



The "Pay or Play" Clause in Film and TV Contracts

June 15, 2011 by Bob Tarantino

I was speaking at a conference earlier this week when the discussion turned to the issue of "pay or play" (sometimes rendered "pay-or-play") clauses in film- and TV-related contracts, particularly contracts entered into by actors or other participants in the creative process (such as directors). While everyone on the panel seemed fairly comfortable that "pay or play" has a relatively settled meaning in the film and TV industries, I thought it might be useful to review some definitions of the term which had been proposed by others.

First up, Wikipedia has a surprisingly detailed entry on the topic which includes multiple examples (under the heading "Guarantee (filmmaking)"). According to Wikipedia, "pay-or-play" is an "informal" term referring to "a term of an actor or director's contract that guarantees remuneration if, through no fault of their own, the artist is released from the contract". That seems to be broadly consistent with what many people in the industry might use, though it is a bit imprecise from a legal standpoint: I'm a little troubled by the notion that it is a "guarantee" and that the payment obligation is binding so long as "through no fault of their own" an artist is "released from the contract". A "guarantee" is actually a legal obligation imposed on a third party to perform contractual obligations if the party whose performance is being guaranteed fails to perform; I can't meaningfully guarantee my own obligations, only someone else can. A contract can have both a pay-or-play clause and be guaranteed - but a pay-or-play clause isn't itself a guarantee. The phrase "through no fault of their own" seems a little too narrow (i.e., if I'm acting for the producer I think there are other situations in which the artist should not be paid, even if they are pay-or-play) and "released from the contract" also seems too narrow (i.e., if I'm acting for the performer, the payment obligation should be triggered even in situations where the performer is not technically "released" from the contract).

Matt Galsor at Law Law Land wrote Q&A: So...What Exactly Is "Pay or Play?", which seems like a promising source of information - and indeed the promise is fulfilled, but so well that the post is difficult to summarize. Here's an attempt: the notion of a pay-or-play obligation is impossible to understand without first appreciating that the obligation of a producer under a performer's contract will often be subject to certain conditions precedent being met (for example: the producer being able to obtain sufficient financing for the project; the performer proving that they are legally able to work (by proving citizenship or holding a visa, for example); other performers being available for the project, etc.). But performers don't want their deals (and their entitlement to payment) to be subject to conditions - they want their money whatever happens. Hence, the demand that they be made "pay or play" - which translates, as Matt writes, into

"when everyone wants to be pay or play, what they really mean or should mean is that they want no conditions to their deal so that the money will be owed whether or not the movie actually happens"



That's a bit more nuanced than the Wikipedia entry, and raises a concern: people, even individuals who have extensive industry experience, seem to be using a three word phrase to describe a concept which is pretty darn complicated (Matt spent more than 700 words explaining it). Language "shortcuts" like that tend to (or should) give lawyers the willies. People are using the phrase to mean something, but it's not always entirely clear that everybody means the same thing. Our next source seems to indicate that the "pay or play" concept is fairly slippery, and that what at first seemed to be a pretty open-and-shut entails a fairly involved analysis. Do the words "pay or play" in a contract mean that the money is owed irrespective of whether the movie is made or not? It might - particularly if the phrase "pay or play" is not qualified or modified by any other language - but then again, it might not.

John Yudelson has written a pair of informative articles which also happen to shed some light on what "pay or play" means: "Hot bodies or cool heads?: actors versus producers in feature film deals" and "The impact of actors and producers in studio-financed movie deals". In "Hot bodies..." Yudelson describes a pay-or-play deal as one "under which the studio is obliged to pay their full fee irrespective of whether a film is produced or not, depending on certain contingencies". That starts to sound interesting: what are the "certain contingencies"? It's beginning to seem like "pay or play" is not so much a binary switch (i.e., once a deal is "pay or play" the producer is obliged to make payment come hell or high water) but instead is an obligation based on the obtaining of a number of different states of affairs.

Tony Duarte's masterful *Canadian Film & Television Business & Legal Practice* offers some further insight into the matter. In section 9:50.70(c), Tony states that a "pay-or-play" agreement is one in which the performer's "compensation is earned in full under any and all circumstances other than the performer's own default and, in some cases, force majeure" [emphasis added]. Now we're getting somewhere.

Duarte goes on in the notes to his Form 8 to say that "pay or play contracts allow the production company to terminate services for any reason provided that the entire fee expected by the contractor for the engagement is paid to the contractor in full ... such guarantees are generally drafted to make clear that certain named events of force majeure may excuse the production company from performing the contract or that the contract is terminated and no payment made in the event of the contractor's death or defined events of disability or default" [again, emphasis added]. Excellent - more details.

Before going further, we should also note that Duarte's comments add an important element to the analysis: "pay or play" status can be beneficial for the producer as well as the talent, since it means that the producer is able to terminate a performer for any reason whatsoever, so long as the fee is paid - that can come in handy if an actor is disruptive or even if for purely creative or personal relationship reasons the engagement simply isn't productive.

Adding together the foregoing, we can see that simply using the phrase "pay or play" in a contract, without anything further, could be a recipe for confusion: on its own, the phrase can mean anything from "payment is owed no matter what" (favourable to the performer) to "payment is owed in certain



circumstances" (favourable to the producer). Because of the variation in understandings of the "meaning" of the term "pay or play", resort to contractual language will be important in the event of a dispute. As usual, precision in drafting is required. If acting as producer's counsel, I suggest that a pay or play clause should be made expressly subject to the following:

- termination of the performer "for cause" (such as default)
- termination of the performer as a result of death or disability
- the occurrence of an event of force majeure (or at least certain events of force majeure)
- the performer's signing of documents which contain at least a grant of rights in favour of the producer
- the performer qualifying for insurance coverage
- the performer qualifying for any necessary immigration or job eligibility conditions (for example, if the film is being shot in Canada (or any other country), and the performer is not eligible to enter Canada because of an undisclosed prior criminal conviction, why should the performer enjoy a windfall payment?)

The film and TV industries are industries replete with their own terms of art - only in limited circumstances should trade "understandings" of those terms of art be relied on.

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