must accept jobs with lower wages. From 1979 to 1999, roughly 30 percent of the people who lost jobs as a result of cheap imports in sectors other than manufacturing had not found jobs a year later. And for those who found new jobs, the wages in the new jobs varied considerably. About a quarter actually found better-paid jobs, and on average, wages in the new jobs were about the same as the wages in the jobs that had been lost. Nevertheless, 55 percent took lower-paid jobs, and about 25 percent took pay cuts of 30 percent or more.[310]

The economic picture of the world today is not unlike that of 1900 to 1929. The gap between the worlds rich and poor today is almost the same as before the Great Depression and workers wages, benefits and safety have slowly eroded. Is history repeating itself?

V. Runaway Production: Solutions and Problems

Tax Incentives As Subsidies: Corporate Welfare?

The FTAC is opposed to foreign and domestic subsidies, which they label "corporate welfare." The use of subsidies is a nebulous topic and an in-depth discussion of the economic worth of subsidies is well beyond the reach of this paper.[311] Scratching the surface of subsidies as applied to the motion picture industry is, however, valuable. Leftist activist Ralph Nader first coined the term "corporate welfare" in 1956. The use of corporate welfare (subsidies, tax incentives, grants etc.) is not, however, a left-right issue. In June 1999, Stephen Moore, a conservative economist with the CATO Institute and co-founder of the right-wing Club for Growth, testified before the U.S. House Budget Committee on the issue of corporate welfare, which Moore called, "egregious subsidies."[312]

Moore addressed two arguments used by subsidy proponents:

> Although it is said that corporate subsidies are necessary so that U.S. firms can compete with their subsidized rivals in other nations, more than 90 percent of American businesses manage to stay in

[310] McKinsey and Company, *Exploding the Myths About Offshoring*, (April 2004).
[311] Corporate subsidies are now conmen in political rhetoric. If one eliminates the word "corporate" from the discussion, might subsidies be viewed as a social good? Government subsidization of healthcare research, the arts, green technology etc. If a small corporation that manufactures solar panels is subsidized by the government, would Nader, Moore and FTAC remain opposed to them?
[312] *Corporate Subsidies in the Federal Budget: Testimony Before House Budget Committee*, 106th Cong. (1999) (Testimony of Stephen Moore, Director of Fiscal Policy Studies, CATO Institute).

> business without ever receiving government grants, loan guarantees, insurance, or airplane seats on Commerce Department trade missions around the globe. But they pay higher taxes, which lowers their competitiveness, to support those businesses that do.
>
> Nor are these programs needed to save jobs. The Commerce Department's Advanced Technology Program is advertised as a job producer. But from 1990-94 the ATP provided more than $250 million to eight firms--Amoco Corp., AT&T, Citicorp, DuPont, General Electric, General Motors, IBM, and Motorola. Over those five years, these firms reduced their total U.S. workforces by 329,000.[313]

Moore makes a good argument against corporate subsidies in general, but the argument weakens when applied to the movie industry. For instance, tax incentives for movies benefit numerous small businesses (special effects firms, costume manufacturers etc) whose collaborative effort results in a major motion picture. Further, because the Hollywood studio system no longer exists, the movie arms of major corporations do not have large workforces to layoff (though the special effects house that no longer gets studio contracts might have to reduce their workforce).

Louisiana's tax incentives provide proof that subsidies draw movies. Thus, when it comes to movies, tax incentives (at the least) create jobs. The reality is that subsidies, for better or worse, exist at home and abroad and are needed to keep the movie industry in the U.S. Moreover, if generous subsidies and tax incentives fail to pass, the U.S. and other industrialized nations may lose the film industry to third world nations like Romania and Morocco.

Encouraging Signs From the States

Clearly Louisiana's legislation has been wildly successful even in the aftermath of Hurricane Katrina. Other states are taking notice. New Mexico, for example, has gone beyond offering tax subsidies to establishing a fund to invest in movies. New Mexico offers no-interest loans of up to $7.5 million, repayable over five years, so long as filmmakers do most of their filming in the state and hire a crew made up of at least 60% New Mexico residents.[314] New

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[313] *Corporate Subsidies in the Federal Budget: Testimony Before House Budget Committee*, 106th Cong. (1999) (Testimony of Stephen Moore, Director of Fiscal Policy Studies, CATO Institute).

[314] 2005 CEIDR Report, *supra* note 6, at 65.

Mexico also offers a 25% tax rebate for every dollar spent in the state.[315] Perhaps the best incentive New Mexico offers is a mentor program that allows a 50% salary rebate for advancing the skills of crew members hired for the first time or promoted to higher positions.[316]

As a result of these programs, within two years New Mexico went from having zero movies filmed to 25 movies.[317] In 2005, in an effort to remain competitive, New Mexico enacted several new tax breaks and raised the loan amount to $15 million.[318]

Cost to state treasuries is the fundamental drawback to film incentives. At a time when many states face large budget shortfalls, it remains unclear if film incentives can be justified.[319] On the one hand, New Mexico's incentives are not draining the state's treasury and produce positive economic impacts. For example, as of August 2006, New Mexico had loaned $146 to film producers since the loan program was approved in 2002.[320] As a result of New Mexico's loans, movie productions paid a total of $36 million to 2,256 New Mexico residents (i.e. not the Hollywood talent) and spent $113 million within the state.[321] In sum, states and local governments study the various state incentives and perform a cost benefit analysis before hastily enacting poorly thought out legislation.

Further compounding the cost-benefit problem is the lack of evidence, for the time being, that the economic activity generated by movie productions will offset the cost to the states. It is

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[315] Author's phone interview with Jennifer Schwalenberg of the New Mexico Film Office, September 15, 2006.
[316] 2005 CEIDR Report, *supra* note 6, at 65-66.
[317] *Id.*
[318] *Id.*
[319] In Louisiana for example, in recent years the state has given out roughly $100 million in credits. According to Greg Albrecht, chief economist at the Legislative Fiscal Office in Baton Rouge, taxes generated by film activity will make back less than one-fifth of the credits. Thus far, Louisiana's economic development team has ignored Albrecht. They rhetorically ask what other industry can create $20-an-hour jobs for residents without college degrees? Furthermore, Albrecht's detractors claim movie subsidies are small change compared with the $1 billion that Alabama and Mississippi, two other poor southern states, have spent luring car factories. *see e.g.* The Economist, *Thespians in Louisianana*, April 14, 2005.
[320] New Mexico Film Investment Program Overview as of August 2006, *available at* http://www.state.nm.us/nmsic/PDF%20files/NM_Film_Investment_Program_8.31.06_Final.pdf
[321] *Id.* The numbers reported by New Mexico were for actual dollars spent. NO multiplier effect was calculated.

possible that revenue streams flowing back to the state from an increase in film production may take several years.

California, home to Hollywood, is an anomaly. The state provides no tax incentives or subsidies whatsoever. Some state lawmakers have tried to enact legislation to address runaway production and Governor Arnold Schwarzenegger voiced his support, albeit tepid, for such legislative efforts. Despite a lack of any state incentives, California seems to be faring well. In 2005, 61% of the budgets for domestic theatrical releases were spent in California as opposed to 50% in 1998. Conversely, in 1998, 62 films were made in California, but dropped to 46 films in 2005.

In sum, more money was spent on California films in 2005 than 1998, but the total number of films made in California in 1998 than 2005. Perhaps it's just a tradeoff. For the time being, California may not feel the need to enact legislative handouts to the entertainment industry because Hollywood remains the epicenter of filmmaking and the hundreds of allied businesses (such as special effects shops) that create an unparalleled entertainment infrastructure. For now.

Federal Jobs Creation Act of 2004: Did the Entertainment Industry Need It?

While this author generally supports film subsidies if done well (New Mexico, for example, has a well-conceived plan whereas Louisiana may just be giving away the bank for short term benefits), there have been some failures that give weight to Stephen Moore's arguments. Passage of the American Jobs Creation Act of 2004 is an example of unnecessary handouts. Under the law, film and television productions can write-off 100% of incurred costs if the following qualifications are met: (1) 75% of total compensation went to American actors, directors, and other personnel involved in the production process; (2) the production must be performed in the United States; and (3) the aggregate cost of the film or television production must be at or below $15 million.[322]

The law was unnecessary. In 1999, 87% of films with budgets under $15 million were already shot in the U.S. (compared to 13% in Canada).[323] In 2001, 67% of films with budgets under $15 million filmed in the U.S. (compared to 35% in Canada, which was down from 52% in 2001)[324]. In short, the federal legislation targeted low budget films that were not running away.

In fact, the Republican-controlled Congress arguably showed its deep-rooted animus towards Hollywood during the passage of the Federal Jobs Creation Act. When the MPAA selected Dan Glickman, a former Democratic Congressman and President Clinton's secretary of agriculture, it angered key Republican leadership in the House and Senate, who felt a Republican should have been appointed.[325] It was rumored that Glickman's hiring caused Republican to take retribution against Hollywood. Led by then-Majority Leader Tom Delay (R-TX), House GOP members on the conference committee voted as a block to oppose $1 billion in tax credits in a $140 billion tax bill because they were too expensive.[326]

Senator Diane Feinstein (D-CA), was furious that the motion picture industry was singled out in the legislation, noting the breaks on other businesses such as a NASCAR racetrack owners $101 million write-off for improvements and Home Depot's $44 million tariff suspension it owes for importing Chinese ceiling fans.[327] Feinstein claimed the final legislation will cost the motion picture industry $5 billion over 10 years to accounting for revenues.[328]

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322 Katharine Davidson and Mark Saulino, *The Jobs Creation Act of 2004 and the Entertainment Industry*, LOS ANGELES LAWYER (May 2005).
323 Stephen Katz, *The Migration of Feature Film Production From the U.S. to Canada and Beyond* 6, CEIDR (2001).
324 *Id*.
325 Brody Mullins, *Studios Take Hit in Tax Bill*, ROLL CALL, (October 7, 2004).
326 *Id.*
327 S. Conf. Rep. No.S-11191, at S11205 (2004).
328 *Id.* The Republican changes to the forced the motion picture industry to adopt unified accounting. For example, an expensive film produced in the U.S. that loses money will have to lump its losses with all other revenues such as

Federal Legislation That Would Help

The Louisiana and New Mexico models show how proactive legislation foster the movie industry at highly successful levels.. Enactment of similar legislation at the federal level, especially when combined with state incentives, could help stem the flow of runaway productions to such an extent that a new economic boom that provides Americans with highly skilled and highly paid jobs in an field that may be the last distinctively American industry left. As the 2005 CEIDR report notes, "state incentives are working," but there are caveats:

> U.S. state incentives are working, but it is not clear if they are they keeping production from leaving the U.S., or just moving them from one U.S. location to another, especially if a location doesn't offer any incentive. State incentives on average are 15% of qualified labor which means that a $25.00 per hour worker will cost the producer $21.25 an hour, comparatively, Canada saves the producer an additional $6.76 (27%), Australia $2.61 (10%), and New Zealand $7.54, (30%).[329]

While the CEIDR report acknowledges the cost to the federal treasury, it offers a plan where the benefits outweigh the costs:

> While a U.S. Federally-based incentive would clearly have a cost to the Treasury, it is likely that it would be a sound investment in our Country's future and that results and benefits would significantly outweigh the cost. By way of illustration…a 16% U.S., labor based tax credit could gain 33,780 jobs and have a value of $3 billion to the economy, at a cost of $203 million, which equals $1,200 per job. [330]

The CEIDR report concludes with the following eloquent remarks that lawmakers would do well to heed:

> In the world today, globalization is an economic fact of life. Companies across the world are seeking lower costs of manufacturing, distribution and operations. The growth of foreign production of U.S. originated entertainment product, however, seems, to a significant measure, to be driven by economic subsidies to producers as a conscious decision by countries seeking well-paying jobs in a clean industry.
>
> The question is with any job leaving the U.S. is, where and when does it stop. When Canada was proposing their federal incentive their rallying call was, "These are the jobs your children want." The U.S. must decide it they want feature film production careers for their children, and their children's children.[331]

DVD sales and theme parks. Thus, assuming a film loses $50, requiring unified accounting will cost the studio $2.6 million in additional taxes.

[329] 2005 CEIDR Report, *supra* note 6, at 70.

[330] 2005 CEIDR Report, *supra* note 6, at 74.

[331] *Id.* at 75.

Other Solutions

Many states have no film commissions and those that do have slashed their budgets because of budget shortfalls and other reasons. The United States is the only major nation that does not have an organization at the federal-level to address the motion picture industry.[332] The Commerce Report explains the value of a national film commission:

> The commission could coordinate with state film commissions on how to attract film production through streamlining bureaucratic processes, simplifying access to government-owned property for filming, and standardizing licensing and permitting procedures. It could help to resolve problems relating to film production and employment data and assist with uniform data collection. Finally, the commission could publish periodic economic analyses of the industry.[333]

Other ideas to alleviate the problem of runaway productions include: government sponsored training programs to ensure a steady supply of artists and film technicians in the U.S.; Congressional hearings on runaway productions so lawmakers can gain a better understanding of the issue and how it affects local communities; and better collection of industry data at the national level to ensure better accuracy.

Conclusion: U.S. Motion Pictures--To Be, or Not to Be?

The movie industry is a national treasure that many Americans take for granted. Simultaneously, many in America would agree that movies, studios, and Hollywood (as a physical location and as a part of the American psyche) are treasures the nation should not export. The U.S. is in a position to compete with Canada and other nations that offer incentives and it must do so before runaway productions migrate to third world nations, which can beat the United States in a race to the bottom. This paper has highlighted the economic consequences of losing film productions and the dire conditions that exist in the third world—conditions that globalization has arguably made worse. The U.S. should condemn the practices of third world

[332] *Id.* at 89.
[333] 2005 CEIDR Report, *supra* note 6, at 89.

governments that do not improve the lives of their residents as well as condemn the multinational corporations that perpetuate the status quo. Admittedly, these are optimistic aspirations.

That said, Canadian Entertainment Attorney Joe Sisto offers assesses the sobering reality of runaway productions and the failure by both the Clinton and Bush administrations as well as Congress to pass measures to stop runaway production:

> American film producers are in the business of producing film -- emphasis on 'business.' American producers admit that the costs of producing feature-length motion pictures in California has become so prohibitively expensive that it simply makes good business sense to seek out viable alternatives. Many worthy projects would otherwise simply die at the development stage.
>
> In this light, the runaway production seems a rather tame and toothless beast when compared, for instance, to the practice of U.S. auto manufacturers setting up shop in right-to-work states in order to avoid the unions or in South America to gain access to cheap labor. U.S.-based pharmaceutical, energy and aerospace companies typically operate across borders as well. The same applies to banking, insurance and other financial institutions. There is a plethora of American companies in a variety of industries that have moved permanently to Mexico and the Far East to reduce their labor costs.
>
> Ultimately, producers are in the business of making films and like every other sector of industry, are not responsible for ensuring the survival of labor unions or subsidizing municipal operating budgets. Producing a top-quality and commercially viable film or TV show at a significant discount simply makes good business sense. And in fairness, it would seem perfectly reasonable for U.S. government officials to attempt to level the playing field by offering financial incentives to producers similar to those offered in other countries.
>
> The market will dictate where projects are shot. The issue is not one for independents alone -- the majors, themselves subsidiaries of multinational corporations, answer to shareholders and are no longer beholden to Hollywood as a geographical must. The need to stretch a dollar to its conceivable limit has inevitably led film and TV producers, among many other 'manufacturers,' beyond U.S. borders.[334]

Sisto's analysis is accurate. It is not, however, too late for the U.S. government "to attempt to level the playing field." Americans, to borrow a line from Peter Finch's character in 1976's "Network," need to say "we're mad as hell and we're not gonna take this anymore." The politically incorrect yet pragmatic solution is getting politicians to treat movie incentives like any other pork barrel project. If a federal or state incentive results in a movie being made in a

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[334] Joe Sisto, *Outsourcing the Movies: Runaway Productions of American Film and Television in Canada*, ENTERTAINMENT AND SPORTS LAWYER, (Spring 2004).

particular community (which benefits economically as a result), the constituency are likely to reelect the politician that backed the incentive.

Unfortunately, most Americans are completely unaware of runaway production. Perhaps the magic of movies has been too good at tricking Americans into thinking that American films are made here. Employees at Wyoming's Department of Tourism know that American audiences were fooled after thousands of people across the nation called the department wanting to know where Brokeback Mountain (the fictional location of the film "Brokeback Mountain," which was set in Wyoming) was.[335] But it wasn't filmed in Wyoming; it was filmed in British Columbia. There is little hope that runaway production will be the leading news story on America's media outlets because the same large conglomerates that own the studios own most of the news outlets. In 2006, as of this writing, there is a glimmer of hope that the public is taking notice of runaway productions.

The movie at issue is "Dallas," a big screen version of the long-running television series. Film commissioners from Toronto, Louisiana, and Florida were attempting to lure filming away from Dallas.[336] Dallas Mayor Laura Miller said, "The thought of 'Dallas' being made in Toronto is not a good idea."[337] The Dallas Film Commission fought back, launching a "Shoot JR in Dallas" public relation campaign to lure the film's production.[338] In addition, the Dallas Film Commission asked private sector businesses in Dallas to offer incentives for the film. The film's producers estimate they would spend $30 million on the movie, which would have an economic impact on the Dallas area of $62.6 million.[339] The Dallas Film Commission estimates that the

[335] Dan Harris, *Finding Brokeback; Is it Real?*, ABC News Transcripts, March 5, 2006.
[336] *Dallas Urges Local Filming of TV Spin-off*, ASSOCIATED PRESS, March 9, 2006.
[337] *Id.*
[338] Press Release, Dallas Film Commission, *What it Means to Have the Movie Dallas shot in Dallas* (on file with author).
[339] *Id.*

film would create 300 direct jobs and 650 indirect jobs.[340] Increased tourism and free publicity would also benefit the city. As the Dallas Film Commission says, "This is marketing we can not afford to buy. The true impact of this is immeasurable."[341]

The Dallas Film Commission's web site urges city residents to help by purchasing hats, shirts and bumper stickers bearing the "Shoot JR in Dallas" slogan. The Dallas Film Commission claims the city has lost 24 productions with budgets totaling $500 million.[342] The Dallas Film Commission says losing the film would be a "black eye on the industry…why shoot a film here if 'Dallas' won't shoot here?"[343]

The Texas State Legislature passed a bill in 2005 to offer a $750,000 rebate for production costs, but the initiative remains unfunded.[344] Michael Costigan, a co-producer of the film, told the local press that he would like to "make the whole film in Dallas" but cautioned, "It's now going to come down to really making the numbers work with our studio (20th Century Fox)."[345]

As of this writing, Dallas has received good news. There is no further talk of filming in Canada or Florida. In June 2006, 20th Century Fox informed the Dallas Film Commission they planned to shoot in Dallas for four weeks, instead of the four or five days of filming 20th Century Fox initially planned.[346] So, while still tentative, Dallas will get four weeks of filming and Shreveport, Louisiana will get eight.[347] Janice Burklund, Director of the Dallas Film

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[340] *Id.*
[341] Press Release, Dallas Film Commission, *What it Means to Have the Movie Dallas shot in Dallas* (on file with author).
[342] *Id.*
[343] *Id.*
[344] *Dallas Urges Local Filming of TV Spin-off*, ASSOCIATED PRESS, March 9, 2006.
[345] *Id.*
[346] Ed Clark, *Big D Gets Bigger Role in 'Dallas' Filmmakers Expand Local Shoot to 4 Weeks*, THE DALLAS MORNING NEWS, June 13, 2005at A1.
[347] *Id.*

Commission, said "The public awareness that we've gotten out of this has been a big deal. I think it's kind of worked as an ad campaign."[348]

[348] Ed Clark, *Big D Gets Bigger Role in 'Dallas' Filmmakers Expand Local Shoot to 4 Weeks*, THE DALLAS MORNING NEWS, June 13, 2005at A1.