

THROUGH THE LOOKING GLASS: RUNAWAY PRODUCTIONS AND “HOLLYWOOD ECONOMICS”

Adrian McDonald*

I. INTRODUCTION

This Article¹ will discuss the issue of runaway production and use it 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 will be discussed so the reader can understand how runaway production, a major issue itself, is one piece of the Hollywood puzzle. Specifically, this Article will attempt to study runaway productions using the “Law and Economics” approach of Judge Richard Posner as outlined in his texts.

After the destruction caused by Hurricane Katrina, Louisiana found an unlikely industry coming to the area that created new jobs, the movie industry. In 2005, six movies filmed in New Orleans, which created over 600 new jobs.^{2 3}

However, Hollywood’s perceived altruism may be somewhat misplaced. While it is commendable that recent film production created 600 new jobs in New Orleans, it is naive to think that the film industry’s presence in New Orleans is entirely altruistic. In 2005, before Hurricane Katrina, movies filmed in Louisiana had a combined budget of \$550 million.⁴ Filming in Louisiana is not about altruism; it is about economics.

Louisiana State House Bill 731 (signed by the Governor as Act No.

* J.D., 2007, South Texas College of Law. The author would like to thank Professor Drury Stevenson, South Texas College of Law, for his inspiration and advice, and Professor Claire Wright, Thomas Jefferson School of Law, for her comments and advice.

1. This Article is also printed in *Currents International Trade Law Journal* (2007).

2. Missy Schwartz, *Southern Comfort*, ENT. WKLY., March 24, 2006, available at <http://www.ew.com/ew/article/0,,1174193,00.html>.

3. Louisiana will be used throughout this Article as a quasi case study for runaway productions.

4. *CNN American Morning: Filming in New Orleans* (CNN television broadcast Mar. 20, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0603/20/ltn.06.html>).

456), allows any motion picture production company that spends at least \$250,000 to make a movie exempt from all state sales and use taxes.⁵ 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, then the taxpayer is allowed a 15% tax credit for their actual investment.⁶

With Louisiana's generous incentives in place, ten films were in production in Louisiana in 2005, up from four in 2004 and only one in 2002.⁷ Although Hurricane Katrina gave Hollywood the chance to spin itself as part of the rebuilding effort, it seems Hollywood executives were actually motivated to film in Louisiana because of tax credits. Dating back to 2002, Louisiana's previous legislative incentives also had dramatic results for the state. From 2002 to 2004, production budgets for movies, television shows and commercials filmed in Louisiana grew from \$11.8 million in 2002 to \$355 million in 2004—an increase of 2,850%.⁸

While Louisiana's growth in movie production in recent years is arguably positive for the state and perhaps Hollywood's image as well, lawmakers in Baton Rouge should be wary. Foreign nations and other states are competing for a share in the motion picture industry; by competing for runaway productions.

A. *Scope of the Article*

This Article is not an exhaustive discussion of runaway production, which is continuously studied by other sources—many of which are biased and critique one another. Large amounts of industry data have been compiled and complex economic models have been applied to reach varying conclusions. This Article 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

5. H.B. 731, 2005 Reg. Sess. (La. 2005).

6. *Id.* (These incentives all had different start/end dates of when they were in effect, ranging from January 1, 2004 until July 1, 2010).

7. *Hollywood: Runaway Production Map*, <http://www.calendarlive.com/printedition/calendar/la-hollywoodmap-fl,2,3467022.flash> (last visited Apr. 5, 2007) [hereinafter *Runaway Production Map*] (click on Louisiana and then click on "U.S. Movies in this State").

8. STEPHEN KATZ, 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 (2006) [hereinafter 2005 CEIDR REPORT].

and around the world, it serves as an excellent starting point for those, such as 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 Article is divided into five parts. Part I provides an overview of the movie business and how revenue streams and content delivery have changed. This section also explores the impact of movie piracy of DVDs, and how Wal-Mart has usurped Blockbuster video and the movie 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 2006 data on runaway production, which along with other evidence lends weight to the main argument of this paper: runaway productions are draining the United States economy of a vital, quintessentially American industry. Motion picture employment is surveyed and the negative cultural impacts of runaway productions are 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. The two main methods to stop runaway productions, (1) the subsidy to fight subsidy approach and (2) questioning the legality of film subsidies under the agreement that established the World Trade Organization (WTO), 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 that the United States government could take to further combat the decline of the motion picture industry within the States.

II. HOLLYWOOD TODAY

A. *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."⁹ The Commerce Report claimed the film industry

9. OFFICE OF PUB. AFFAIRS, U.S. DEP'T OF COMMERCE, COMMERCE SECRETARY

produced over 270,000 jobs, “more than the number of workers directly employed in the steel industry.”¹⁰ In 2003, United States Trade Representative Robert B. Zoellick said that the United States copyright industry, which includes members of the motion picture and recording industries, theater owners, video game programmers and television programmers, employed approximately 4.7 million Americans and accounted for more than 5% of the United States GDP.¹¹

Industry figures¹² show that 2005 domestic box-office sales, based on tickets sold at the movie theatres, remained near \$9 billion, compared to \$7.66 billion in 2000.¹³ Global box-office sales, including the United States were over \$23 billion, which was 46% higher than the 2000 mark of almost \$16 billion.¹⁴ The number of movies released in 2005 reached 549, compared to 528 in 2004 and 411 in 1995.¹⁵

While domestic box-office revenues have increased steadily over the

MINETA RELEASES REPORT ON THE IMPACT OF THE MIGRATION OF U.S. FILM AND TELEVISION PRODUCTION 5 (2001), available at <http://www.ita.doc.gov/media/migration11901.pdf> [hereinafter THE COMMERCE REPORT].

10. *Id.*

11. Press Release, Office of the U.S. Trade Representative, Zoellick Joins Entertainment Industry Launch of Free Trade Coalition (Mar. 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=.

12. 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.” Edward Jay Epstein, *The World According to Hollywood*, SLATE, Oct. 31, 2005, <http://www.slate.com/id/2129112>. According to Edward Epstein, “[i]nstead of supplying the *New York Times* with the actual numbers, 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.” *Id.* 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 “the motion picture industry employs nearly 750,000 people nationwide”. See *Economies*, Motion Picture Association of America, http://mpaa.org/piracy_Economies.asp; *Digital Content and Enabling Technology: Satisfying the 21st Century Consumer: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. on Energy & Commerce*, 109th Cong. 30 (2006) (statement of John Feehery, Executive Vice President, External Affairs, Motion Picture Association of America) [hereinafter Feehery Testimony]. The 750,000 number is drastically higher than the MPAA’s own figures from 2004, when it projected over 367,000 jobs. MOTION PICTURE ASSOCIATION OF AMERICA, WORLDWIDE MARKET RESEARCH, U.S. ENTERTAINMENT INDUSTRY: 2004 MPA MARKET STATISTICS 27 (2004) [hereinafter MPAA 2004 STATISTICS] (on file with author).

13. MOTION PICTURE ASSOCIATION OF AMERICA, WORLDWIDE MARKET RESEARCH, U.S. THEATRICAL MARKET: 2005 STATISTICS 4 (2005) [hereinafter MPAA 2005 STATISTICS] (on file with author).

14. *Id.* at 5.

15. *Id.* at 11.

past five years,¹⁶ the number of tickets sold has not. In 2000, U.S. admissions were 1.42 billion¹⁷. In 2005, however, domestic admissions had dropped to 1.4 billion.¹⁸ Yet, compared to other recreational alternatives such as theme parks and major sporting events, with admissions of 334 and 134.5 million respectively,¹⁹ a night at the movies is a preferred and affordable activity for many Americans. In 2005, the average price of a movie ticket was \$6.41, compared to \$33.54 for a theme park and \$21.00 for a baseball game.²⁰

Despite relatively stable admissions since the 1980's, the number of screens doubled from 17,590 in 1980 to 36,594 in 2004.²¹ The tremendous growth of movie screens in the United States and the modest increase of admissions over the same period are perplexing.²² Why are there so many screens? The answer lies in the growth of megaplexes—theatres with fifteen or more screens. 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 7744 to 6012.²³ For historical contrast, in 1945 there were 18,413 movie theatres.²⁴

Internationally, American films dominate the markets of other countries. Foreign governments fear the American dominance in this industry for various reasons and are attempting to foster their own local film industries.²⁵ Thus far, Hollywood is winning the battle. In 2002, 70% of moviegoers in the European Union spent their money on U.S. films.²⁶ Conversely, foreign language films drew one-half of 1% of the U.S. box

16. While the box office gross did increase from 2000 to 2005, hitting close to \$9 billion in 2005, Edward Epstein reveals that when the box office gross sales from 1948 is adjusted for inflation it was \$7.8 billion in 2004. See *Id.* at 2; Edward Jay Epstein, Hollywood by the (Secret) MPA Numbers, <http://www.edwardjayepstein.com/mpa2004.htm> (last visited Apr. 6, 2007).

17. MPAA 2005 STATISTICS, *supra* note 13, at 6.

18. *Id.* While box office admissions have risen 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 (65% of the population) paid to go see a movie on weekly basis, as oppose to 30 million Americans (roughly 10% of the population) in 2004. Furthermore, in 1948, theaters sold 4.7 billion movie tickets for the entire year. Eleven years later, in 1958, most American homes had TV sets--a "rarity" in 1947--the number of tickets sold plunged to 2 billion. See *Id.* at 24; Edward Jay Epstein, *The Vanishing Box Office*, SLATE, July 5, 2005, <http://www.slate.com/id/2122000/>.

19. MPAA 2005 STATISTICS, *supra* note 13, at 7.

20. *Id.* at 26. Baseball game was the cheapest average price of all sporting events. A hockey game was \$45; basketball game \$47.50; and football game \$57.50.

21. MPAA 2004 STATISTICS, *supra* note 12, at 23.

22. See *Id.* at 8, 23.

23. *Id.* at 25.

24. MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 48 (1960).

25. Mark Litwak, *Runaway Home*, L.A. LAWYER, May 2004, at 24.

26. *Id.* at 26.

office.²⁷ In 2002, Jack Valenti, then-president of the Motion Picture Association of America (MPAA), told Congress that the movie industry has “a surplus balance of trade with every single country in the world. . . . No other American business enterprise can make that statement.”²⁸

B. *When Hollywood Comes to Town*

Determining the importance of the movie industry in terms of employment is difficult due to conflicting numbers from various sources. Employment numbers are discussed later, but they range from 127,000 (1996) to 750,000 (2006).²⁹ A movie’s economic impact is, perhaps, more insightful if studied at the community level.

Most of the benefits communities receive from filmmaking are only occasionally mentioned in newspapers and law review articles as anecdotal evidence. Thus, many stories are splintered across many sources, and their impact is greatly reduced.

The following is a compilation of “anecdotal stories” that, when viewed in total may leave the reader with a greater sense of a movie’s impact on a local economy:

- The film *Tin Cup*, a movie about golf starring Kevin Costner, filmed in Houston, Texas for ten weeks. Production expenses

27. ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY 33 (1999). In the 1970’s, the percentage of foreign films accounted for 10% of the United States box office; in the mid 1980’s foreign films accounted for roughly 7% of the United States box office. The fact that foreign films now account for less than 1% of the United States box office is discussed by Robert W. McChesney, a research professor at the Institute of Communication Research at the University of Illinois at Urbana-Champaign. McChesney claims the drop of foreign films as a percentage of the United States box office was a result of the dominance of “chain owned megaplex movie theatres.” The megaplexes, 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 profit” 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.

Id. at 32-33.

28. *Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 12 (2001) (statement of Jack Valenti, Chairman and CEO, Motion Picture Association of America).

29. See Martha Jones, *Motion Picture Production in California*, California Research Bureau, March 2002 at 1; *Economies*, Motion Picture Association of America, http://mpaa.org/piracy_Economies.asp.

included \$22,000 for dry cleaning, \$121,000 for hardware and lumber, and \$498,000 for location fees to private businesses.³⁰

- Kevin Costner's *Field of Dreams* has been a boon for Iowa. The Iowa baseball diamond hidden in the cornfields has drawn 100,000 tourists.³¹
- Clint Eastwood's *Bridges of Madison County*, which was also filmed in Iowa, increased tourism by 20% in one year.³²
- In 2003, the Mississippi Film Office created "The Movie Map of Mississippi" to guide visitors to film locations in the state.³³ More than 40 movies and 24 television programs have been filmed in Mississippi.³⁴ Several years ago, the big screen adaptation of John Grisham's novel *A Time to Kill* was filmed in Mississippi and the production issued 10,000 paychecks to Mississippi's residents.³⁵
- 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 impact of more than \$21 million."³⁶
- A study by the Dallas Film Commission found that "an average of 300 different non-film businesses" benefited by providing services to film productions.³⁷ 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 phone use, \$50,400 on janitorial services, \$22,000 on freeway tolls, and \$6,000 on local transportation.³⁸
- The 2006 blockbuster *Superman Returns*, which was filmed in Australia, injected \$80 million into the local economy, created 800 new jobs, and employed 10,000 people during its eight-month shoot.³⁹

30. Gail Frommer, *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).

31. Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 LOY. L.A. ENT. L.J. 1, 8 (1996).

32. *Id.*

33. Press Release, Mississippi Film Office, Mississippi Film Office Unveils First Mississippi Film Tourism Map (Jan. 8, 2003) (on file with author).

34. *Id.*

35. *Id.*

36. Jones, *supra* note 29, at 31 (citing Arthur Anderson Report).

37. THE COMMERCE REPORT, *supra* note 9, at 22 (citing Dallas Film Commission).

38. *Id.*

39. Geoff Boucher, *Up, up . . . and away; Superman may be quintessentially American, but it's cheaper to film him in Australia*, L.A. TIMES, Dec. 31, 2005, at E1.

1. Hollywood's "Real Numbers"

The impressive box-office returns domestically and worldwide, the growth of admissions--though modest over the past 20 years, the proliferation of movie screens, and the dominance of American films in foreign markets paints a rosy picture of the motion picture 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 on its opening weekend, 50% or more of the gross revenue can go to the theater.⁴⁰ The theater remits the balance to the studio, which in turn makes payments to others.⁴¹

Edward Jay Epstein, who writes about Hollywood economics, explains the harsh reality of 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.⁴²

If studios lose money at the box-office, then how does Hollywood make money? Epstein claims that the studios "spoon-feed" 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."⁴³ The major studios secretly supply their "real numbers"--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."⁴⁴ The MPAA then compiles the information into a privately circulated document amongst the major

40. Edward Jay Epstein, *Gross Misunderstanding*, SLATE, May 16, 2005, <http://www.slate.com/id/2118819/>.

41. Edward Epstein provides an example of the so-called "gross misunderstanding": "Touchstone's *Gone in 60 Seconds*...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.*

42. *Id.*

43. *Id.*

44. *Id.*

studios called the “All Media Revenue Report.”⁴⁵

According to authors Jonathan Bing and David Hayes, a new Hollywood “culture” exists that helps explain the confidential revenue reports mentioned by Epstein:

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 finances⁴⁶

C. *Hollywood Economics 101: DVD Sales and Wal-Mart*

Epstein’s access to past “All Media Revenue Reports” reveals that DVD sales increased dramatically in recent years and are the leading revenue stream for the motion picture industry.⁴⁷ In 2000, 13 million American households owned DVD players and 174.4 million films were 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.⁴⁸ Average DVD movie prices 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 \$90⁴⁹ in 2004.⁵⁰

By 2003, home entertainment sales, mainly from DVD sales, totaled \$33 billion and studios “were taking in almost five times as much revenue

45. *Id.*

46. DADE HAYES & JONATHAN BING, *OPEN WIDE* 14 (2004).

47. Epstein, *Gross Misunderstanding*, *supra* note 40 (click on the link in the parenthesizes where it says “to see these private date click here”). 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 Corp., Annual Report (Form 10-K), at 47 (Oct. 1, 2005), *available at* <http://sec.gov/Archives/edgar/data/1001039/000095014805000128/v14978e10vk.htm#102>.

48. MPAA 2005 STATISTICS, *supra* note 13, at 28-29.

49. While the “average cost” of a DVD player was \$90 in 2005, retail giant Wal-Mart sold DVD players as low 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 is 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 of APEX’s largest Chinese facilities earned about \$55 a month. See Prachi Patel Predd, *The Price is Wrong*, SPECTRUM, Aug. 2005, *available at* <http://spectrum.ieee.org/print/1499>.

50. MPAA 2004 STATISTIC, *supra* note 12, at 33.

from home entertainment as from theaters.”⁵¹ In 2005, Americans spent \$16.3 billion on DVD sales and \$6.5 billion on DVD rentals, a total of \$22.8 billion.⁵² Conversely, the box office gross was \$8.99 billion in 2005.⁵³ From 1999 to 2005, the combined sales and rentals of DVDs totaled \$81.8 billion;⁵⁴ from 2000 to 2005, box office revenue was \$53.61 billion.⁵⁵

The data above tends to rebut the argument that runaway production--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 five years.⁵⁶

Bringing doubt to the MPAA report on modest price declines of DVD titles is the “everyday low price”⁵⁷ at retail juggernaut Wal-Mart. Wal-Mart accounts for 40% of all DVD titles sold in the United States.⁵⁸ Wal-Mart did not earn its position as a DVD powerhouse by any illegal corporate practices. Rather, Wal-Mart benefited from the mistake of media mogul Sumner Redstone, the head of Viacom, a massive conglomerate that once owned Blockbuster Video.⁵⁹

51. EDWARD JAY EPSTEIN, *THE BIG PICTURE* 19-20 (2005).

52. Press Release, Digital Entertainment Group, Consumer Spending Reaches \$24.3 Billion For Yearly Home Video Sales (Jan. 5, 2006), available at <http://www.dvdinformation.com/News/press/CES010506.htm> (last visited Apr. 7, 2007).

53. MPAA 2005 STATISTICS, *supra* note 13, at 4.

54. Digital Entertainment Group, *supra* note 52. 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.” See *The Way We Were*, *ECONOMIST*, Aug. 25, 2005, at 50. The slow growth rate in DVD sales in recent years is mostly attributable to slow sales of *Shrek 2* and *The Incredibles*. According to an unnamed executive at a rival media firm, however, the declines “were specific to [*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.’” *Id.*

55. MPAA 2005 STATISTICS, *supra* note 13, at 4. 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.

56. MPAA 2004 STATISTICS, *supra* note 12, at 36.

57. Wal-Mart, *How We Get Everyday Low Prices*, <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=433>.

58. Edward Jay Epstein, *Wal-Mart and the Shanghai Pirates*, *SLATE*, March 13, 2006, <http://www.slate.com/id/2137955/>.

59. 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% of the voting stock of both companies and is also the chairman of both

1. Blockbuster Video's Mistake and Decline

In 1998, Warren Lieberfarb, then chief of Warner Brothers home-video division, offered Blockbuster CEO John Antioco a proposal that would have made the transition from video rentals to DVD rentals an easy one—nothing would change except that DVDs would replace videos⁶⁰. Lieberfarb offered the creation of a rental window for DVDs, during which new movies released on DVD would not be available for purchase right away, only for rental.⁶¹ Perhaps not realizing how quickly DVDs would become popular, Blockbuster rejected Lieberfarb's proposal.⁶²

Enter Wal-Mart. The retail giant seized on the opportunity to use DVD's as an "enormous traffic-builder for its stores" and began selling DVD's "like hot cakes."⁶³ By 2003, Wal-Mart replaced Blockbuster as the studios' single largest source of revenue.⁶⁴ Other retailers followed Wal-Mart's example, often pricing new DVDs below their own wholesale price to attract customers who, the retailers hoped, would buy additional products with much higher profit margins.⁶⁵ Blockbuster, which had no other products to sell and was therefore unable to match the low prices on DVDs sold by Wal-Mart and other retailers, found their rental business destroyed.

In its heyday, Blockbuster opened new stores on a weekly basis. By 2005, Blockbuster's 4,000 brick-and-mortar locations proved a liability.⁶⁶ Blockbuster was losing money: \$1.62 billion in 2002, \$978.7 million in 2003, and \$1.24 billion in 2004.⁶⁷ By 2006, Blockbuster, which Redstone had purchased in 1994 for \$8.4 billion, had an estimated market value of under \$700 million.⁶⁸

companies. Viacom controlled Blockbuster Video until 2004, when it was spun off into a separate company.

60. Edward Jay Epstein, *Hollywood's New Zombie*, SLATE, Jan. 9, 2006, <http://www.slate.com/id/2133995/>. At the time of the offer in 1998, the video rental business provided the studios with \$10 billion in revenue, half of it generated by Blockbuster.

61. *Id.* This was the same deal that studios had with Blockbuster for video rentals. When a movie first comes out on video, it can only be rented through Blockbuster and the general public must wait before they can purchase the video. This time period is know as the "rental window." In exchange the studio's receive 40% of the rental profits. Sumner Redstone had personally pioneered this arrangement for Blockbuster a few years earlier when he told Lieberfarb, "The studios can't live without a video rental business--we [Blockbuster] are your profit." *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

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 studios in control over their own products.”⁶⁹ Epstein sums up Blockbuster’s future as follows:

As far [sic] 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.⁷⁰

D. *Movie Piracy: Hollywood’s Great Concern*

In addition to devastating Blockbuster’s rental business, DVDs—Hollywood’s major moneymaker—also threaten the motion picture industry by facilitating movie piracy.⁷¹ A 2005 report commissioned by the MPAA claimed, “Piracy is the biggest threat to the U.S. motion picture industry.”⁷² In 2005 alone, the major studios lost \$6.1 billion to piracy worldwide, with 20% of the total piracy occurring in the United States.⁷³ Of the \$6.1 billion loss, 62% came from so-called “hard piracy,” which primarily involves burning illegal DVDs, and 38% came from internet piracy.⁷⁴ If the loss is expanded beyond the major studios, and includes foreign and domestic producers, theatres, video stores and pay-per-view operators, the total loss to the industry in 2005 balloons to \$18.5 billion.⁷⁵

Hollywood’s major nemesis, at least in the long-term, is piracy in

69. *Id.*

70. *Id.*

71. Fox’s SEC filings explain the importance of DVDs:

“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, [Fox]’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.”

Fox Entertainment Group, Inc., Annual Report (Form 10-K) at 24 (June 30, 2004), available at <http://sec.gov/Archives/edgar/data/1068002/000119312504154960/d10k.htm>.

72. MOTION PICTURE ASSOCIATION OF AMERICA, THE COST OF MOVIE PIRACY, 3, http://www.mpa.org/2006_05_03leksumm.pdf.

73. *Id.* at 4.

74. *Id.*

75. *Id.*

China, where 90% of estimated revenue is lost to piracy.⁷⁶ In 2005, in terms of total dollars lost to piracy in “mature international markets,” the major offenders were Mexico (\$483 million lost), the United Kingdom (\$406 million lost) and France (\$322 million lost).⁷⁷ Thus, while Hollywood suffered a greater loss in total dollars from Mexico, England and France, in the long term, China and, to a lesser extent, Russia and Eastern Europe, may pose greater threats to the motion picture industry.

Pirated copies contain the same DVD extras and sound and picture quality as the original. In China, high quality DVDs sell for roughly \$1.25, which is less than a movie ticket in Shanghai.⁷⁸ Much to the dismay of the major studios, Chinese consumers rarely go to movie theatres; they buy carts full of illegal DVDs instead.⁷⁹ DVDs priced at \$15, the official non-pirated retail price in China, hardly sell, but the low-priced illegal copies sell an estimated 1.3 billion copies per year.⁸⁰

In the United States, the Executive Branch, acting under authority of the President, can bring trade complaints to the World Trade 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 ten WTO cases against nations accused of violating trade rules. By contrast, in the 41-month period before President Bush came to office, the Clinton Administration brought thirty-three WTO complaints against other nations.⁸¹ The Bush Administration’s inaction is astounding, especially in light of a 2006 report from the Office of the United States Trade Representative (USTR) claiming, “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.”⁸²

Hollywood’s revenues are also affected by Wal-Mart’s expanding retail and purchasing operations in China.⁸³ Overall, 70% of Wal-Mart products are Chinese-made, and 80% of the 6000 factories supplying Wal-

76. *Id.* at 6. Other major offenders include Russia with 79% of estimated revenue lost to piracy, Thailand (79%), Hungary (76%), Poland (65%) and Mexico (61%). In the United States, however, the estimated revenue lost to piracy is 7%. *Id.*

77. *Id.* at 7. Mature markets return greater income to the United States motion picture industry than “still developing” international markets such as China and Russia. *Id.*

78. Epstein, *Wal-Mart*, *supra* note 58.

79. *Id.*

80. *Id.*

81. AFL-CIO Issue Brief, *The Bush Record on Shipping Jobs Overseas*, 3 (August 2004) (on file with author).

82. OFF. U.S. TRADE REP., 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.

83. China’s sixth largest export partner was not a country but Wal-Mart. See PRICE WATERHOUSE COOPERS, REDEFINING INTELLECTUAL PROPERTY VALUE: THE CASE OF CHINA 63, (October 2005) (on file with author).

Mart are Chinese.⁸⁴ As a result, Wal-Mart can offer low prices because of cheap labor and the unregulated nature of the Chinese manufacturing sector.

However, Wal-Mart wants to take pirating and modify it to create a legitimate business model. Wal-Mart has plans to make DVDs cheaper in the United States by placing kiosks in stores that could burn DVDs on demand to meet consumers' requests.⁸⁵ Unlike the copies made illegally in China, Wal-Mart would pay a licensing fee to the studios for each copy it burns.⁸⁶ Consumers benefit by having the ability to choose the title, specify the format, bonus extras, all while paying less. Studios would benefit by eliminating the cost of manufacturing, packaging and warehousing DVDs, which Wal-Mart would handle instead. Wal-Mart needs to work out one detail: the price of licensing fees to pay the studios per copy. Wal-Mart's current proposal is \$3 to \$4 for older movies, which is about what studios currently receive from selling DVDs to Wal-Mart.⁸⁷ The danger for studios is that once a licensing scheme is established, Wal-Mart may later pressure them to reduce the licensing fee.⁸⁸

E. The Changing Hollywood Business Model

Given the astronomical growth in DVD sales and profits in the last 10 years, there is reason to believe Hollywood movies, in terms of content, audience and maybe even profitability are on the verge of a major shift. From 1984 to 2004, the costs of both making and marketing movies increased dramatically. First, the actual cost of making a movie, referred to as "negative costs," has risen 341% over the last twenty years: from \$14.4 million in 1984 to \$63.6 million in 2005.⁸⁹ Second, marketing costs have risen 413% over a similar time period: from \$6.7 million in 1984 to \$34.4 million in 2004.⁹⁰ Given that box office revenue rose only 134% over the same period,⁹¹ the sharp rise in negative and marketing costs appears inexplicably.

Beginning in 1985, studio receipts from home video sales and rentals doubled every five years until the mid-1990s.⁹² In 2000, studio receipts

84. AFL-CIO, *Paying the Price at Wal-Mart*, http://www.aflcio.org/corporatewatch/walmart/walmart_5.cfm.

85. Epstein, *Wal-Mart*, *supra* note 58 (describing Wal-Mart's plan to sell burned DVDs).

86. *Id.*

87. *Id.*

88. *Id.*

89. MPAA 2004 STATISTICS, *supra* note 12, at 19.

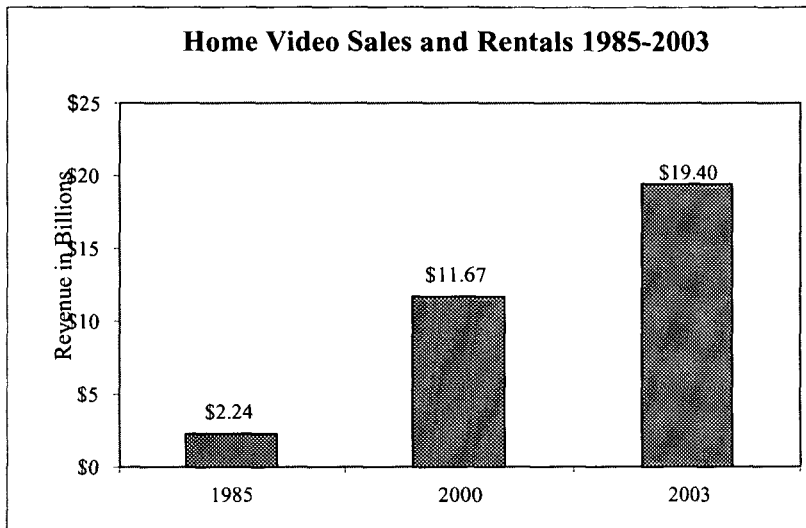
90. *Id.* at 17.

91. *See id.* at 4.

92. Epstein, *Hollywood By the (Secret) MPA Numbers*, *supra* note 16.

from home video and DVD sales and rentals totaled \$11.67 billion (in 2003 inflation adjusted dollars).⁹³ In 1985, studio receipts from home video sales and rentals (in 2003 inflation adjusted dollars) were only \$2.34 billion.⁹⁴ By 2003, studio receipts from home video and DVD sales and rentals soared to \$19.4 billion, an increase of 829%.⁹⁵ Most significantly, until the late 1990's, most of these receipts were from home video rentals, not sales.⁹⁶

The following chart illustrates the rise of home video sales and rentals, which skyrocketed when DVD titles became sell-thru items in the late 1990s:



When the video rental business was booming, studios employed an interesting economic model to maximize profits. For many years, the studios charged a wholesale price of \$60 or more on most videos⁹⁷ because: (1) the studios thought they could make more money selling a few expensive copies to video stores rather than selling many inexpensive copies to retail consumers⁹⁸ and; (2) keeping the wholesale price high allowed studios to protect the then-valuable video rental business.⁹⁹ Edward Jay Epstein explained the result of this business model:

93. *Id.*

94. *Id.*

95. *Id.*

96. MOTION PICTURE ASSOCIATION OF AMERICA, WORLDWIDE MARKET RESEARCH, U.S. THEATRICAL MARKET: 2004 STATISTICS 30 (2004)

97. Epstein, *Wal-Mart*, *supra* note 58.

98. *Id.*

99. See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 84 (2nd ed. 1990).

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.¹⁰⁰

Since studios knew the rental-chain business model, they spent massive amounts of money marketing movies and booking them on thousands of screens to maximize opening weekend revenue. In 1990, only 27% of a movie's total box office gross came on the first week of release; in 2003, however, that number jumped to 41%.¹⁰¹ Thus, the 413% increase in marketing costs from 1984 to 2004 paid off because receipts from video sales and rentals increased 829% over roughly the same period, from 1985 to 2003.

Epstein questions whether high marketing costs are still justified. Wal-Mart replaced Blockbuster 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.¹⁰² Why then, do studios continue to spend millions of dollars to market movies on their first week of release?

New technology will make Hollywood's future revenue streams even more difficult 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.¹⁰³ If consumers hesitate to purchase one of the new formats, it could hurt movie sales until one format prevails. Second, the emergence of video on demand may entirely usurp movie sales, be they DVD, HD-DVD or Blue-Ray.

F. *Box Office Decline and Hollywood's Changing Demographic*

From 1948 to 1958, box office admissions dropped precipitously, from 4.6 billion to 2 billion.¹⁰⁴ Admissions continued to drop until the mid 1980's. In recent years, however, admissions are more stable and not drastically lower than those in 1958. Two conventional and widely cited reasons for the box office drop are: (1) the advent of television and (2) the United States Supreme Court decision in *United States v. Paramount*

100. Edward Jay Epstein, *Dumb Money*, SLATE, June 6, 2005, <http://www.slate.com/id/2120335/>.

101. HAYES & BING, *supra* note 46, at 8.

102. Epstein, *Dumb Money*, *supra* note 100.

103. CNET.com, *Blu-Ray vs. HD-DVD: Knocking Each Other Out?*, http://news.com.com/Blu-ray+vs.+HD+DVD+Knocking+each+other+out/2030-1069_3-6137359.html (Nov. 21, 2006).

104. Epstein, *Vanishing Box Office*, *supra* note 18.

*Pictures, Inc.*¹⁰⁵ in 1948.

The invention of television and its rapid penetration into American households most likely had an impact on movie attendance; almost overnight Americans had a free in-home alternative. However, scholars have also pointed to other factors that may have contributed to the decline. In 1960, Professor Michael Conant, of the University of California, studied the attendance drop and concluded that, in addition to television, the “large postwar sales of automobiles permitted” leisure activities that were formerly inaccessible without a car.¹⁰⁶ Furthermore, “the sharp increase in the birth rate following the war kept a significant sector of the younger adults at home caring for babies.”¹⁰⁷

The Supreme Court’s decision in *Paramount*, though widely cited as an explanation for the attendance drop¹⁰⁸, likely had little effect on attendance. Rather, the *Paramount* decision affected studio revenues. Prior to the *Paramount* ruling, the major studios not only made movies, but they also owned their own theater chains.¹⁰⁹ The Supreme Court held that this violated anti-trust laws.¹¹⁰ In effect, the studios “could either make pictures or operate theaters—they couldn’t do both.”¹¹¹

Before the *Paramount* decision, the American box office accounted for almost all studio revenue. In 1947, “the six major studios earned over 95 percent of their revenue from their share of ticket sales.”¹¹² This revenue amounted to \$1.1 billion, which made the motion picture industry America’s third largest retailer, behind grocery stores and automotive sales.¹¹³

According to President Ronald Reagan,¹¹⁴ the government’s decision

105. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

106. CONANT, *supra* note 24, at 12. Ironically, Conant suggests that the automobile helped counteract declining attendance. From 1946 to 1956, the number of drive-in theaters in the United States increased from 102 to 4494. As a result of this increase, drive-in theaters took in an estimated 22% of all domestic theater admissions. In fact, in June 1956, “more people attended drive-in [theaters] than four-wall theaters 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. By 1953, the drive-in caused total motion picture attendance to be highest in the summer. *Id.* at 15.

107. *Id.* at 12.

108. EPSTEIN, *THE BIG PICTURE supra* note 51, at 30.

109. *Id.*

110. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 150 (1948) (ruling that since these jointly-owned theaters are being run “collectively, rather than competitively,” they are unreasonably restraining trade within the meaning of the Sherman Act).

111. RONALD REAGAN, *AN AMERICAN LIFE* 117 (1990).

112. EPSTEIN, *THE BIG PICTURE, supra* note 51, at 5.

113. *Id.* at 5-6.

114. Reagan was also president of the Screen Actor’s Guild (SAG) from 1947-1952 and 1959-1960. Reagan supported Hollywood unions because of unbearable working conditions

to break up the studio system was wrong:

[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.¹¹⁵

Owning theatres, Reagan felt, guaranteed studios a way to recoup losses "if they guessed wrong on a movie."¹¹⁶ Artistically, allowing studios to own theatres "allowed them to take risks on people and stories."¹¹⁷ As President, Reagan supported "free and fair trade," but cautioned: "For the free market to work, everyone has to compete on an equal footing."¹¹⁸

Unfortunately, President Reagan did not define "fair trade" and "equal footing." Clearly, runaway production, in part, involves the America motion picture industry outsourcing overseas and shooting offshore. It seems that filming abroad reduces production costs, ideally leading to higher profit margins, which is a clear advantage to corporate-owned studios. Far from clear is whether filming abroad involves "equal footing" or "free trade."

People aged 12 to 24 years old comprise the overwhelming majority demographic of movie theater audiences.¹¹⁹ Hence, the most profitable movies target this demographic and industry observers frequently point to this as a major reason for the changing artistic nature of film, which is commonly perceived as a negative development. This argument lacks persuasiveness, since the age demographic of movie audiences in 2006 is not substantially different from 1957, when 52% of the audience was under 20 years-old and 72% under 30.¹²⁰ No doubt, there has been a shift in the nature of filmmaking; however, it is not due to audience demographics. In fact, the demographic shift affecting modern filmmaking comes from the transformation of the major Hollywood studios, not their audiences.

From the 1930s to the early 1970s, movie studios were perceived, perhaps incorrectly, as goliaths.¹²¹ Since that time, multinational corporations and media conglomerates have purchased the major studios from their founders (i.e., the real Warner Brothers), and Hollywood became

before the creation of the guilds. Valerie Yaros, *Remembering Ronald Reagan: The SAG Years*, SCREEN ACTORS GUILD MAGAZINE, Summer 2004, at 28.

115. REAGAN, *supra* note 111, at 117.

116. *Id.*

117. *Id.*

118. *Id.* at 355.

119. ARBITRON COMPANY, THE ARBITRON CINEMA ADVERTISING STUDY 11-12, (2003).

120. CONANT, *supra* note 24, at 5.

121. *PBS Frontline, The Monster that Ate Hollywood: Interview with Michael Douglas* (June 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/interviews/douglas.html>.

a 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.

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.¹²²

Douglas's observations are echoed by Peter Bart, a former film executive at 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

122. *Id.*

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.¹²³

Bart's comments on Hollywood's transformation are vague; it is not clear whether he supports the transformation or longs for a return to a cottage industry.

How and why Hollywood went from a cottage industry to a corporate town is beyond the subject matter of this piece, but a brief explanation is useful. Starting with Steven Spielberg's film *Jaws* and followed by other hits, such as *Star Wars* and *Superman*, blockbusters demonstrated an unprecedented level of financial success in the movie business; and major corporations saw the opportunity to make money off the movie industry in Hollywood.

Peter Guber, a former studio chief at Columbia Pictures, claimed corporations were drawn to the motion picture 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.¹²⁴

The *Paramount* decision further altered the motion picture industry's demographics by forcing theater owners to find new revenue streams.

123. *PBS Frontline, The Monster that Ate Hollywood: Interview with Peter Bart* (April 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/interviews/bart.html>.

124. *PBS Frontline, The Monster that Ate Hollywood: Interview with Peter Guber* (June 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/hollywood/interviews/guber.html>.

Since movie theater owners split ticket proceeds with the studios, their largest source of profit is now popcorn, which has a 90% return (candy, soda and other concessions have similar returns).¹²⁵ Popcorn also has the added benefit of making people thirsty, “forcing” them to purchase beverages¹²⁶. The logical conclusion is that drinks, in turn, causes bathroom breaks, which leads the customer back by the concession stands. “[T]heater owners,” Epstein claims, “don’t benefit from movies with gripping or complex plots, since that would keep potential popcorn customers in their seats.”¹²⁷ Furthermore, to maximize the number of “popcorn” customers, theater owners want to maximize the number of viewings shown in their theaters. To that extent:

[T]heater 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.¹²⁸

Since concessions have a profit margin of 90%,¹²⁹ while box office profits are split with the studios 50-50, and most theaters use those profits to cover their operating expenses,¹³⁰ theatre owners have little incentive to raise ticket prices.

In sum, the structure of Hollywood has changed from the cottage industry to a corporate town. Theatre attendance has declined from its 1947 peak, largely because of television, automobiles and their impact on U.S. culture. The *Paramount* decision drastically altered the studios revenue streams and forced theatre chains to adapt new businesses practices. New dynamics are at play in the era of globalization. Blockbuster’s decline, the importance of DVD sales and DVD pirating and Wal-Mart’s growing influence on the motion picture industry all highlight the uphill battle runaway production opponents face.

III. RUNAWAY PRODUCTION

A. *What Is Runaway Production?*

Dr. Martha Jones, of the California State Legislature’s Research

125. Edward Jay Epstein, *The Popcorn Palace Economy*, SLATE, Jan. 2, 2006, <http://www.slate.com/id/2133612/>.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

Bureau, provided a succinct definition of a runaway production:

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.¹³¹

There are three different categories of runaway productions (1) artificial economic runaways, (2) natural economic runaways, and (3) artistic runaways. Artificial economic runaways are films shot abroad because of artificial, or legislatively created, incentives designed to lure productions. Natural economic runaways are films that shoot abroad to take advantage of natural economic occurring phenomenon—cheap labor—that lower production costs. Artistic runaways are films that shoot abroad to artistically service the story—a film about Paris that shoots in Paris.

B. Runaway Production Is Not New to Hollywood

While runaway production is a large and contentious issue currently facing the motion picture industry, it is certainly nothing new. In the late 1940's, then-SAG President Ronald Reagan went to the White House and met with President Harry Truman to address runaway production.¹³² In 1957, the Hollywood American Federation of Labor (AFL) Film Council, composed of twenty-eight 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 the United States.¹³³ From 1949 to 1957, however, of the 314 films produced by the four major studios at that time, 159 (50.6%) shot abroad in countries such as the United Kingdom, France, Germany, Italy, and Mexico.¹³⁴

In 1961, actor Charlton Heston, alongside SAG officials, testified before Congress regarding the impact of runaway production on employment in the U.S.¹³⁵ At the hearing, foreign subsidies were identified as a primary cause of runaway productions.¹³⁶ Heston and SAG officials urged Congress to “fight subsidy with subsidy.”¹³⁷ The appeal to Congress failed and runaway production continued to grow as a major problem

131. Jones, *supra* note 29, at 2.

132. Yaros, *supra* note 114, at 28.

133. Pamela Conley Ulich & Lance Simmens, *Motion Picture Production: To Run or Stay Made in the U.S.A.*, 21 LOY. L.A. ENT. L. REV. 357, 358-59 (2001).

134. *Id.* at 359.

135. *Id.* at 360.

136. *Id.*

137. *Id.*

affecting hundreds of thousands of Americans. Indeed, in 2006, films produced outside of the United States again represented about 50% of the market share for theatrical releases.¹³⁸ If copyrightable works, most notably movies, are the most important economic products and exports that the U.S. controls,¹³⁹ why are the general public and the U.S. government allowing the movie industry to slip away?

C. *The Problem of Quantifying Runaway Production*

Many economists admit that traditional economic theories employed to study other American industries--the automotive industry, for example--are not well-suited to study the entertainment industry. Since runaway production involves outsourcing, it is tempting to equate it with off-shoring in the automobile industry. Economist Harold Vogel offers the following caveat for such a temptation:

Industries requiring sizable capital investments can normally be expected to evolve into purely oligopolistic forms: steel and automobile manufacturing, for example. But because movies--each uniquely designed and packaged--are not stamped out on cookie-cutter assembly lines, the economic structure is somewhat different. Here, instead we find a combination of large oligopolistic production/distribution/financing organizations regularly interfacing with and highly dependent on, a very fragmented assortment of small specialized service and production firms.¹⁴⁰

Thus, the unique nature of the motion picture industry poses obstacles to professional economists, let alone students of law and economics. Movies are short-term projects, which inherently do not provide stable employment. In order to provide stable employment, centers of film production, such as Hollywood, are crucial. Studying and explaining Hollywood economics is further compounded by statistical discrepancies from a vast variety of sources that reveal, as Martha Jones terms it, "astounding imprecision."¹⁴¹ Determining the economic impact of runaway productions and gathering accurate economic data on the motion picture industry 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

138. 2005 CEIDR REPORT, *supra* note 8, at 2.

139. *See* Part II.A, *supra*.

140. VOGEL, *supra* note 99, at 34.

141. Jones, *supra* note 29, at 1.

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 480,000.¹⁴²

Jones notes the difficulty of gathering reliable data on runaway productions:

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.¹⁴³

D. Dueling Reports on the Impact of Runaway Production

The impacts of runaway production on the United States are imprecise and contested. Therefore, it is useful for newcomers to compare the economic data in the widely cited Monitor Report and a newer, less cited, report by Neil Craig Associates. The Monitor Report¹⁴⁴ was commissioned by the Screen Actors Guild (SAG) and the Directors Guild of America (DGA), two prominent labor unions in Hollywood opposed to runaway production. The Craig Report was commissioned by a variety of Canadian labor unions, who favor runaway production. . .so long as it goes to Canada.

According to the Monitor Report, from 1990 to 1998, the share of all American developed film and television programs identified as runaway productions increased from 29% in 1990 to 37% in 1998.¹⁴⁵ In 1998, the United States suffered an economic loss--composed of direct spending lost, multiplied dollars, and tax revenue loss--of \$10.3 billion, up from \$2 billion in 1990.¹⁴⁶ In 1998, the United States lost 23,500 full time equivalent jobs due to runaway production.¹⁴⁷ If one employs the divergent employment statistics noted by Jones in 1996 (which only covered industry

142. *Id.*

143. *Id.* at 2.

144. The Monitor Group, a management consulting boutique with offices in Santa Monica, California publishes The Monitor Report.

145. THE MONITOR COMPANY, THE ECONOMIC IMPACT OF U.S. FILM AND TELEVISION RUNAWAY FILM PRODUCTION 7 (1999) [hereinafter THE MONITOR REPORT].

146. *Id.* at 12-13.

147. *Id.* at 16. Of the 23,500 jobs 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. *Id.* at 16-17.

employment in California), a loss of 23,500 jobs (if accurate) out of 127,000 or 480,000 is significant.¹⁴⁸

At the other end of the spectrum is a 2004 report by Neil Craig Associates, a consulting firm based in Toronto. The Craig Report claims the economic impact of runaway production in 1998 on the United States was \$1.7 billion, not \$10.3 billion as claimed by the Monitor Report.¹⁴⁹ The Craig Report is unapologetic to runaway production opponents in the United States, noting Canada has been an asset¹⁵⁰ to Hollywood over the years and “Canadians have earned their role in the global industry.”¹⁵¹

The Craig Report makes a strong argument over the Monitor Report’s failure to account for the balance of trade and the revenue repatriated by the United States:

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.¹⁵²

To be fair, Hollywood is not exploiting Canadian workers. Movie production shifted to Canada because studios can take advantage of various tax incentives, not because Canada has cheaper labor, which is the usual reason why runaway productions are shifted to other countries. Outsourcing to Canada does not perpetuate economic disparity between first and third-world nations; instead it perpetuates a status quo benefiting large corporations focused only on profits. There are a plethora of nations Hollywood could exploit for cheap labor, yet it has not . . . yet. If we assume all nations should have comparable standards of living, then Canada might serve as a model for outsourcing. It seems that the problem that many American film workers have with Canada is its tax incentives for film, which place American workers in a weaker position than their Canadian counterparts. In essence, Canada’s film boom was not the result of free and fair trade; it resulted from artificially lowered production costs. Thus, most films shot in Canada are artificial economic runaways.

The Craig Report implies that Canada is no different from some states in the United States, such as Louisiana, with incentives to lure Hollywood

148. Jones, *supra* note 29, at 1 (which cited these numbers).

149. NEIL CRAIG ASSOCS., INTERNATIONAL FILM & TELEVISION PRODUCTION IN CANADA 1 (2004) [hereinafter THE CRAIG REPORT].

150. How Canada has been an asset is not developed in the report.

151. *Id.* at 7.

152. *Id.* at 3.

productions.¹⁵³ It seems to me that this argument, however, is flawed. Canada, as a nation, has greater economic power and political will to retain film productions than most states do.

Despite the differences between the reports, there are several considerations to keep in mind. First, the reports duel on the issue of runaway productions with respect to Canada, not other international locations. Second, while the reports differ on numbers, the disagreement is one of degree; the Craig Report does not claim runaway production is minimal or nonexistent.

E. Causes of Runaway Production

While many factors contribute to runaway production, it is important to remember that decisions to film abroad are 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.¹⁵⁴

Hollywood studios owned by multinational corporations owe no duty to the United States or any other nation. A corporation's duty is to its shareholders. Furthermore, these corporations do not depend on studios as "the principal way any of them [make] their money".¹⁵⁵

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 money.¹⁵⁶

Common factors used to explain why runaway production occur includes;

153. THE CRAIG REPORT, *supra* note 149, at 2.

154. 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).

155. EPSTEIN, THE BIG PICTURE, *supra* note 51, at 16.

156. *Id.* at 15-16.

rising costs in the United States, favorable exchange rates, cheap labor abroad, and tax incentives. Some of these factors appear to have weight while others are educated guesses. That said, Louisiana's recent rise in movie production provides strong evidence that tax incentives and rebates are one of the primary cause's of runaway productions.

While the motion picture industry claims rising production costs in the United States lead to runaway productions, it is not always clear which costs are the ones rising. In fact, corporate data from MGM for 2006 reveals that their overhead and distribution costs both declined significantly in recent years. From 1997 to 2001, MGM decreased overhead and distribution costs from 24.6% in 1997 to 10.8% in 2001 through corporate restructuring and distribution methods.¹⁵⁷ On an anecdotal level, one example of cost-cutting for major motion pictures can be seen in the actions of the producers of *Star Wars: Episode VI--Return of the Jedi*. Given the success of the earlier *Star Wars* films, and knowing that George Lucas would spend any amount of money on one of his film's, production services were inclined to charge more for services and prices rose. When the production title was changed from *Star Wars* to *Blue Harvest*, prices decreased.¹⁵⁸ Thus, it could be argued that corporate inefficiencies cause rising production costs. It could thus be shown that further restructuring could resolve the runaway production problem.

Steven Katz, an Academy Award winner for the co-development of Dolby Stereo and the author of CEIDR's reports on runaway production, predicts major movie stars will see their salaries shrink as studios seek to control costs.¹⁵⁹ For now, there are fewer "desirable stars" than film projects and, as a result, star compensation remains exorbitant.¹⁶⁰ In 2003, major movie stars received between \$20 and \$30 million in fixed compensations and, in some cases, also a percentage of a film's total revenue after repaying cash outlays.¹⁶¹ If studios refused to pay such high salaries by reducing fixed pay to \$5 million, for example, it could wipe out the need to save costs by shooting abroad. Indeed, if star salaries were reduced, filming in the United States would be more affordable and could reduce the need for tax incentives or subsidies. Of course, greedy studios could pay talent less and still film abroad.

Perhaps the most quantifiable factor influencing runaway productions

157. MGM Power Point Presentations for 2002, available at http://web.archive.org/web/20041109232307/www.mgm.com/mgm/images/corporate/ppt_report/ppt_backup_dec00/P15_DEC00.JPG.

158. IMDB.com, *Trivia for Star Wars: Episode VI--Return of the Jedi (1983)*, <http://www.imdb.com/title/tt0086190/trivia>.

159. Telephone interview with Stephen Katz, author of CEIDR's reports on runaway production (Sept. 13, 2006).

160. EPSTEIN, *THE BIG PICTURE*, *supra* note 51, at 18.

161. *Id.*

are favorable exchange rates—a factor creating natural economic runaways—in other nations, specifically Canada. Since 1990, the value of the U.S. dollar increased in relation to the value of the Canadian dollar.¹⁶² As a result, production costs in Canada were reduced up to 23% in the past 10 years because of a weak Canadian dollar.¹⁶³ The exchange rate argument is not often challenged by law journals or news reports. The Craig Report noted the relationship between exchange rates and levels of movie production but also labeled it as “far from conclusive.”¹⁶⁴

The Craig Report studied the exchange rate between the United States and Canada from 1997 to 2003.¹⁶⁵ When the Canadian dollar was at its strongest—0.723 cents exchange rate in 1997, and before Canadian tax incentives took effect, production spending in Canada was \$561 million, the lowest of the period studied.¹⁶⁶ By contrast, when the Canadian dollar was weaker—0.683 cents in 1999, studios spent \$977 million on Canadian production.¹⁶⁷ However, 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).¹⁶⁸ Another weakness of the exchange rate argument is that it fails to consider how weaker currencies affect profitability at foreign box offices, which account for half of the studio’s box office revenues. According to Vogel, a strong American dollar is associated with lower foreign ticket revenues and studio profitability.¹⁶⁹

Cheap labor in poor nations—a factor in natural economic runaways—may also lure Hollywood productions. Like the exchange rate argument, the availability of cheap labor and its relationship to an increase of movie production is also far from conclusive, especially when labor-friendly Canada draws most runaway productions.¹⁷⁰ On the other hand, according to 1987 labor statistics, United States residents in right-to-work states—where workers are not forced into joining unions—employed on movie and television projects earned roughly 83% less than residents in non-right-to-work states.¹⁷¹ Moreover, the level of fringe benefits in right-

162. Wicker, *supra* note 154, at 468.

163. *Id.* at 469 (citing THE MONITOR REPORT, *supra* note 145, at 4).

164. THE CRAIG REPORT, *supra* note 149, at 12.

165. *Id.* at 11-12.

166. *Id.* at 12.

167. *Id.*

168. *Id.*

169. VOGEL, *supra* note 99, 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 can noticeably improve movie industry profitability.” *Id.*

170. See MONITOR REPORT *supra*, note 145.

171. Jones, *supra* note 29, at 39.

to-work states was 3% of the payroll compared to 32% in Southern California.¹⁷² Based on discrepancies in pay and benefits between U.S. states, the availability of cheap labor alone cannot be ignored by studios. 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”¹⁷³

The workers in right-to-work states may receive less pay, but at least the jobs will remain domestic. That said, studios and producers seeking to cut costs are increasingly going abroad to locations where labor costs are miniscule.¹⁷⁴ This so-called savings can offset production costs by as much as 40%, without any government incentives.¹⁷⁵ Cheap labor and few government regulations may save money, but it is deeply troubling in terms of human rights and the unequal footing for workers in developed nations, who cannot compete with the wages paid to workers in third-world nations.

Thus far, the majority of all American runaway productions go to Canada, the United Kingdom and Australia.¹⁷⁶ From 2001 to 2005, 147 U.S. feature films were produced in Canada, the location of choice for major Hollywood studios.¹⁷⁷ The minimum weekly salary, in American dollars, of an assistant director in Canada is \$2927; in the U.S. it is \$3285—a savings of 11%.¹⁷⁸ If you multiply that savings by the large amount of crew members most productions have, there is a noticeable difference. Thus, as is discussed in more detail later in the Article, if cheap labor in Canada and other industrialized nations have been a motivating factor for runaway productions, it is because government tax incentives artificially make labor cheap.

Low wages, thus far, have not been a major cause of runaway productions. In Romania, for example, labor costs may be 80% cheaper

172. *Id.* (citing Will Tusher, *High Labor Costs Hold Key to Runaway Filming*, DAILY VARIETY, June 5, 1990 at 3).

173. VOGEL, *supra* note 99, at 72-73.

174. See John Horn, *Filmmakers Are Swept Away by Romania*, L.A. TIMES, October 2, 2005, at A1.; Megan K. Stack, *Down, Dirty in Morocco*, L.A. TIMES, Oct. 16, 2005, at E1

175. VOGEL, *supra* note 99, at 72-73.

176. JONES, *supra* note 29, at 24 tbl.9.

177. *Runaway Production Map*, *supra* note 7 (click on “World Map,” then click on “Canada,” then click on “U.S. Movies in this Country”). During this same time period, 19 went to the United Kingdom, 13 to Mexico, 12 to Australia, 11 to the Czech Republic, 7 to Romania, 7 to France, 5 to Bulgaria, 4 to Hungary, and only 2 to China. *Id.* (click on “World Map,” then click on each individual country, then click on “U.S. Movies in this Country”). 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. See 2005 CEIDR REPORT, *supra* note 8, at 8.

178. Carl DiOrio & Dave McNary, *H’wood’s Runaway Train*, VARIETY, Feb. 4-10, 2002, at 1.

than American labor costs.¹⁷⁹ According to one film executive, a driver for a film production in Los Angeles can earn \$470 a day; in Bucharest, Romania's capital, the daily rate for the same job may be as low as \$9.52.¹⁸⁰ There is anecdotal evidence that workers in Romania are highly skilled;¹⁸¹ there is "no noticeable qualitative differences" in their work, as Vogel predicted.¹⁸² While movie production in Romania increased recently, only seven U.S. movies filmed there from 2001 to 2005.¹⁸³ That said, third-world nations, such as Romania and Morocco, have cheap labor because their standards of living and national economies are miniscule compared to those of the United States or Canada. While the number of films shot in Romania is small, the overall increase of production spending in all of Eastern Europe increased an astonishing 927% from 2001 to 2005.¹⁸⁴

Cheap labor in poor nations is a given. Therefore, incentives to lower their labor costs are not needed. United States lawmakers must be alerted: if movie production continues to shift to such nations, the United States, Canada, and other industrialized nations' ability to compete for film productions will greatly diminish, even with generous tax incentives.

Contrarily, there is some positive news. In 2007, Romania will join the European Union. 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 runaway productions going to Romania since film production costs will increase there.

Finally, the 2005 CEIDR report eschews most factors thought to cause runaway production and concludes that 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

179. Horn, *supra* note 174.

180. *Id.*

181. *Id.* The anecdotal evidence from the article included the following: "By traveling 6500 miles, producer Greg Hoffman of Twisted Pictures was able to fill two sound stages with tunnels so intricate that even the Catacombs [a horror film set in caves] construction crew[--]a few dozen carpenters eager to work for \$20 a day[--]would get lost in them."

182. VOGEL, *supra* note 99, at 72-73.

183. *Runaway Production Map*, *supra* note 7 (click on "World Map," then click on "Romania," then click on "U.S. Movies in this Country").

184. See 2005 CEIDR REPORT, *supra* note 8, at 8.

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.¹⁸⁵

Given the flawed arguments of exchange rates, production costs and cheap labor, this author tends to agree with the 2005 CEIDR conclusion: government subsidies are the main factor creating artificial economic runaways.

F. Is Runaway Production Even an Issue?

Some commentators argue runaway production is not a monolithic issue. In 2002, Allen Scott, the Director of the Center for Globalization and Policy Research at the University of California, Los Angeles (UCLA), claimed that there is an 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.¹⁸⁶

In 2002, Scott's presumptions may have been true. In 2006, however, the landscape has changed. The Commerce Report discusses the rise in technology and digital transmission,¹⁸⁷ which could refute Scott's presumption that "close supervisory control . . . at all stages of production" is required.¹⁸⁸ Furthermore, the rise of massive production facilities and sound stages in Australia, the creation of special effects houses in New Zealand, Canada and elsewhere¹⁸⁹ further weaken Scott's presumption that Hollywood will remain the epicenter for a "significant core of the

185. 2005 CEIDR REPORT, *supra* note 8, at 4.

186. Allen J. Scott, *A New Map of Hollywood and the World* 22-23, Center for Globalization and Policy Research, School of Public Policy and Social Research, UCLA 22-23 (2002), available at <http://www.ersa.org/ersaconfs/ersa02/cd-rom/papers/521.pdf>.

187. THE COMMERCE REPORT, *supra* note 9, at 4.

188. Scott, *supra* note 186, at 22.

189. THE COMMERCE REPORT, *supra* note 9, at 46-56.

industry's product range."¹⁹⁰

Arguing that Hollywood will remain the epicenter of the motion picture industry ignores the city's own history. The early filmmakers went to California for a host of reasons, which include: (1) leaving the East Coast, which was the primary filming location in the United States, to avoid patent enforcement actions by Thomas Edison, who invented the moving picture¹⁹¹ and (2) the availability of then-cheap land and labor. Thus, Hollywood itself was, in a sense, built on runaway productions. By the mid-1930s, as many as 90% of all feature films were shot in Southern California.¹⁹²

History is replete with analogous examples of nations and industries at their zenith collapsing to the point of nonexistence. Why is Hollywood different from Ancient Rome, London and the British Empire, or Detroit—which loses more control of the world automobile business on a daily basis? Enron was a top ten Fortune 500 company. Just 10 years ago, Kodak had little reason to believe digital cameras would decimate its bottom line. And Blockbuster Video is crumbling because it dismissed the DVD.¹⁹³ Perhaps Hollywood will remain the center of the motion picture industry, but it's equally possible that its head is in the sand.

Scott's lack of foresight is illustrated by the following:

[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 [. . . .] talks about 'Hollywood's exodus into worldwide locations,' are both exaggerated and premature.¹⁹⁴

Epstein's discussion of Wal-Mart¹⁹⁵, argued major studios could save time and money by using technology to retire Hollywood's unparalleled distribution system.¹⁹⁶

Juxtaposed to Scott's well-reasoned arguments, however inaccurate, are the words of former MPAA chief Jack Valenti. In April 2004, Valenti responded to a letter¹⁹⁷ from Congresswoman Diane Watson (D-CA),

190. Scott, *supra* note 186, at 22.

191. ESPSEIN, *THE BIG PICTURE*, *supra* note 51, at 5.

192. Judith Cummings, *Plea From Los Angeles: Big Films, Come Home*, N.Y. TIMES, August 17, 1986, at 24.

193. See *supra* Part II.C.1.

194. Scott, *supra* note 186, at 23.

195. See Epstein, *Hollywood's New Zombie*, *supra* note 60.

196. See Epstein, *Wal-Mart*, *supra* note 58.

197. Letter from Diane Watson, Congresswoman, U.S. House of Representatives to Jack Valenti, Chairman and CEO of the MPAA (Apr. 5, 2004) *available at*

which was co-signed by 27 Members of the House of Representatives, 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.”¹⁹⁸ In what the *Hollywood Reporter* called a “four-page missive,” Valenti stated, “[t]here 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.”¹⁹⁹ Valenti’s response ignored reality; the rate of filming outside of the United States has increased dramatically in the last ten years and there is no question permanent jobs have been exported.²⁰⁰

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 on equal footing. Scott and Valenti, however, do not make such an argument. Rather, Scott and Valenti erroneously state that there is no argument. They are wrong.

G. *Runaway Production’s Negative Effects on United States Production Spending*

The Commerce Report provides a general overview of the economic impact runaway productions have on the United States:

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

http://www.iatse.org/letter_to_valenti_from_congress.htm.

198. *Id.*

199. Peter Kiefer, *Valenti Defends the Right of U.S. Firms to Film O’s seas*, HOLLYWOOD REPORTER, April 19, 2004.

200. *See infra* Part III.H.

wore on.²⁰¹

The United States is not an effective competitor for capturing movie productions in comparison to Canada and other countries that create tenuous schemes to lure film production. True, much film production is performed in the United States, but complacency could lead to Hollywood's downfall. In 1998, 90% of the budgets for the top 250 films-for 1998-were spent in the United State.²⁰² In 2001, that number dropped to 76%.²⁰³ Canada, on the other hand, received just 10% of the total film budgets in 1998, but in 2001, after tax incentives were in place for several years, that number jumped to 24%.²⁰⁴ Hence, when the Craig Report claims Canada has not "stolen" film production from the United States, it should be noted that Canada did benefit at the expense of the United States.

Recent statistics are even more sobering. The 2005 CEIDR Report on runaway productions claims that the worldwide geographic shift of theatrical productions is "nothing short of astounding."²⁰⁵ While the amount of money spent on theatrical releases worldwide rose from \$5.5 billion in 1998 to \$7.2 billion in 2005, the U.S. market share of production dollars spent on theatrical releases plummeted from 71% to 47% for the same period.²⁰⁶ The number of movies filmed in the United States dropped from 127 in 1998 to 99 in 2005, while the number of movies filmed abroad rose from 67 to 104 during the same seven-year period.²⁰⁷ The 2005 CEIDR Report's most disconcerting finding is the following claim:

Using standard industry metrics of a 3.3 multiplier²⁰⁸ 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 billion²⁰⁹

And while economists quibble over the correct multiplier, anything close to a loss of \$23 billion for the U.S. economy is devastating and unacceptable.

201. THE COMMERCE REPORT, *supra* note 9, at 2-3.

202. STEPHEN KATZ, THE CENTER FOR ENTERTAINMENT INDUSTRY DATA AND RESEARCH, THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO CANADA: YEAR 2001 PRODUCTION REPORT 1-2 (2002) [hereinafter 2001 CEIDR REPORT].

203. *Id.* at 1.

204. *Id.*

205. 2005 CEIDR REPORT, *supra* note 8, at 2.

206. *Id.*

207. *Id.* at 3.

208. While the Craig Report criticized the 3.3 multiplier, Neil Craig recently said the CEIDR multiplier number was generally accurate. Telephone Interview with Neil Craig, CEO, Neil Craig Assocs. (September 15, 2006). Craig disputed the 3.3 multiplier in his 2004 report, claiming the Monitor Report should have used a multiplier of 1.9 for California. See THE CRAIG REPORT, *supra* note 149.

209. 2005 CEIDR REPORT, *supra* note 8, at 2.

H. *Runaway Production's Impact on Jobs in the United States*

Gathering and analyzing employment statistics on the motion picture industry is the most challenging and perplexing part of studying runaway production. The numbers vary greatly depending on the source and its reliability. Be that as it may, a survey of these numbers is revealing, if not frustrating.

Employment numbers from the MPAA reveal imprecision. In 1992, the MPAA claimed 164,000 Californians were directly employed in entertainment production.²¹⁰ In 1996, the number of Californians directly employed in entertainment production rose to 226,000.²¹¹ Furthermore, in 1996, the estimated number of California jobs indirectly generated by the entertainment industry ranged from 233,000 to 253,100, which brought the "industry's total employment to well over 450,000."²¹² The MPAA claimed that entertainment production in California during 1996 generated \$27.5 billion in economic activity for the state.²¹³

The astonishing economic growth from 1992 to 1996, according to the MPAA, exploded for two reasons: (1) as the growth of multiplex theaters and cable television rose, it created a higher general demand for more entertainment media productions; and (2) "the possibility that this new production activity would occur outside California, or in other countries, did not materialize."²¹⁴

In 2004, the MPAA reported employment numbers for the entire United States. The employment numbers were broken into three categories: production and services (P&S), theaters and video tape rental, and other.²¹⁵ In 1995, the total number of Americans employed in the motion picture industry was 283,700 (135,200 in P&S); in 1997, total employment was 323,000 (159,600 P&S); in 2000, total employment was 351,600 (182,100 P&S) and; in 2004, total employment was 367,900 (198,300 P&S).²¹⁶ 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 earlier claim that, in 1996, the industry

210. MOTION PICTURE ASSOCIATION OF AMERICA, STATE OF THE INDUSTRY: THE ECONOMIC IMPACT OF THE ENTERTAINMENT INDUSTRY ON CALIFORNIA 8 (1998) (on file with author) [hereinafter MPAA INDUSTRY REPORT]. 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 United States Bureau of Labor Statistics (BLS).

211. *Id.* at 8.

212. *Id.*

213. *Id.* at 16.

214. *Id.* at 12.

215. MPAA 2004 STATISTICS *supra* note 12, at 27. Again, the MPAA used numbers from the BLS.

216. *Id.*

employed over 450,000 workers in California alone. Adding to the confusion, The Commerce Report—which used the same BLS data cited by the MPAA—claimed 236,152 workers were employed nationwide in motion picture production and allied services in 1997.²¹⁷

In August 2005, the Los Angeles Economic Development Corporation (LAEDC) released a report commissioned by the California Film Commission on the economic impact of runaway productions. The report compared motion picture employment numbers gathered from the MPAA and the United States Census for the same year, 2002. The data from the MPAA and the Census was divided into two categories: (1) overall motion picture employment in the United States and; (2) the amount of motion picture employment in California—how much California captures of the total U.S. figure.²¹⁸ In 2002, the Census reported that 153,000 people worked in the motion picture industry in the United States and, of that amount, 88,500 worked in California.²¹⁹ The MPAA data for 2002 reported 353,076 workers in the motion picture industry in the United States, with 245,900 of those jobs in California.²²⁰

Finally, in 1996, the MPAA, seemingly out of nowhere, claimed that the film industry employed 750,000 Americans, a number that remains on the MPAA's Web Site for 2006.²²¹

Due to the confusing employment numbers in the aforementioned sources, the following chart²²² provides a simplified visualization for the inexplicable nature of the major data:

217. THE COMMERCE REPORT, *supra* note 9, at 18.

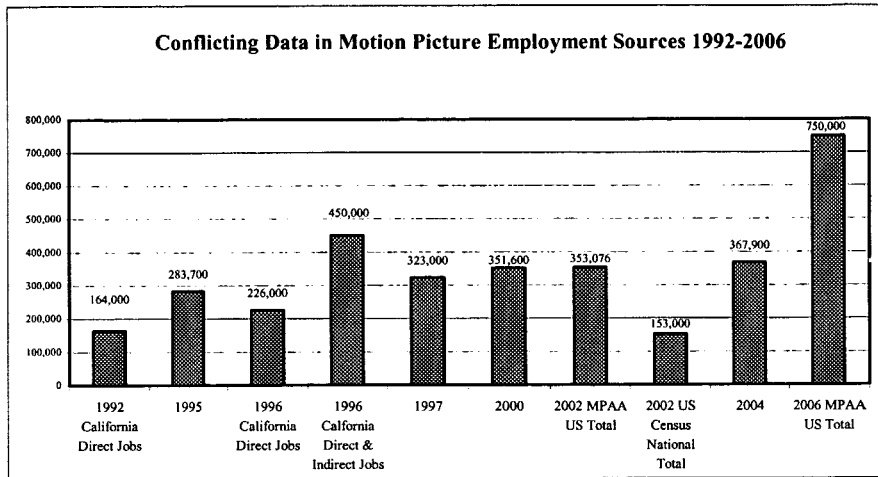
218. GREGORY FREEMAN ET AL., LOS ANGELES COUNTY ECON. DEV. CORP., WHAT IS THE COST OF RUN-AWAY PRODUCTION? JOBS, WAGES, ECONOMIC OUTPUT AND STATE TAX REVENUE AT RISK WHEN MOTION PICTURE PRODUCTIONS LEAVE CALIFORNIA 2 (2005), *available at* http://www.film.ca.gov/ttca/pdfs/link_overview/cfc/California_Film_Commission_Study.pdf [hereinafter THE LAEDC REPORT].

219. *Id.*

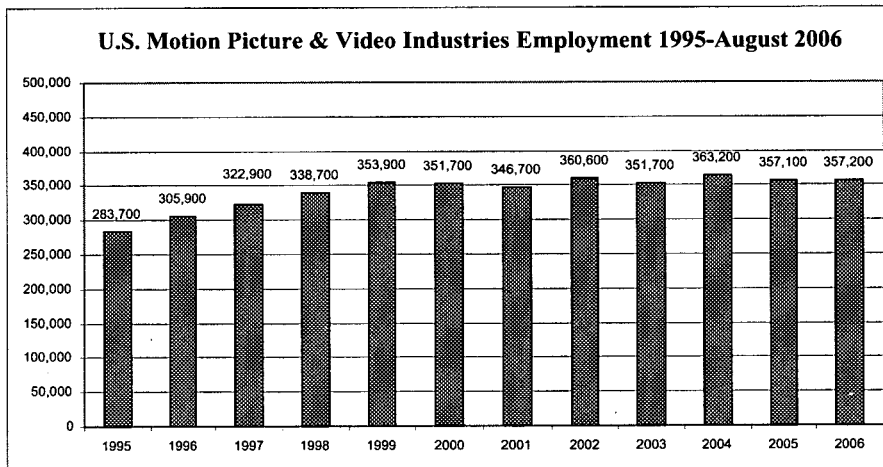
220. *Id.*

221. Multiple attempts to reach the MPAA for an explanation of the 750,000 job number were unsuccessful. See Motion Picture Association of America, Economies, http://mpaa.org/piracy_Economies.asp (last visited June 30, 2007).

222. Data for 1995, 1997, 2000 and 2004 is from the MPAA 2004 Market Statistics Report (citing BLS data) on total United States employment. MPAA 2004 STATISTICS, *supra* note 12, at 27. Data for 1992 and 1996 is from the MPAA 1998 State of the Industry Report, which also used BLS numbers. MPAA INDUSTRY REPORT, *supra* note 210, at 8. Data for 2002, as reported by LAEDC's California Film Commission Study, is from the United States Commerce Department, Bureau of the Census and the MPAA. THE LAEDC REPORT, *supra* note 218, at 2. (Note, however, that the 2002 MPAA number cited by LAEDC (353,076) conflicts with the MPAA 2004 Market Statistics Report (which reports 2002 employment at 360,700). See MPAA 2004 STATISTICS, *supra* note 12, at 27). Data for 2006 is from MPAA executive John Feehery's Congressional Testimony. Feehery Testimony, *supra* note 12.



The following chart²²³ represents BLS data from 1995 to 2006 and seems to accurately track total motion picture employment in the U.S.:



While the employment data above appears healthy, that it is steadily increasing up, roughly 30% over eleven years, and the overall trend from 1997 to 2006 is relatively stable—if the BLS data is presumed reliable, there were some slight dips and gains.²²⁴ However, dramatic jumps in

223. Bureau of Labor Statistics, Motion Picture and Video Industry Employees (2006) (on file with author). These numbers mostly match those used in the MPAA 2004 report. See MPAA 2004 STATISTICS, *supra* note 12, at 27.

224. Note that this data includes many jobs which are not directly related to actual film production; therefore these numbers are wildly inaccurate vis-a-vis production jobs.

employment over small periods of time, such as the 36% increase from 1992 to 1996 for example, appear to be over. It is also troubling that there remains no explanation for the huge discrepancies from the aforementioned sources.

In 2005, the LAEDC also compared payroll spending reported by the United States Census and the MPAA for 2002. The Census reported total payroll spending in the motion picture industry in the United States to be at \$9.3 billion, of which \$6.4 billion was spent in California.²²⁵ The MPAA reported total payroll spending in the United States to be at \$21.2 billion, of which \$17.2 billion was spent in California.²²⁶

In 1992, according to the MPAA, the industry payroll for California was \$7.4 billion.²²⁷ In 1996, the industry payroll for California jumped to \$12 billion, an incredible 62% rise in only four years.²²⁸ In 2002, industry payroll in California was \$17.2 billion,²²⁹ a 43% rise over a six-year period. Thus, while payroll spending in California has seen healthy increases in recent times according to MPAA's data, the gains are not as spectacular as they once were; there was a slowdown. Coincidentally, the California slowdown coincides with the enactment of film subsidies and tax incentives in Canada and other countries in 1997. The result of this slowdown, according to the 2005 CEIDR Report, is a cumulative loss of \$23 billion to the United States economy from 1998 to 2005 and a loss of 329,000 jobs over seven years—47,000 U.S. jobs lost for each year.²³⁰

The assertions in the 2005 CEIDR Report, however accurate, are misleading. As the BLS figures in the aforementioned chart indicate, the U.S. motion picture industry is not "losing jobs" per se. Rather, a more accurate assertion is that the United States is not adding new jobs that would otherwise exist domestically but for the tax incentives pioneered by Canada and duplicated by other nations. 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 United States supremacy over the motion picture industry.

If the job losses reported in the Monitor Report, The Commerce Report, and the 2005 CEIDR report were accurate, film employment in Canada should rise. It did. In 1994, Canadian workers directly and indirectly involved in film and television production was 24,100 (direct workers) and 38,600 (indirect workers).²³¹ In 2002, those numbers jumped

225. THE LAEDC REPORT, *supra* note 218, at 2.

226. *Id.*

227. See MPAA INDUSTRY REPORT, *supra* note 210, at 8

228. *Id.* at 2-3.

229. LAEDC REPORT, *supra* note 218, at 2.

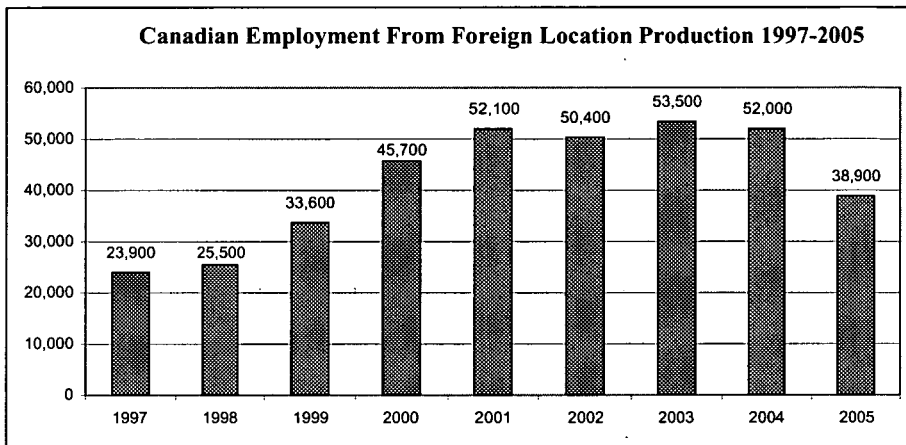
230. 2005 CEIDR REPORT, *supra* note 8, at 2.

231. THE EMPLOYMENT DEVELOPMENT DEPARTMENT (EDD), REPORT TO THE LEGISLATURE ON THE MOTION PICTURE INDUSTRY IN CALIFORNIA 24, (2005) (compiling

to 51,300 and 82,100 respectively.²³² In 1999, film and television location spending in Canada was \$1.96 billion, an increase of 34% from 1998, and an almost five-fold increase since 1992.²³³ In 1994, by comparison, foreign location spending in Canada was just \$318 million.²³⁴

In 2004, foreign film and television production spent in Canada was \$1.9 billion and the number of jobs in the industry was 52,000 (20,000 direct and 32,000 indirect).²³⁵ In 2005, however, those numbers plummeted to \$1.46 billion spent on production and 38,900 jobs created (15,000 direct and 23,900 indirect).²³⁶

The following chart²³⁷ illustrates the dramatic increase in motion picture employment after the first Canadian tax incentives took effect in 1998:



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

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

figures for Canadian film and television product collected from various Canadian sources) (on file with author) [hereinafter THE EDD REPORT].

232. *Id.*

233. THE COMMERCE REPORT, *supra* note 9, at 1 (citing PricewaterhouseCoopers profile on Canadian film industry for 2000).

234. DEPARTMENT OF CANADIAN HERITAGE, PROFILE 2006: AN ECONOMIC REPORT ON THE CANADIAN FILM AND TELEVISION PRODUCTION INDUSTRY 5 (2006) available at http://www.cftpa.ca/newsroom/pdf_profile/profile2006-english.pdf [hereinafter THE DCH REPORT].

235. *Id.* at 53.

236. *Id.*

237. *Id.*

again, the oscillation in the volume of activity illustrates the uncertainty of depending on offshore sources as an industrial base.²³⁸

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 2004.²³⁹ The Department of Canadian Heritage attributes the decline in foreign location spending and employment to the rise of the Canadian Dollar and the “proliferation of tax incentives outside of Canada.”²⁴⁰ Lastly, it must be acknowledged that U.S. films accounted for 86.8% of the Canadian box office in 2004.²⁴¹

Although the motion picture employment in Canada is high, the growth of employment is not on par with job losses in the United States. Thus, job losses in the United States cannot be attributed to Canada alone. Nations such as Romania, Great Britain, New Zealand, Morocco, South Africa, etc. also contribute to job losses in the United States.²⁴² With the exception of Australia, employment data for other nations is beyond the scope of this paper. Indeed, as Canada predicted,²⁴³ other jurisdictions, like Australia, have enacted tax incentives for the motion picture industry and drained employment from Canada. Australia passed its first film incentives in 2002.²⁴⁴ Since then, major motion pictures such as *The Matrix Trilogy*, *Star Wars Episode II*, and *The Thin Red Line*, all box-office hits, filmed partly in Australia.²⁴⁵

The following chart²⁴⁶ illustrates the growth of new film employment in Australia:

238. *Id.* at 5.

239. *Id.* at 55.

240. *Id.* at 52.

241. *Id.* at 45. While “U.S.” films dominated the Canadian box office, many of those films were shot in Canada.

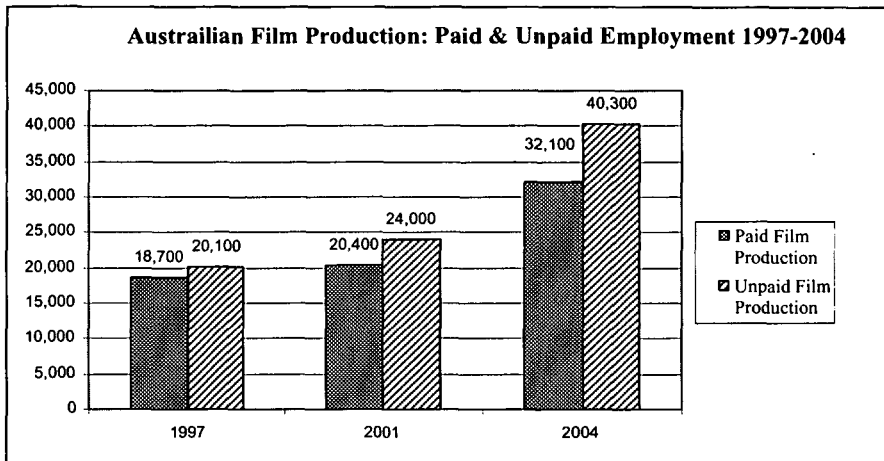
242. *See supra* Part II.E, pp. 52-54.

243. DEPARTMENT OF CANADIAN HERITAGE, PROFILE 2006: AN ECONOMIC REPORT ON THE CANADIAN FILM AND TELEVISION PRODUCTION INDUSTRY 52 (2006), available at http://www.cftpa.ca/newsroom/pdf_profile/profile2006-english.pdf [hereinafter THE DCH REPORT].

244. 2005 CEIDR REPORT, *supra* note 8, at 48.

245. THE EDD REPORT, *supra* note 231, at 16.

246. AUSTRALIAN FILM COMMISSION, INDUSTRY OVERVIEW: EMPLOYMENT 12 (2005), available at <http://www.afc.gov.au/gtp/pdfs/employment.pdf>. The report provides no explanation as to why there are such large numbers of unpaid workers.



Clearly, there are problems with the employment numbers in the motion picture industry. Given the confusion between direct and indirect employment and the use of multipliers, we may never have an accurate count. There are simply too many variables to consider. Based on the information above, however, it is relatively safe to assume that 350,000 Americans are employed by the motion picture industry.

In sum, the United States is rapidly losing its position as the main filming location for so-called American films, in that an American film can be shot abroad. It can be argued the United States has not lost jobs because of runaway productions, but it certainly is not gaining them at the rate of other countries. Since American consumers are not benefiting from the alleged cost savings of shooting abroad, why should the United States allow a profitable, distinctly American, industry that employs hundreds of thousands of well-compensated employees to migrate to other countries? And how can the United States stop it? These questions are explored later. To be sure, globalization is not helping American competitiveness in the movie industry because there is, or at least was, no threat of foreign competition. To keep Hollywood in Hollywood, so to speak, state and federal lawmakers must take immediate action to level the playing field and, hopefully, more productions will stay in the United States.

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

For better or worse, movies are the one of the more significant cultural productions that the United States has 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 has said, "it cannot be doubted" that motion pictures possess elements that "characterize[] 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.²⁴⁷

James Mangold, who wrote and directed 2005's highly acclaimed film *Walk the Line* about legendary singer Johnny Cash, claims 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 parts 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 who are from the area. And, you know, in this case also you get people who love Johnny Cash and work their heads off. . . . In every scene we did, in every concert scene we did, the extras were so passionate.

You can't imagine what a trying experience it is to be an extra in one of these scenes and how long your standing 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 scenes.²⁴⁸

This same sentiment is echoed by director/producer/actor 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, you know, people were telling me how rough it is 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 are the extras, give you so much more than you'd get anywhere

247. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

248. James Mangold, Director's Commentary, *WALK THE LINE* (20th Century Fox 2005).

else.²⁴⁹

The decision to shoot *Superman Returns* in Australia was particularly odious to some in Hollywood, who point out that Superman stands for “Truth, Justice and the American Way.”²⁵⁰ Superman, perhaps more than any other fictional character, is the epitome of American culture. 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.”²⁵¹

Other quintessentially “American” films—films about or set in America—shot abroad include the aforementioned *Cinderella Man*, *Superman 1978*, *Hollywoodland*, *Capote*, *New York Minute*, *Chicago*, *Cold Mountain*, *United 93*, *Blue Brothers 2000* and *Wicker Park*.²⁵² These films barely begin to scratch the surface.

Clearly, studios can save money by filming abroad. Despite these savings, Jack Green, an acclaimed cinematographer and Academy Award nominee for 1992’s *Unforgiven*, claims filmmakers are leaving the U.S. unnecessarily.²⁵³ Green claims you get what you pay for; American movie crews cost more because they know how to do things faster and better. Green also 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. Green laments, “[H]ere was a film about the American Dream, and they were shooting it in Canada. It just really disturbs me.”²⁵⁴

Former President Ronald Reagan credits the start of his political career to speeches he made as president of the SAG.²⁵⁵ Reagan said he “tried to emphasize how important the movies were to American culture.”²⁵⁶ During World War II, Reagan was tasked with producing air

249. Ivan Reitman, Director’s Commentary, *GHOSTBUSTERS* (Columbia Pictures 1999). Reitman recorded the commentary for the film for the 1999 DVD release of the film.

250. See Film and Television Action Committee, “Superman Returns” has been outsourced to Australia!, <http://ftac.net/html/superman.html> (last visited June 30, 2007); IMDB.com, Memorable Quotes for Superman (1978), <http://imdb.com/title/tt0078346/quotes> (last visited June 30, 2007).

251. Boucher, *supra* note 39. 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. *Id.* To be fair, the 1978 Superman film was also shot internationally in Canada and England. IMDB.com, Filming Locations for Superman (1978), <http://imdb.com/title/tt0078346/locations> (last visited June 30, 2007).

252. See generally IMDB.com (providing detailed information about film histories and plotlines)

253. Mary McNamara, *Down-Home Directing*, L.A. TIMES, Oct. 9, 2005, at E1.

254. *Id.* at E28.

255. REAGAN, *supra* note 111, at 119.

256. *Id.*

force training videos and documentaries and, because of his Hollywood ties, he recruited technicians and artists from the industry ineligible for combat.²⁵⁷ Finally, Reagan credits Hollywood—its technology, camera operators, technicians—with capturing and preserving the film footage that reveal the horrors of German concentration camps.²⁵⁸

Expanding on Reagan's positive view of the motion picture industry is Meryl Marshall, a former member of the Academy of Television Arts and Sciences, who wrote on the values 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.²⁵⁹

The United States is viewed unfavorably by much of the global community and something needs to be done to improve world opinion. Hollywood movies, as President Reagan and Meryl Marshall point out, are treasures of American culture capable of exporting idealistic American values. Unfortunately, the United States is allowing this treasure to erode.

IV. MAJOR PLAYERS IN THE RUNAWAY PRODUCTION DEBATE

The primary beneficiaries of runaway production are major studios seeking to reduce costs. Whether studio executives "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 more movies here.

Filmmaking is a very expensive undertaking and involves high risk.

257. *Id.* at 98.

258. *Id.* at 99-100.

259. THE COMMERCE REPORT, *supra* note 9, at 8 (citing Marshall's essay on American films).

Because of market uncertainties, decisions on who to cast, what genre to film, and where to film are all based on the bottom line, especially in Hollywood's current corporate era. Time-Warner, a publicly traded company, has a fiduciary responsibility 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 duty to its shareholders to do so. 20th Century Fox executive vice-president Fred Baron claimed, "What we're trying to do right now is fight[] to keep film in America. But in our process, we are forced to go offshore because of prices."²⁶⁰ Baron cited *Fantastic Four* and *X-Men 3* as examples of movies too expensive to film in the United States.²⁶¹ If a big budget movie flops, then a savings of 30% on production could save a studio from insolvency. In short, there is no "bad guy" in the runaway production battle. It is quite possible that an executive who decides to film abroad would also prefer to keep the production in the United States.

There are many groups and organizations in the United States opposed to runaway production. Leading the charge to curb, if not end, runaway production, is a variety of labor unions, actors, and politicians at all levels of government. However, these opponents do not provide a unified front and there is constant bickering between various factions.

A. *The Approach of the Directors Guild of America and the Motion Picture Association*

The Directors Guild of America (DGA) claims a membership of 13,100.²⁶² The DGA's importance 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 must be guild members to direct films for the major studios.²⁶³

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."²⁶⁴ Today, the MPAA

260. Tatiana Siegel, *Unite, State Film Czars Told*, HOLLYWOOD REP., Aug. 1, 2005.

261. *Id.*

262. Welcome to the Director's Guild of America, Michael Apted, DGA President, <http://www.dga.org/index2.php3> (follow "THE DGA" hyperlink; then follow "BASICS" hyperlink) (last visited Mar. 27, 2007).

263. DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT OF 2005 (2005), available at <http://dga.org/index2.php3> (follow "signatory database" hyperlink; then follow "agreements" hyperlink).

264. Motion Picture Association of America, About Us, <http://www.mpa.org/AboutUs.asp> (last visited Mar. 27, 2007).

represents the world's major media conglomerates: Disney, Sony, 20th Century Fox, Paramount, Universal, Warner Brothers, and MGM.²⁶⁵

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

B. The Approach of the Film and Television Action Committee

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."²⁶⁶ FTAC claims it is "supported and endorsed" by a variety of entities, including SAG.²⁶⁷ According to their website:

FTAC is a democratically structured, volunteer, grassroots, non-partisan, single-issue organization dedicated to recovering American film jobs that have been lost [to] the [nineteen] foreign countries due to unfair trade practices. FTAC is supported and endorsed by these unions: IATSE Locals 695, 871, 44, 728, 720, and 600. The Screen Actors Guild (SAG), Laborers International Union of North American (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 and Television Association, the cities of Burbank, Santa Monica, West Hollywood and Glendale, 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. Along with many other businesses that service the film industry and tens of thousands of rank and file Entertainment Workers who support the 301a petition.²⁶⁸

FTAC has been advised by experts on international trade that foreign production subsidies like those offered by Canada and its imitators do not comply with U.S. trade agreements. In short, FTAC plans to file a petition with the U.S. Trade Representative (USTR), who would conduct an investigation of foreign--specifically Canadian--subsidies.²⁶⁹ Obviously,

265. Motion Picture Association of America, About Us: Members Page, <http://www.mpa.org/AboutUsMembers.asp> (last visited Mar. 27, 2007).

266. Film and Television Action Committee, About FTAC, www.ftac.net/html/about.html (last visited Mar. 27, 2007).

267. *Id.*

268. *Id.*

269. Film and Television Action Committee, Latest FTAC News, <http://www.ftac.net/> (last visited June 30, 2007).

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.

However, the FTAC faces major obstacles by filing a complaint with the USTR. First, the government has total discretion in deciding whether or not to pursue a trade dispute with any member of the WTO.²⁷⁰ Given the minimal trade disputes that the United States files with the WTO, FTAC would bear an astonishing high level of persuasion to overcome U.S. apathy in this area.²⁷¹ Nevertheless, the FTAC received strong financial commitments from the SAG and The Studio Lighting Technicians Local 728 in support of the USTR filing.²⁷²

Second, it is 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.²⁷³ This argument carries weight given the current political climate of states' rights and national sovereignty encouraged by the Republican-controlled government. Moreover, FTAC's complaint, which has yet to be filed, targets Canada specifically and not other countries.²⁷⁴ But hope lingers. With the arrival of a Democratic-controlled Congress, the government may be more sympathetic to the FTAC's cause.

The DGA and the MPAA argue that FTAC's plan would cause a trade war with Canada and other countries, which might cause foreign nations to block the importation of U.S. films.²⁷⁵ Such a trade war would in turn cause further job losses in the United States.²⁷⁶

Although the DGA/MPAA's preference for subsidies may be a more effective means of preserving jobs in the United States, especially if the FTAC does not prevail, their attack on the FTAC's plan may be disingenuous and over exaggerated. In the era of globalization and free trade, it is 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 is increasingly difficult to define a "U.S. film." Entertainment Attorney Mark Litwak explained the dilemma of defining "U.S. films":

It can be difficult to characterize films according to nationality in

270. 19 U.S.C. § 2412(b), (c) (2000).

271. *See supra* Part II.D.

272. Film and Television Action Committee, *supra* note 269 (stating that the large donations were made between October 22 and November 11, 2006).

273. *See* Part VII, *infra*.

274. Film and Television Action Committee, *supra* note 269

275. *Id.*

276. *Id.*

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 Australian²⁷⁷

Since the MPAA represents media companies seeking increased profits and lower production costs, they, by corporate design, have a self-interest in pursuing the “subsidiaries to fight subsidies” approach. But the MPAA approach is inherently flawed: as city, state, and national governments pass incentives to lure film production, this could create a “race to the bottom” phenomenon that primarily, if not exclusively, benefits the industry itself.

In 2001, the Achilles heel facing the FTAC is the presumed legality of Canadian subsidies. The 2000 CEIDR report claimed:

[T]here 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).²⁷⁸

The 2000 report is, however, outdated. Indeed, there is a powerful argument that questions the legality of Canada’s film subsidies under existing trade agreements.²⁷⁹ Nevertheless, CEIDR’s 2005 report downplays FTAC’s 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 filing with the United States Trade Representative. While well-

277. Litwak, *supra* note 25, at 31 n.2.

278. STEPHEN KATZ, THE CENTER FOR ENTERTAINMENT INDUSTRY DATA AND RESEARCH, THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO CANADA: YEAR 2000 PRODUCTION REPORT 5 (2001).

279. See, e.g., Claire Wright, *Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 AKRON L. REV. 739, 745 (2006) (arguing that the PSTC film incentives in Canada are “most likely [] inconsistent with those WTO Members’ obligations under WTO law, as they adversely affect the U.S. feature film production industry”).

intentioned, many believe this approach could present unintended consequences and difficulties for the U.S. production industry . . .

²⁸⁰

Finally, even if the U.S. Trade Representative chooses to pursue the FTAC's forthcoming filing and the WTO rules in favor of the United States, 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.²⁸¹

C. *The Screen Actors Guild's Stance*

The SAG's resistance to runaway production dates back to the 1950s. SAG is a large force in Hollywood, with a membership exceeding 100,000. SAG is an affiliate of the AFL-CIO and has a long history of improving working conditions for actors.²⁸² A major limitation—though arguably a benefit to SAG members—is that members cannot work on non-union productions.²⁸³ There may be a perception that the SAG is populated by elite, highly-paid, liberal actors from Hollywood. In reality, 70% of SAG members earn less than \$7500 in a year.²⁸⁴

For the past several years, political infighting amongst SAG's leadership has raised questions as to whether the guild's loyalty lies with its membership or with the major studios. Specifically, SAG's internal leadership struggles have led it to flip-flop on the two conflicting legislative methods pursued by FTAC and the DGA/MPAA.

In 2001, SAG's board of directors named Bob Pisano as its National Executive Director.²⁸⁵ Pisano came to SAG with 30 years of experience in the entertainment industry, having served as a senior executive at Paramount Pictures and MGM. This presented a conflict of interest. How could a former studio executive of the motion picture industry, which

280. 2005 CEIDR REPORT, *supra* note 8, at 73. It must be noted that Steven Katz is not an expert on international trade and Professor Wright's credentials on the issue are outstanding and highly persuasive.

281. Indeed, the United States makes this argument itself. According to a 2005 document from the U.S. Trade Representative, "Trade panels cannot overturn or change U.S. federal, state or local laws." OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STATE SOVEREIGNTY AND TRADE AGREEMENTS: THE FACTS (2005), *available at*, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2005/asset_upload_file870_7578.pdf.

282. Screen Actors Guild, About SAG, <http://www.sag.org/sagWebApp/> (click "About SAG") (last visited June 30, 2007).

283. SCREEN ACTORS GUILD, SCREEN ACTORS GUILD MEMBERSHIP RULES AND REGULATIONS, *available at*, http://www.sag.org/Content/Public/sag_rules.pdf.

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

285. Dave McNary, *SAG EXEC Bows Out*, DAILY VARIETY, October 8, 2001.

would prefer the non-existence of labor unions, effectively represent SAG? To whom was Pisano loyal?

SAG's leadership appears to have two factions: one supporting the FTAC and one in favor of appeasing the MPAA. SAG's general membership overwhelmingly supports the FTAC. SAG's decision to hire Pisano was an effort by the MPAA, and those in SAG's leadership opposed to FTAC,²⁸⁶ to destroy opposition to runaway production amongst members whose views paralleled those of the FTAC.

Pisano opposed the SAG's general support of the FTAC. In October 2005, after Pisano's tenure at the SAG ended, SAG's national board voted unanimously to support the FTAC and its approach to end runaway production.²⁸⁷ Worries that Pisano's position at SAG represented a conflict of interest were realized in 2005, when the MPAA named Pisano president and, unsurprisingly, COO for its Los Angeles operations.²⁸⁸

Evidence of the SAG's factional leadership continues. The SAG contributed \$10,000 of the \$50,000 needed to produce the 2005 CEIDR report,²⁸⁹ which calls the FTAC approach "well-intentioned" but rife with problems.²⁹⁰ Stephen Katz, author of the 2005 CEIDR Report, claims that the SAG's internal politics did not influence the report, which generally supports subsidies in some fashion.²⁹¹ That said, as aforementioned,²⁹² the SAG recently pledged \$50,000 to the FTAC's filing with the USTR.²⁹³

Katz shares the FTAC's concerns and agrees runaway production must end. The difference between the two is how. Katz, for example, points to the numerous U.S. state-level incentives, which may be as culpable for runaway productions as Canada's subsidies.²⁹⁴ As subsidies for the motion picture industry proliferate, declaring only Canada's subsidies may not be practical. Thus, United States subsidies may be the pragmatic fallback, if the FTAC's efforts fail.

286. Interview with anonymous source (notes on file with author).

287. Press Release, Screen Actors Guild, Screen Actors Guild Supports Film and Television Action Committee (FTAC), (Nov. 1, 2005) (on file with author).

288. Dave McNary, *Split Decision for MPAA*, DAILY VARIETY, Sept. 23, 2005 available at <http://www.variety.com/article/VR1117929508.html?category=1236&cs=1>.

289. Telephone interview with Stephen Katz, author of CEIDR's reports on runaway production (Sept. 13, 2006).

290. 2005 CEIDR REPORT, *supra* note 8, at 73.

291. Telephone interview with Stephen Katz, author of CEIDR's reports on runaway production (Sept. 13, 2006).

292. Film and Television Action Committee, Latest FTAC News, <http://www.ftac.net/> (last visited June 30, 2007).

293. Film and Television Action Committee, *supra* note 269.

294. Telephone interview with Stephen Katz, author of CEIDR's reports on runaway production (Sept. 13, 2006).

D. *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, even in the United States for only \$39 million.²⁹⁵ This was the case with Universal’s 2005 film *Serenity*. Executives at Universal liked the pitch for *Serenity*, and loved Joss Whedon, the creator, writer, and director.²⁹⁶ Universal Executives estimated *Serenity* would require a \$100 million budget, which was “just too much” for a film with no name recognition.²⁹⁷ Whedon promised Universal that he could shoot the film at half the \$100 million estimate.²⁹⁸ Whedon became a hero in the eyes of runaway production opponents, who hailed *Serenity* as a model of efficiency that proved that running away to Canada or Romania was not needed.²⁹⁹

According to one Universal executive, “[Whedon] was so eager to show that you could make a movie in L.A., we never thought of going anywhere else.”³⁰⁰ Whedon’s decision to film in Los Angeles, however, did not stem from altruism. Whedon said his “reasons were completely personal.”³⁰¹ Whedon’s wife is an architect in Los Angeles and he has two young children that he did not want to “uproot.”³⁰² Labeling Whedon as a champion of keeping jobs in America may be premature. His next project, a big screen version of *Wonder Woman*, is scheduled to shoot in Australia.³⁰³

Similarly, U.S. labor unions should think twice about praising Jodie Foster, star of 2005’s *Flightplan*. The movie was scheduled to film abroad until Foster refused to leave Los Angeles.³⁰⁴ The specifics of Foster’s salary are unknown, but she said that her contract “made it worth their while” to keep the film in Los Angeles.³⁰⁵

Republican Governor of California Arnold Schwarzenegger refused to join the cast of *Terminator 3* unless production moved from Vancouver to California.³⁰⁶ Schwarzenegger’s solidarity with the U.S. worker, however, may be disingenuous. Politics, not altruism, may have motivated

295. McNamara, *supra* note 253.

296. Whedon’s popularity stemmed from writing and directing the television series “Buffy the Vampire Slayer” and “Angel.” *See Id.*

297. *See Id.*

298. *Id.*

299. *See Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Edward Jay Epstein, X-Raying the Deal, <http://www.edwardjayepstein.com/x-rar1.htm> (last visited June 30, 2007).

Schwarzenegger. When he demanded to shoot in California, he was preparing to run for Governor.³⁰⁷ The *Terminator 3* budget was about \$170 million and Schwarzenegger took credit for taking an \$8 million pay cut to get production moved to California.³⁰⁸ The pay cut, however, is not praiseworthy when details of Schwarzenegger's contract are examined. Among the "goodies" in the 33-page contract was a "pay or play" fee of \$29 million, meaning Schwarzenegger would get paid even if the film was never made. There was also a pay package of \$1.5 million for personal bodyguards, use of a private jet, a fully equipped gym trailer, and 24-hour limousine service.³⁰⁹ Further, Schwarzenegger's "film in California" rhetoric is hypocritical; many of his past films were shot in Canada and Mexico.³¹⁰ Despite promises to fight runaway production from California, the state's budgetary problems have precluded the legislature from passing tax breaks. To be fair, Governor Schwarzenegger would likely sign anti-runaway production laws if they reached his desk.

There are, however, some in the film industry that do refuse to film overseas for economic reasons, such as Clint Eastwood, Harold Ramis, M. Night Shayamalan and Spike Lee,³¹¹ but an overall sampling of productions that relocated from abroad to the United States reveals that Hollywood's stars were motivated for personal, not social, reasons.

V. APPLYING LAW & ECONOMICS TO RUNAWAY PRODUCTIONS, POVERTY, AND GLOBALIZATION

A. *Social Costs: Runaway Production in Third World Nations*

As discussed earlier, Romania is fast becoming a popular filming location.³¹² Although Romanian workers are eager to work on movies, the working conditions in Romania highlights the darker side of runaway production not present in Canada or Australia. While union workers in the United States are often guaranteed overtime wages after working eight hours in a day, in Romania, however, workers typically do not collect

307. *The Roar of Greasepaint*, ECONOMIST, Mar. 9-15, 2002, at 63.

308. Ian Edwards, *B.C. Industry Must 'Reinvent' Itself*, PLAYBACK, Sept. 15, 2003, available at <http://www.playbackmag.com/articles/magazine/20030915/prodvan.html?>

309. Edward Jay Epstein, Budget for T-3, <http://www.edwardjayepstein.com/budget.htm> (last visited June 30, 2007).

310. See IMDB.com, Filming Locations for The 6th Day (2000), <http://imdb.com/title/tt0216216/locations> (last visited June 30, 2007); IMDB.com, Filming Locations for Predator (1987), <http://imdb.com/title/tt0093773/locations> (last visited June 30, 2007).

311. See generally IMDB.com (providing details of filming locations chosen by various directors).

312. Horn, *supra* note 174.

overtime wages until they work seventy-two hours in a week.³¹³ Furthermore, the “work environment encountered overseas is often unsafe and unregulated.”³¹⁴ In Romania, there are few, if any, unions or watchdog groups to enforce safe working conditions,³¹⁵ which is an advantage that “studio executives are loathe to say [] aloud,”³¹⁶ since there is no costly oversight or need to comply with regulations, which makes production cheaper. Perhaps the saddest comment on the welfare of Romanian film crews is that livestock used in a recent film cost more than the local actors.³¹⁷

There is an argument that runaway productions enable studios to make “good” movies that otherwise would not get made. Evidence for this argument needs further study, but it does exist.³¹⁸ In 2003, *Cold Mountain*—a natural economic runaway about the American Civil War, was the “first major mainstream American movie” filmed in Romania, despite the story’s North Carolina setting.³¹⁹ Albert Berger, the film’s producer, claimed: “[w]ithout the savings that Romania offered, ‘Cold Mountain’ absolutely would not have gotten made.”³²⁰ *Cold Mountain* received numerous Academy Award nominations, and Renee Zellweger won the Oscar for Best Supporting Actress.³²¹

Runaway production also leads to the creation of what many would consider “bad” films. An interesting example involves film producers who wanted to film a horror movie in New Mexico. Ironically, producers of 2006’s *The Hills Have Eyes*—a natural economic runaway—filmed in Morocco because New Mexico was too expensive and “religious Saudis” owned the land the producers wanted to use and demanded to read and

313. Horn, *supra* note 174.

314. *Id.*

315. *Id.* The following example illustrates the poor working conditions: “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 didn’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.’” *Id.* (alteration in original).

316. *Id.*

317. *Id.* In 2007, Romania officially joins the EU and must comply with union’s labor and monetary policies. Thus, poor working conditions and low pay may vanish. *Id.*

318. 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. See generally IMDB.com (search for “recent best pictures”).

319. Horn, *supra* note 174.

320. *Id.*

321. IMDB.com, Awards for Cold Mountain (2003), <http://imdb.com/title/tt0159365/awards> (last visited June 30, 2007).

censor the script.³²² Morocco's Islamic government, however, wants to lure the film industry and does not "tamper with film content."³²³

Morocco also lured director Oliver Stone to film much of 2004's *Alexander* there.³²⁴ Despite several suicide bombings in Morocco in 2003, Stone insisted on using Morocco as the backdrop for his story.³²⁵ *Alexander* was, at that time, the most expensive independent movie shot outside the United States.³²⁶ *Alexander*'s producers knew the benefits of Morocco's "main attraction," that movie extras work for \$1.80 an hour.³²⁷ Without such savings, *Alexander* would have cost much more to make, if it was made at all.

Despite growing evidence pointing to Islamic Fundamentalism in Morocco, Director Sir Ridley Scott elected to shoot scenes there for *Kingdom of Heaven*, which for some Muslims was a religiously sensitive film about the Crusades.³²⁸ Security for the film tightened after rumors surfaced that one scene featured a crusader "stamping on the Koran."³²⁹ Islamic fundamentalism, ironically, was embraced by the makers of Universal's *United 93*, which captured the horror of 9/11. According to 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.³³⁰ It can be argued that these films were artistic runaways.

The Romanian and Moroccan examples provide evidence that runaway productions can benefit 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 labor and expose workers to unsafe working conditions that do not seem to offset cost savings. Economics aside, is all this a good thing?

322. Megan K. Stack, *Down, Dirty in Morocco*, L.A. TIMES, Oct. 16, 2005, at E1

323. *Id.*

324. *Relocation, Relocation, Relocation*, ECONOMIST, July 10-16, 2004, at 77.

325. *Id.*

326. *Id.*

327. *Id.*

328. *See id.* Other films shot in Morocco that seemingly conflict with Islamic fundamentalism include: "Black Hawk Down," IMDB.com, Filming Locations for Black Hawk Down (2001), <http://imdb.com/title/tt0265086/locations> (last visited June 30, 2007); "The Nativity Story," IMDB.com, Filming Locations for The Nativity Story (2006), <http://imdb.com/title/tt0762121/locations> (last visited June 30, 2007); and "The Last Temptation of Christ," IMDB.com, Filming Locations for The Last Temptation of Christ (1988), <http://imdb.com/title/tt0095497/locations> (last visited June 30, 2007).

329. *Relocation, Relocation, Relocation*, ECONOMIST, July 8, 2004, at 77.

330. 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. IMDB.com, Filming Locations for World Trade Center (2006), <http://imdb.com/title/tt0469641/locations> (last visited June 30, 2007).

To this author, there is something inherently wrong when a movie about the Civil War films in Romania. There is something wrong when *Superman Returns*, a tale of a superhero who was raised in Kansas, who stands for “truth, justice and the American way,”³³¹ 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.

At some point, students of law and economics must separate themselves from the efficiency and benefits that Hollywood and other multinational corporations receive from runaway productions or off shoring. At some point, students should or may want to ask: “Is this ethical?” Shouldn’t all laws and theories be questioned for sound ethics?

B. Judge Posner on Globalization and Free Trade

Should the United States take protectionist measures against what Judge Richard Posner calls “allegedly ‘unfair’ trade practices?”³³² According to Posner, “in general the answer is no, if the maximand is taken to be world economic welfare as a whole.”³³³ Posner concedes, however, that if the maximand “is [] protecting the nation’s welfare, then protectionism may occasionally be justified.”³³⁴ 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 such as 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. [Economist Gary] 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 tha[n] local minimum wages, and the federal minimum wage

331. IMDB.com, Memorable Quotes for Superman (1978), <http://imdb.com/title/tt0078346/quotes> (last visited June 30, 2007).

332. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 315 (Sixth Edition, Aspen Publishers 2003).

333. *Id.*

334. *Id.*

fewer disemployment effects than state minimum wages.³³⁵

In 2006, *The Economist* published a 19-page report on the world economy.³³⁶ According to the report, so-called “rich countries” are democracies, therefore “continued support for globalization will depend on how prosperous the average worker feels.”³³⁷ The average “share of the cake”—in terms of wages as a percentage of national income—for a rich country’s worker is “the smallest it has been for at least three decades.”³³⁸ Corporate America, on the other hand, almost doubled its share of national income from 7% in 2001 to 13% in 2006.³³⁹ In sum, globalization has redistributed income by lifting corporate profits relative to wages.

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.”³⁴⁰ It is commonly asserted that free trade and off shoring should not affect total employment in rich countries; but rather, trade with emerging economies “can have a big impact on both average and relative wages.”³⁴¹ According to *The Economist*, real wages, over a long period of time, “tend to track average productivity growth. But so far this decade, workers’ real pay in many developed economies has increased more slowly than labour productivity.”³⁴² For example, “the real weekly wage of a typical American worker fell 4%” since 2001 while labor productivity rose by 15% over the same period.³⁴³ According to *The Economist*: “[T]he usual argument in favour of globalisation—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.”³⁴⁴ Over time, the report claims, worldwide competition should “reduce 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

335. Posting of Richard Posner to The Becker-Posner Blog, <http://www.becker-posner-blog.com/archives/2006/07/> (July 30, 2006, 22:15 EDT). 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 . . .” *Id.*

336. *The New Titans: A Survey of the World Economy*, *ECONOMIST*, Sept. 16-22, 2006, at 3.

337. *Id.* at 12.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

time.”³⁴⁵ Countering the fears of outsourcing are employment statistics. Thus far, “fewer than one million American service-sector jobs have been lost to off shoring.”³⁴⁶ Forrester Research forecasts that by 2015, roughly 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.”³⁴⁷ Princeton University economist Alan Blinder, however, thinks many economists, including those at Forrester Research, underestimate the damaging effects of off shoring. Blinder suggests 30% of all jobs might be at risk.³⁴⁸

It could be argued that opponents of runaway production were overreacting to films that went to Canada and other industrialized nations. Nevertheless, proponents of globalization, free trade and off shoring prevailed in opening Hollywood’s floodgates to the world. 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, such as the poor standard of living in third world nations, poor safety conditions and the loss of an American industry, in favor of the economic savings. Morality should never suffer in favor of profits; free trade should also be fair trade.

Perhaps union-militancy-exasperated runaway production and union leaders should have made reasonable concessions to loosen strict demands in their contracts. Moreover, America’s elected officials, at all levels of government, failed to recognize the resurgence of runaway production. Lawmakers should be proactive in enacting legislation to address foreseeable problems, especially when a vital American industry is at stake.

C. 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, then globalization needs major improvements. Posner admits that income in the United States is unevenly distributed.³⁴⁹ Since Posner’s book, *Economic Analysis of the Law*, was published in 2003, why does he use data from 1986 to measure income inequality?³⁵⁰ More recent, and more pertinent, data on inequality is available. In 1986, the poorest 20% of American households possessed about 5% of the nation’s personal

345. *Id.* at 14.

346. *Id.*

347. *Id.* (citing Forrester Research reports).

348. *Id.* See also, Alan S. Blinder, *Offshoring: The Next Industrial Revolution?*, 85 FOREIGN AFF. 113 (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.

349. POSNER, *supra* note 332, at 468.

350. *Id.*

income and the richest 20% had about 47%.³⁵¹ Even in 1986, the United States, along with Switzerland, had the most unequal distribution of income among the wealthy nations of the world.³⁵² Posner's position on income inequality is ambiguous. In any event, income inequality increased dramatically. In 1997, the richest 1% of Americans controlled 40.1% of the nation's wealth.³⁵³ In 1979, the richest one 1% of Americans controlled 20.5% of the nation's wealth.³⁵⁴ Indeed, the rich get richer and poor get poorer.

While the income studies Posner cites may differ from recent income study conclusions, both show that disparities in wealth shrunk precipitously after 1945, but have risen since the 1980's.³⁵⁵ 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 its peak in the mid-1950's, when the unionized portion of the work force was 32.5%.³⁵⁶ Since 1975, union membership has taken its steepest decline, dropping to just 14.1% of the workforce, a level not seen since before the Great Depression.³⁵⁷ Unions helped increase wages and improved working conditions.³⁵⁸ The G.I. Bill sent millions of servicemen to college after World War II.³⁵⁹ New Deal programs helped build the nation's infrastructure. Former President Lyndon Johnson waged a war on poverty and African Americans received the right to vote.³⁶⁰ Social Security was established, federal minimum wage was enacted, Medicare and Medicaid were established . . . and the list goes on. Posner ignores these factors, and by failing to address them, it is possible that Posner may be drawing conclusions about inequality without taking major policies and laws into his calculations. Posner could have at least explained why he does not address these factors.

Perhaps the establishment of these progressive laws and regulations correlated with the reduction of inequality. Does Posner fail to address these issues because he opposes them on political or economic grounds? Does Posner omit a discussion because others—and Perhaps Posner

351. *Id.*

352. *Id.*

353. THOMAS FRANK, ONE MARKET UNDER GOD 7 (2000).

354. *Id.* at 8.

355. *See id.*; POSNER, *supra* note 332, at 468.

356. ROBERT D. PUTNAM, BOWLING ALONE 81 (2000).

357. *Id.*

358. *See* AFL-CIO, *The Union Difference*, <http://www.aflcio.org/joinaunion/why/uniondifference/index.cfm>.

359. *See* United States Department of Veterans Affairs, G.I. Bill History, http://www.gibill.va.gov/GI_Bill_Info/history.htm (last visited June 30, 2007).

360. *See* Basic Readings in U.S. Democracy, Lyndon B. Johnson, <http://usinfo.state.gov/usa/infousa/facts/democrac/40.htm> (last visited June 30, 2007).

himself—have found these laws and regulations (entitlements as some prefer to label them) were major forces that reduced inequality? Students of law and economics can only speculate.

Posner implies that the solution to economic inequality in the United States is a transfer of wealth from the rich to the poor, which could involve high transaction costs.³⁶¹ Again, Posner hurries his discussion on wealth redistribution and likens it to a Robin Hood mentality. But why does wealth need redistribution? Is redistribution the only solution to reducing inequality? Is wealth a limited resource? The nature of investments is to grow wealth into more wealth. Thus, we could reduce inequality without redistributing what people own. Rather, we could implement policies to increase opportunities for the poor and allow them to generate wealth on their own. Ironically, those in favor of free trade and globalization flout Posner's concerns about wealth redistribution.³⁶² Many free traders claim open markets are beneficial because they raise living standards across the world by more fairly redistributing wealth.³⁶³

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.³⁶⁴ Given this assumption, which Posner may or may not agree with, equalizing incomes would probably increase utility.³⁶⁵ 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?³⁶⁶

Posner's theory does a disservice to the millions of Americans working hard to earn a living. The working poor of this nation work hard for meager income and give up leisure time to earn it. Suggesting they do not value money because they may not "succeed in making it" is insulting. It is a myth that anyone can work hard, make money, and be successful. It happens, but not very often.

D. Judge Posner on Labor and Unions in the United States

In 1998, author Barbara Ehrenreich, inspired by the rhetoric

361. POSNER, *supra* note 332, at 470-479.

362. See Martin N. Baily & Diane Farrell, *Exploding the Myths of Offshoring*, MCKINSEY QUARTERLY, June 2004.

363. See *id.*

364. POSNER, *supra* note 332, at 470-473.

365. *Id.* at 470.

366. *Id.*

surrounding welfare reform, wanted to find out if an American could prosper on jobs that paid at, or slightly above, the minimum wage.³⁶⁷ Ehrenreich spent the year 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.³⁶⁸ Ehrenreich provided the following evaluation of her experience:

[A]ll of these jobs were physically demanding, some of them even damaging if performed month after month. . . . [T]he 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.³⁶⁹

In January 2004, the conservative Heritage Foundation conceded that real wages had been stagnant for some time and that average real hourly earnings were slightly below \$8.40; in 1998—the year of Ehrenreich’s research—it was about \$7.80.³⁷⁰ Achieving economic success, Ehrenreich learned, was not realistic and even basic survival was difficult.³⁷¹ Indeed, survival in the workplace is an issue for many American workers.

When Ronald Reagan became President in 1980, the Occupational Safety and Health Administration (OSHA) had only 1300 inspectors for ensuring the safety of over five million workplaces across the country.³⁷² By 1981, Reagan slashed 20% of OSHA inspectors.³⁷³ Furthermore, OSHA adopted a “voluntary compliance” policy, under which OSHA inspectors had to inspect a company’s injury log before entering their plant.³⁷⁴

As author Eric Schlosser noted, “OSHA’s voluntary compliance policy did indeed reduce the number of recorded injuries in meatpacking plants. It did not, however, reduce the number of people getting hurt.”³⁷⁵ Over a three-month period in 1985, the Iowa Beef Packing company (IBP) kept two injury logs: one for recording every injury that occurred at the slaughterhouse and one for when OSHA inspectors visited.³⁷⁶ The first log

367. BARBARA EHRENRICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 1-3 (2001).

368. *See Id.*

369. *Id.* at 195.

370. Tim Kane, *The Real Story on “Stagnant” Wages*, THE HERITAGE FOUNDATION, Apr. 27, 2004, available at <http://www.heritage.org/Research/Economy/wm491.cfm>.

371. EHRENRICH, *supra* note 367, 193-221.

372. ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 179 (2001).

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 180.

recorded 1800 illnesses and injuries. The log given to OSHA recorded only 160—"a discrepancy of more than 1,000%."³⁷⁷

A contributing factor to the mounting numbers of injuries--other than fraud and the understaffed 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 workers belong to a union. Most of the nonunion workers . . . are generally employed 'at will.' That means they can be fired without warning, for just about any reason.³⁷⁸

Posner gives 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."³⁷⁹ As aforementioned, the increasing pace of runaway production due to government incentives or cheap labor has not resulted in cheaper DVDs or movie theatre tickets. Worse yet, new technology like HD-DVD and Blu-Ray machines 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 motion picture industry specifically. Furthermore, even those in favor of free trade admit its drawbacks.³⁸⁰ According to historical data,

[a] sizable portion of workers who lose their jobs because of free trade don't find new ones easily or must accept jobs with lower wages. From 1979 to 1999, roughly 30 percent of the people who were unemployed as a result of cheap imports in sectors other than manufacturing hadn't found jobs a year later. For those who did find them, average wages were about the same as before. Within that average, however, wages varied considerably. About a quarter of these people were better paid, but 55 percent took lower-paid jobs and as many as 25 percent of this group took pay cuts of 30 percent or more.³⁸¹

The economic picture of the world today is not unlike that of 1900 to

377. *Id.*

378. *Id.* at 174.

379. POSNER, *supra* note 332, at 336.

380. Martin N. Baily & Diane Farrell, *Exploding the Myths of Offshoring*, MCKINSEY Q., June 2004.

381. *Id.*

1929.³⁸² The gap between the worlds of rich and poor today is almost the same as before the Great Depression³⁸³ and workers wages, benefits and safety have slowly eroded. Is history repeating itself?

VI. RUNAWAY PRODUCTION: SOLUTIONS AND PROBLEMS

A. *Tax Incentives As Subsidies: 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 Article.³⁸⁴ 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 1956.³⁸⁵ The use of corporate welfare-subsidies, tax incentives, and grants, 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."³⁸⁶

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% of American businesses manage to stay in 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 adverti[s]ed 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.

382. See discussion on Posner and Inequality, *supra* p. 935-36.

383. *Id.*

384. Corporate subsidies are now comen in political rhetoric. If one eliminates the word "corporate" from the discussion, might subsidies be viewed as a social good? For instance, 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?

385. Columbia Commonwealth University, Ralph Nader on Corporations, http://www.ontheissues.org/Celeb/Ralph_Nader_Corporations.htm (last visited June 30, 2007).

386. *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).

Over those five years, these firms reduced their total U.S. workforces by 329,000.³⁸⁷

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 including special effects firms and costume manufacturers, 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.³⁸⁸ Thus, when it comes to movies, tax incentives create jobs. The reality is that subsidies, for better or worse, exist at home and abroad and may be needed to keep the movie industry in the United States. Moreover, if generous subsidies and tax incentives fail to pass, the United States and other industrialized nations may eventually lose the film industry to developing nations like Romania and Morocco.

B. 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.³⁸⁹ New Mexico also offers a 25% tax rebate for every dollar spent in the state.³⁹⁰ 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.³⁹¹

As a result of these programs, within two years New Mexico went from having no movies filmed to 25 movies.³⁹² In 2005, in an effort to remain competitive, New Mexico enacted several new tax breaks and raised the loan amount to \$15 million.³⁹³

387. *Id.*

388. *See* note 8, *supra*.

389. 2005 CEIDR REPORT, *supra* note 8, at 65.

390. Telephone interview with Jennifer Schwalenberg, New Mexico Film Office, (Sept. 13, 2006).

391. 2005 CEIDR REPORT, *supra* note 8, at 65.

392. *Id.*

393. *Id.* at 66.

Cost to state treasuries is the fundamental drawback to film incentives. At a time when many states face large budget deficits, it remains unclear if film incentives can be justified.³⁹⁴ 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 million to film producers since the loan program was approved in 2002.³⁹⁵ As a result of New Mexico's loans, movie productions paid a total of \$36 million to 2,256 New Mexico residents and spent \$113 million within the state.³⁹⁶ In sum, states and local should 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 economic activity generated by movie productions will offset the cost to the states. It is 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.³⁹⁷ 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 1998.³⁹⁸ Conversely, in 1998, 62 films were made in California, but dropped to 46 films in 2005.³⁹⁹

In sum, more money was spent on California films in 2005 than 1998, but the total number of films made in California in 1998 was more than 2005. Perhaps it's just a tradeoff. For the time being, California may not

394. Louisiana, for example, in recent years 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., *Thespians in Louisiana: Come Play With Me*, ECONOMIST, Apr. 16-22, 2005, at 29.

395. New Mexico Film Investment Program, *Outstanding Loans*, Aug. 31, 2006, available at http://www.state.nm.us/nmsic/PDF%20files/NM_Film_Investment_Program_8.31.06_Final.pdf

396. *Id.* The numbers reported by New Mexico were for actual dollars spent. No multiplier effect was calculated.

397. Directors Guild of America, *Governors Join as 'Big Four' and Come out Against Runaway Production*, July 2004, http://www.dga.org/thedga/leg_rp_updte-704.php3.

398. 2005 CEIDR REPORT, *supra* note 8, at 4.

399. *Id.*

feel the need to enact legislative handouts to the entertainment industry because Hollywood remains the epicenter for filmmaking and the hundreds of allied businesses (such as special effects shops) that create an unparalleled entertainment infrastructure. For now.

C. *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.⁴⁰⁰ 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.⁴⁰¹

The law was unnecessary. In 1999, 87% of films with budgets under \$10 million were already shot in the United States; compared to 13% in Canada.⁴⁰² In 2001, 65% of films with budgets under \$10 million filmed in the United States; compared to 35% in Canada, which was down from 52% in 2000.⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵

Senator Diane Feinstein (D-CA) was furious that the motion picture

400. Public Law No: 108-357, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.04520>.

401. M. Katharine Davidson & Mark Saulino, *The Jobs Creation Act of 2004 and the Entertainment Industry*, L.A. LAWYER, May 2005, at 12.

402. 2001 CEIDR REPORT, *supra* note 202, at 6.

403. *Id.*

404. Brody Mullins, *Studios Take Hit in Tax Bill*, ROLL CALL, Oct. 7, 2004.

405. *Id.*

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.⁴⁰⁶ Feinstein claimed that the final legislation will cost the motion picture industry \$5 billion over 10 years to change the way they account for revenues.⁴⁰⁷

D. Federal Legislation That Would Help

The Louisiana and New Mexico models show how proactive legislation fosters 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 a field that may be the last distinctively American industry left, comes about.

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 [sic] 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%).⁴⁰⁸

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,

406. 150 CONG. REC. S-11191 (daily ed. Oct. 11, 2004) (statement of Rep. Feinstein).

407. *Id.* The Republican changes force the motion picture industry to adopt unified accounting. For example, an expensive film produced in the United States that loses money will have to lump its losses with all other revenues such as DVD sales and theme parks. Thus, assuming a film loses \$50 million, requiring unified accounting will cost the studio \$2.6 million in additional taxes.

408. 2005 CEIDR REPORT, *supra* note 8, at 70.

which equals \$1,200 per job.⁴⁰⁹

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 [as] with any job leaving the U.S. is, where and when does it stop. When Canada was proposing [its] federal incentive [its] rallying call was, "These are the jobs your children want." The U.S. must decide [if] it want[s] feature film production careers for [its] children, and [its] children's children.⁴¹⁰

E. Other Solutions

Many states have no film commissions and those that do have slashed their budgets because of budget shortfalls among other reasons.⁴¹¹ The United States is the only major nation that does not have an organization at the federal-level to address the motion picture industry.⁴¹²

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.⁴¹³

Other ideas to alleviate the problem of runaway productions include: government sponsored training programs to ensure a steady supply of

409. *Id.* at 74.

410. *Id.* at 75.

411. THE CENTER FOR ENTERTAINMENT INDUSTRY DATA AND RESEARCH, THE GLOBAL SUCCESS OF PRODUCTION TAX INCENTIVES AND THE MIGRATION OF CEIDR, THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO CANADA: YEAR 2001 PRODUCTION REPORT 11 (2002)

412. THE COMMERCE REPORT, *supra* note 9, at 89.

413. *Id.*

artists and film technicians in the United States; 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.

VII. CONCLUSION: U.S. MOTION PICTURES--TO BE, OR NOT TO BE?

This author supports measures, whatever their form, to keep the motion picture industry in the United States. That said, Canadian Entertainment Attorney Joe Sisto 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.⁴¹⁴

Sisto's analysis is accurate. It is not, however, too late for the United States 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 are] mad as hell and [we are] not gonna take this anymore."⁴¹⁵ 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 particular community, which benefits economically as a result, the constituency is 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 American made. Employees at Wyoming's Department of Tourism have seen 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.⁴¹⁶ But it wasn't filmed in Wyoming; it was filmed in Canada.⁴¹⁷ There is little hope, however, 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. As of this writing in 2006, there is a glimmer of hope, though, 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.⁴¹⁸ Dallas Mayor Laura Miller said, "[t]he thought of 'Dallas' being made in Toronto is not a good idea."⁴¹⁹ The Dallas Film Commission fought back, launching a "Shoot JR in Dallas" public relation campaign to lure the film's production.⁴²⁰ In addition, the Dallas Film Commission asked private-

414. Joe Sisto, *Outsourcing the Movies: Runaway Productions of American Film and Television in Canada*, 22 ENT. & SPORTS LAW. 1, 28-29 (Spring 2004).

415. IMDB.com, Memorable Quotes for *Network* (1976), <http://imdb.com/title/tt0074958/quotes> (last visited June 30, 2007).

416. Dan Harris, *World News Tonight: Finding Brokeback; Is it Real?* (ABC television broadcast Mar. 5, 2006).

417. *Id.*

418. *Dallas Urges Local Filming of TV Spinoff*, ASSOCIATED PRESS, Mar. 9, 2006, available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D8G7UR2G1.html>.

419. *Id.*

420. Press Release, Dallas Film Commission, What it Means to Have the Movie *Dallas* shot in Dallas (on file with author).

sector businesses in Dallas to offer incentives for the film.⁴²¹ 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.⁴²² The Dallas Film Commission estimates that the film would create 300 direct jobs and 650 indirect jobs.⁴²³ Increased tourism and free publicity would also benefit the city. As the Dallas Film Commission says, "[t]his is marketing we can not afford to buy. The true impact of this is immeasurable."⁴²⁴

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.⁴²⁵ The Dallas Film Commission claims the city has lost 24 productions with budgets totaling \$500 million.⁴²⁶ 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?"⁴²⁷

The Texas State Legislature passed a bill in 2005 to offer a \$750,000 rebate for production costs, but the initiative remains unfunded.⁴²⁸ 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, "[i]t's now going to come down to really making the numbers work with our studio [20th Century Fox]."⁴²⁹

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 initially planned.⁴³⁰ So, while still tentative, Dallas will get four weeks of filming and Shreveport, Louisiana will get eight.⁴³¹ Janice Burklund, Director of the Dallas Film Commission, said "[t]he 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."⁴³²

The movie industry is a national treasure that many Americans take for granted. Simultaneously, many in America would agree that movies,

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Dallas Urges*, *supra* note 418.

429. *Id.*

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

431. *Id.*

432. *Id.*

studios, and Hollywood--as a physical location and as a part of the American psyche--are treasures the nation should not export. The United States is in a position to compete with Canada and other nations that offer incentives and it must do so before runaway productions migrate to developing nations, which can beat the United States in a race to the bottom. This Article has highlighted the economic consequences of losing film productions and the dire conditions that exist in third world countries; conditions that globalization has arguably made worse.