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HOLLYWOOD DEALS: SOFT CONTRACTS FOR HARD MARKETS

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ABSTRACT

Hollywood film projects involving significant capital investments regularly proceed on the basis of unsigned "deal memos" and draft agreements with uncertain legal enforceability. These "soft contracts" constitute a hybrid instrument adapted to the transactional hazards of an environment in which neither formal contract nor reputation effects can adequately specify and enforce parties' commitments at any reasonable cost. Uncertainly enforceable contracts embed an implicit termination-and-renegotiation option that provides flexibility to respond to changed circumstances while maintaining a threat of legal liability that provides some transactional security. Evidence collected from litigation records, trade-press coverage, and field interviews shows that parties select "softer" or "harder" contractual instruments following a marginal cost–benefit calculus that secures parties' commitments at the lowest transaction-cost burden. Observed differences in the formalization levels selected with respect to different stages, elements, and parties in a film production reflect underlying differences in reputational capital, transactional experience,

† Professor, University of Southern California, Gould School of Law. I am grateful for valuable suggestions from participants at workshops held at Columbia Law School, USC Gould School of Law, and the 2012 Annual Conference of the International Society for New Institutional Economics, as well as conversations and interviews with industry executives and attorneys. I especially thank David Fierson for bringing this paper's subject to my attention, Professors Victor Goldberg and Mark Weinstein for valuable suggestions on prior drafts, and Jonathan Handel for extensive discussions on industry practices. For excellent research assistance, I thank Dmitri Gabrielov, Michael Hartman, Blake Horn, Minku Kang, Susanna Kim, Omar Nourreldin, Vanessa Roman, and Lewis Stevenson. Comments are welcome at jbarnett@law.usc.edu.

specification costs, enforcement costs, and holdup risk. A survey of litigation records and trade-press coverage since the inception of the Hollywood motion-picture industry suggests that soft contracts emerged as a substitute for the long-term employment contracts that secured studios' and talent's commitments in the era of the "studio system."

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"Aren't you people ever going to come in front of me with a signed contract?"[1]

INTRODUCTION

The Hollywood motion-picture industry[2] regularly enters into significant commitments under various species of incomplete agreements: oral communications, informal correspondence, deal memoranda, and draft agreements that are negotiated throughout a production and often remain unsigned. These unsigned deals—what I call "soft contracts"—are supported by an uncertain threat of legal enforcement coupled with some prospect of reputational liability. Hollywood's loose transactional practices challenge conventional expectations that an enforceable contract is a precondition for any significant financial undertaking. Business lawyers usually make special efforts to protect clients (and themselves) by avoiding the predicament of being potentially, but not certainly, subject to legal liability. Hollywood departs from this prudent approach.

1. This statement was reportedly made by the presiding judge to Warner Bros.' counsel in litigation involving an alleged breach of oral contract by Rodney Dangerfield. *See* Joseph D. Schleimer, *Coppola Verdict's Impact on Studio/Talent Talks*, 16 ENT. L. & FIN., No. 6 (Sept. 1998), *available at* http://www.schleimerlaw.com/ELF998.htm.

2. By "Hollywood," I refer throughout to the motion-picture (and, where specified, the television) industry based in Southern California, including the major film studios and the network of smaller entities that transact with those studios.

Existing explanations attribute Hollywood's contracting practices to the creative proclivities of actors and other participants who have little appreciation of legal matters.[3] But these explanations are incompatible with the competitive environment populated by the sophisticated intermediaries who represent talent and their counterparties in Hollywood. I account for Hollywood's contracting practices as an efficient adaptation to an environment characterized by three salient features: high specification and enforcement costs, significant but limited reputational pressures, and high holdup risk and outcome uncertainty. These features drive parties to select uncertainly enforceable soft contracts over two transactional alternatives: more fully formalized and certainly enforceable agreements ("hard" contracts) and less formalized and certainly unenforceable agreements ("informal" contracts). Whereas hard contracts are supported solely by the threat of legal liability and informal contracts are supported solely by the threat of reputational liability, a soft contract relies on a mix of legal and reputational liability to constrain, but not entirely limit, deviations from prior commitments.[4]

This Article's argument relies on a novel approach that treats contractual formality as a deal term on the negotiating table. Just as parties negotiate over the terms of a transaction, parties negotiate over the type of instruments used to formalize those terms.[5] This

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3. *See infra* note 95 and accompanying text.

4. The concept of "soft contracts" draws on two foundational papers. The first is Victor P. Goldberg, *Toward an Expanded Theory of Contract*, 10 J. ECON. ISSUES 45 (1976), which analyzes the use of flexible contractual terms to structure the process of adjusting terms in response to new information. The second is Benjamin Klein, *Why Holdups Occur: The Self-Enforcing Range of Contractual Relationships*, 34 ECON. INQUIRY 444 (1996), which analyzes the interaction of reputational and legal enforcement in constraining holdup behavior. Other scholars have addressed these issues in the context of innovation markets. *See* Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations to Support Innovation* (USC Law & Econ. Research Paper Series No. C12–3, 2012) (arguing that formal contracts serve as scaffolding to the inherently informal enforcement of contractual relations); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1387–1402 (2010) (arguing that innovation markets break down the traditional balancing of formal- and informal-contracting strategies).

5. As discussed below, other scholars have observed (as is well known to practitioners) that parties sometimes intentionally agree upon ambiguous contract terms. *See infra* note 34. By contrast, this Article concerns a strategy in which parties intentionally proceed pursuant to a contract whose entire legal existence is ambiguous. For the closest contribution, see generally Ricard Gil, *The Interplay of Formal and Relational Contracts: Evidence from Movies*, 29 J.L. ECON. & ORG. 681 (2011), which argues that distributors and exhibitors in the Spanish film

contrasts with the traditional approach in contract scholarship, which assumes (usually implicitly) the existence of a binding contract and then proceeds to analyze the efficiency of the contract terms. The level of formalization matters to transacting parties because it impacts the likelihood of legal enforceability, which in turn acts as a proxy for the flexibility of the parties' commitments. Just as parties can achieve any preferred level of transactional flexibility through explicit contractual terms, they can do so indirectly by calibrating the level of formalization used to memorialize those terms. Reducing formalization reduces enforceability, which enhances flexibility by embedding an implicit termination-and-renegotiation option that enables a party to withdraw or adjust contract terms in response to information that significantly raises that party's cost of performance. Increasing formalization increases enforceability, which reduces flexibility by identifying a set of circumstances in which a nonterminating party can credibly threaten legal action in response to an announced or threatened withdrawal. So long as a soft contract can at least mimic the level of flexibility that could be achieved through a more formalized hard contract, the soft contract is the preferred option, given that it achieves the same expected outcome with lower transaction costs, resulting in a net expected gain.

I focus on a segment of the film industry where unsigned deals are especially prevalent: transactions between studios or other production entities[6] and higher-value talent (mostly, actors[7] and directors), commonly known as "stars."[8] I collected evidence through

industry endogenously select the level of contractual formalization, resulting in a hybrid contract consisting of a formal agreement modified by an informal commitment to renegotiate in response to new information. *Id.* at 684.

6. As used in this Article, "studios" refers to either the small group of major studios that have a full range of financing, distribution, and production capacities or the larger group of independent production companies that have only production capacities and must seek distribution and financing elsewhere, or that have limited in-house distribution and financing capacities (a "mini–major" studio). Where necessary, I distinguish between these specific types of entities.

7. Throughout I use the term "actor" to refer to both male and female performers.

8. Existing scholarship on the economics of contracts in the film industry has analyzed contracts between distributors and theatrical exhibitors. *See* Arthur S. De Vany & W. David Walls, *Bose-Einstein Dynamics and Adaptive Contracting in the Motion Picture Industry*, 106 ECON. J. 1493, 1493–1513 (1996) (modeling distributor–exhibitor agreements with regard to information dynamics); Gil, *supra* note 5. Existing scholarship has also analyzed profit-sharing provisions in talent contracts. *See* Darlene C. Chisholm, *Asset Specificity and Long-Term Contracts: The Case of the Motion Picture Industry*, 19 E. ECON. J. 143, 143–55 (1993) (evaluating changes in talent's contracts in Hollywood from 1929 to 1948 with regard to asset specificity and transaction-cost minimization); Victor P. Goldberg, *The Net Profits Puzzle*, 97

field interviews with industry participants;[9] a review of practitioner commentary; a survey of over a century's worth of legal disputes as recorded in the digital archives of *Daily Variety*, the industry's authoritative trade publication; and the opinions and orders of federal and state courts. That rich body of evidence supports two propositions. First, soft contracts occupy an intermediate region of expected enforceability, as compared to hard contracts (which are certainly enforceable), and informal contracts (which are certainly unenforceable). Second, studios and stars (or their representatives) adjust formalization levels to secure parties' commitments to a film project at the lowest transaction-cost burden. In particular, parties adjust formalization levels depending on the reputational capital and transactional knowledge of their counterparties, the holdup risk at any particular stage of a transaction, and the specification costs required to formalize any particular element of a transaction. This approach accounts for observed differences in formalization levels within studio–star transactions, across the larger set of transactions in the Hollywood film industry, and, preliminarily, in other markets that employ a mix of more and less formalized contractual instruments. Far from being imprudent, soft contracts efficiently secure and adjust parties' commitments in high-risk, high-stakes transactions governed by significant but limited reputational pressures.

A complete explanation for soft contracting in Hollywood must explain why studios and stars do not use a simpler mechanism to secure parties' commitments: namely, vertical integration. At a one-time fixed specification cost, the studio could bind talent to a long-term employment contract and shift all transactions from the "market" to the "firm."[10] That would place both parties in a secure transactional framework and significantly limit the risk and

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COLUM. L. REV. 524, 524–50 (1997) (assessing the benefits of contingent-compensation contracts to both studios and talent); Mark Weinstein, *Profit-Sharing Contracts in Hollywood: Evolution and Analysis*, 27 J. LEGAL STUD. 67, 67–112 (1998) (questioning principal–agent explanations for profit-sharing contracts). There is a small practitioner literature on unsigned deals in the film industry. *See supra* note 3.

9. The eight interviewees include three senior law-firm partners or counsel with entertainment-law practices; four current or former in-house counsel, including two general counsels, at two major Hollywood studios and one "mini–major" studio; and a former chief executive at a major Hollywood studio. In addition, I conducted informal conversations with other entertainment attorneys. Throughout, I use abbreviations to refer to the various interviews I conducted with industry participants. For a full list and description of all interviews and corresponding abbreviations, see *infra* App. D.

10. *See* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

uncertainty to which studio and talent are exposed throughout a film production. Hollywood mostly operated under this arrangement during the studio-system era that prevailed from the 1920s until its erosion in the late 1940s. The dismantling of the studio system, and its replacement by a disaggregated network of studios, talent agencies, and independent production companies, necessitated alternative arrangements by which to secure commitments from external suppliers of talent and other inputs to a film production. The result is the fluid mix of hard and soft-contracting practices observed in Hollywood today.

This Article proceeds in six parts. In Part I, I describe the key economic characteristics of a motion-picture project. In Part II, I detail the key features of soft contracts and present data on the use and enforceability of soft contracts in Hollywood from the early twentieth century through the present. In Part III, I propose an economic rationale for soft contracting. In Part IV, I apply that rationale to account for observed tendencies in Hollywood contracting practices. In Part V, I examine how soft contracting may have displaced vertical integration as the primary transactional structure for talent–studio relationships in Hollywood. In Part VI, I discuss soft-contracting practices outside Hollywood and the normative implications of this phenomenon for contract law in general.

I. HOLLYWOOD ECONOMICS

Three features of the Hollywood film industry are especially salient from an economic perspective: (1) the high stakes, extreme risk, and contracting hazards of a film project; (2) the longevity and dominance of a small group of major studios; and (3) the persistence of the "star" vehicle in the labor market for acting and directorial talent. As I explain below, the latter two features derive from the first.

A. Why Only Fools Invest in Movies

Making a movie is far from an economically certain proposition, for three principal reasons: the capital requirements tend to be high, the odds of success are slim, and the contracting hazards are formidable. These factors provide the basis for identifying the economic rationale behind Hollywood's peculiar contracting practices.

1. *High Stakes and Extreme Uncertainty*. A substantial investment is typically at stake in a motion-picture production. The Motion Picture Association of America reported that in 2007, major-studio films had average production and distribution costs of $106.6 million.[11] Recent blockbuster films have had production and distribution budgets as high as $410 million. For example, Disney's *Pirates of the Caribbean: On Stranger Tides*, which was released in 2011, reportedly incurred production costs of $410 million.[12] Compounding matters, any investor's likelihood of earning a positive return on a particular film is slim. A striking illustration of this risk is *John Carter*, a major "flop" resulting in an estimated loss to Disney of $200 million.[13] Any movie is akin to a gamble with long odds: a few hits succeed spectacularly, while the remainder consists of flops that generate meager or no profits. This disparity in outcomes is dramatic. Out of a sample of 2,015 movies released in the North American market between 1984 and 1996, only 22 percent of releases were profitable; and 6.3 percent of all the movies earned 80 percent of the total profits.[14] No known metric exists by which to predict the likelihood of success or failure for a given film.[15] This is sometimes known as the "nobody knows" property.[16]

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11. Richard Verrier, *MPAA Stops Disclosing Average Costs of Making and Marketing Movies*, L.A. TIMES (Apr. 1, 2009), http://articles.latimes.com/2009/apr/01/business/fi-cotown-mpaa1. In industry terminology, "production and distribution cost" refers to both the "negative cost," the cost of production, and prints and ads, or "P&A," which primarily includes the costs of advertising and making prints for theatrical exhibition.

12. Christian Sylt, *Fourth Pirates of the Caribbean Is Most Expensive Movie Ever with Costs of $410 Million*, FORBES (July 22, 2014, 4:28 PM), http://www.forbes.com/sites/csylt/2014/07/22/fourth-pirates-of-the-caribbean-is-most-expensive-movie-ever-with-costs-of-410-million.

13. Paul Bond, *'John Carter' Will Cost Disney $200 Million in Operating Losses*, HOLLYWOOD REP. (Mar. 19, 2012, 1:43 PM), http://www.hollywoodreporter.com/news/john-carter-cost-disney-millions-301704.

14. Arthur S. De Vany & W. David Walls, *Motion Picture Profit, the Stable Paretian Hypothesis, and the Curse of the Superstar*, 28 J. ECON. DYNAMICS & CONTROL 1035, 1039–40 (2004). For this purpose, the authors defined "profit" to mean revenues minus capital, interest, overhead, advertising, and other costs. *Id.* at 1039.

15. *See* ARTHUR S. DE VANY, HOLLYWOOD ECONOMICS: HOW EXTREME UNCERTAINTY SHAPES THE FILM INDUSTRY 75–76, 84–89 (2004).

16. The phrase is derived from a statement by screenwriter William Goldwyn: "NOBODY KNOWS ANYTHING. Not one person in the entire motion picture field *knows* for a certainty what's going to work." WILLIAM GOLDWYN, ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING 39 (1983).

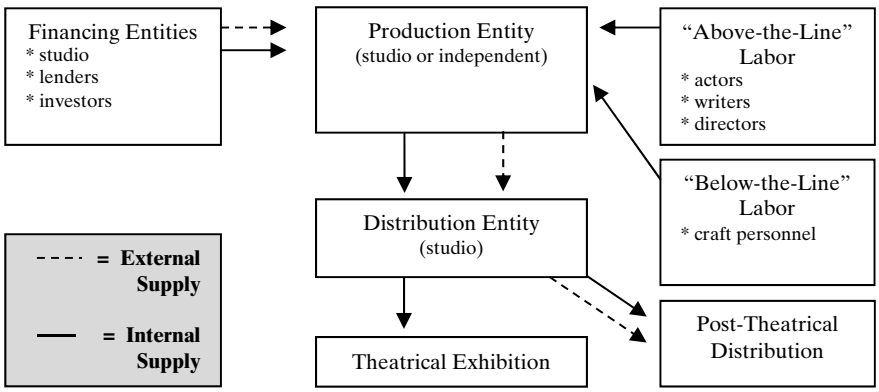
2. *Holdup Risk*. A film project proceeds along an extended multiyear timeline starting with idea conception and running through release at the box office. At various points, parties must make what institutional economists call "specific" investments in the project—that is, investments that have a lower value (or no value) in any alternative use—before having any reliable information as to the likely commercial outcome. Specific investments trigger exposure to holdup behavior by counterparties, subject to reputational and legal constraints. Once one party has made a sunk investment in the film project, the non-investing party can extract value from the investing party by refusing to perform its side of the bargain, subject to renegotiation of the project's terms to the non-investing party's advantage.[17] This concept can be illustrated more concretely in the entertainment context as follows. Assume a studio has started production on a movie and has agreed by contract to compensate its lead star with $1 million in cash and 5 percent of the gross box-office revenues. After one month during which the studio has incurred significant production costs, the lead star announces that he is dissatisfied with the director's performance and threatens to quit. In negotiations, the star's representative suggests that his client may revise his opinion of the director's performance if the star's compensation were increased to $1.5 million in cash and 10 percent of the gross box-office revenues. Ignoring any potential effects on the studio's exposure to opportunistic renegotiation in future projects, the studio will agree so long as its expected incremental costs of obtaining the services of an equivalent-value star, including any delay to the production schedule and associated losses, less any expected amount recoverable through litigation against the talent (net of legal fees), would exceed the additional compensation being demanded by the star.

3. *Multiple Inputs*. A film project is transactionally complex, which inflates its ex ante contracting costs and, in the event of breach,

17. *See* Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 308 (1978) (demonstrating how opportunistic postcontractual incentives to renegotiate based upon changes in the automotive-parts industry led to vertical integration rather than reliance on long-term contracts). *See generally* OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975) (describing how a non-investing party may span both sides of a transaction and thus subordinate and pressure the other party into accepting renegotiated terms).

ex post enforcement costs. The production entity must combine goods and services supplied by hundreds of different entities and individuals. The core inputs include (1) financing; (2) production; (3) creative talent; (4) technical personnel; (5) pre-release marketing; (6) theatrical exhibition; and (7) post-release distribution such as home video, the internet, and television. These inputs can be obtained either internally within a single firm or externally through the market. As shown below, in Hollywood's current industrial structure, external market-based sourcing predominates and is universally the case with respect to talent.

Figure 1. The Transactional Structure of a Hollywood Film Project



B. Why Studios Exist: The Inevitability of Scale

Since the start of Hollywood, a small group of major studios has held remarkably consistent market shares. In 2011, the six major studios (Sony Pictures, 20th Century Fox, Walt Disney, Paramount, Warner Bros., and Universal) accounted for 81.2 percent of gross domestic box-office revenues;[18] in 1939, five major studios and three smaller studios released 85 percent of the feature films released that year.[19] The widespread belief that these high concentration levels can be attributed to high entry barriers misses a more fundamental point.[20] The scale and scope of the Hollywood studio are means by

18. Ray Subers, *Paramount Wins 2011 Studio Battle*, BOX OFFICE MOJO (Jan. 11, 2012), http://boxofficemojo.com/news/?id=3345.

19. *See* MAE D. HUETTING, ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY: A STUDY IN INDUSTRIAL ORGANIZATION 84, 87 (1944).

20. *See generally* DEAN ALGER, HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998) (suggesting that greater

which to fund the high costs, and spread the high risks, of film production. A Hollywood studio does not primarily "make movies"; rather, it is primarily a vehicle for coordinating the inputs required to assemble a film as well as for financing, marketing, and distributing films produced by internal production divisions and independent production entities. By holding a diversified portfolio of projects and maintaining a library of past successes, the studio can generate a sufficient number of "hits" and revenue streams to make up for losses on the far greater number of "flops." The importance of that diversification function is illustrated by the fact that even critically successful independent production companies face chronic financial difficulties and often declare insolvency or are acquired by a major studio.[21]

C. Star Power

The star vehicle has been a consistent feature of the movie industry over virtually its entire history.[22] In 1919, the commercial power of Charlie Chaplin, a star director and performer, was so great that he founded his own production company, United Artists, together with fellow stars Douglas Fairbanks, Mary Pickford, and D.W. Griffith.[23] The persistence of the star vehicle can be explained through reference to two mechanisms. First, high-quality, low-cost reproduction technologies create "winner-take-all" effects that disproportionately drive market rents to the most highly valued performers.[24] Second, consumers mitigate consumption risk by using a star as an imperfect indicator of movie quality, which drives producers, distributors, and financiers to use that same variable as a

consideration should be given to the scale of big corporate media studios and the extent to which they provide diversified information); BEN BAGDIKIAN, THE NEW MEDIA MONOPOLY (2004) (same); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (same).

21. *See* THOMAS D. SELZ, MELVIN SIMENSKY, PATRICIA ACTON & ROBERT LIND, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES §§ 1.8, 2.3 (3d ed. 2009); Barbara Boyle, *The Independent Spirit*, *in* THE MOVIE BUSINESS BOOK 176 (Jason Squire ed., 3d ed. 2004).

22. *See* Gorham Kindem, *Hollywood's Movie Star System: A Historical Overview*, *in* THE AMERICAN MOVIE INDUSTRY: THE BUSINESS OF MOTION PICTURES 79–93 (Gorham Kindem ed., 1982) (tracing the role of the Hollywood star from the 1910s to the 1970s).

23. 1 TINO BALIO, UNITED ARTISTS, 1919-1950: THE COMPANY BUILT BY THE STARS 12–13 (2009).

24. *See* Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 845–58 (1981) (modeling talent in the context of income distribution).

proxy for a film's likelihood of success.[25] Both factors explain why major feature films typically cannot be financed without a "bankable" star cast or director, and why industry participants closely follow rankings of star value.[26] Actors and directors in the upper echelon of those rankings represent a scarce asset for which studios compete vigorously, while all others are virtually a commodity good. The Bureau of Labor Statistics estimates that, in 2010, of the nearly one hundred thousand members of the Screen Actors Guild (the actors' union), only about fifty earned extraordinarily high incomes, while most others earned meager salaries and were unemployed for long periods of time.[27] Other evidence confirms this extreme disparity in talent's fortunes. For the period from 1993 to 1995, only fifty-eight directors directed more than one feature film released by a major studio, and only three directors directed at least three such films;[28] for that same period, 79.5 percent of all actors who acted in any film acted in only one film;[29] and, for the period from 1995 to 2001, only

25. The extent to which the presence of a star improves the likelihood of a successful release remains unresolved. Using a sample of two thousand films released from 1984 to 1996, an empirical study finds that, on average, a star significantly increases the least revenue a movie may earn (that is, a star constrains the lower tail portion of the revenue distribution) and slightly increases a movie's chance of making a profit, in each case relative to a movie without a star. *See* DE VANY, *supra* note 15, at 87–88. This is consistent with findings that actors positively impact opening performance. Anita Elberse, *The Power of Stars: Do Star Actors Drive the Success of Movies*?, 71 J. MARKETING 102, 118 (2007).

26. Recently released rankings include the "Ulmer Scale," a list of the industry's top 1400 actors ranked by "bankability," or the ability to raise "100% or majority financing" for a movie, *Ulmer Scale: Welcome*, THE ULMER SCALE, http://www.ulmerscale.com/aboutUS.html (last visited Nov. 18, 2014), the *Internet Movie Database*'s "StarMeter" list, based on the search behavior of users of the "IMDb.com" website, a leading online source of information in the film industry, *Year in Review—STARmeter Top 10 of 2011*, IMDb, http://www.imdb.com/oscars/year-in-review/starmeter-top-10-of-2011 (last updated June 13, 2013), *Esquire*'s "Box Office Power" list, based on box-office revenues, as weighted by various criteria, Matthew Shepatin, *Who's the Most Bankable Star in Hollywood?*, ESQUIRE (May 27, 2008, 8:27 AM), http://www.esquire.com/the-side/feature/box-office-power-052308, and *Forbes'* "Star Currency" list, based on industry surveys, *Star Currency Celebrity Rankings*, FORBES, http://www.forbes.com/starcurrency (last visited Nov. 18, 2014).

27. U.S. DEP'T OF LABOR, BUREAU OF LABOR & STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 2010-11 LIBRARY EDITION, at 320 (Jan. 2010), *available at* http://en.calameo.com/read/000763400c8731e6cfd86.

28. Ezra Zuckerman, Do Firms and Markets Look Different? Repeat Collaboration in the Motion Picture Industry, 1935-1995, at 9 (MIT Sloan School of Management, Working Paper, 2004). The three directors referred to above are John Badham, Oliver Stone, and Joel Schumacher. *Id.*

29. *Id.* at 10.

thirty-six actors appeared in two or more hit films (defined as a film that grossed $100 million or more).[30]

II. HOLLYWOOD CONTRACTING

Scholars have observed—and business lawyers would not be surprised to learn—that parties use strategic ambiguity in drafting contracts.[31] Other scholars have identified settings in which parties appear to deliberately use legally unenforceable documentation,[32] entering into preliminary agreements that set forth some, but not all, of the terms of a proposed transaction.[33] But scholars have not yet recognized that parties are sometimes strategic about whether they are creating an enforceable contract.[34] Standard business-law practice is to take special care to avoid this predicament.[35] Certainly, operating in a gray area of potentially enforceable agreements may appear to be

30. DE VANY, *supra* note 15, at 243–45.

31. *See* Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 848–924 (2010) (explaining the benefits of vague language in acquisition contracts); George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1664–1719 (2006) (explaining the strategic use of vague language in contracts generally).

32. *See* Arnoud W.A. Boot, Stuart I. Greenbaum & Anjan V. Thakor, *Reputation and Discretion in Financial Contracting*, 83 AM. ECON. REV. 1165, 1165–83 (1993) (describing the effects of discretionary contracts on reputational capital); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 373–467 (1990) (analyzing parties' reliance on nonlegal sanctions to enforce agreements); Victor P. Goldberg, *Lawyers Asleep at the Wheel? The GM-Fisher Body Contract*, 17 INDUS. & CORP. CHANGE 1071, 1071–84 (2008) (evaluating one instance of intentional use of non–legally enforceable contracting); Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1135–90 (1957) (describing the invalidation of franchise contracts due to indefiniteness); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55–67 (1963) (detailing the success of non–legally enforceable arrangements in manufacturing); Ronald Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494, 2494–2536 (2000) (describing unenforceable credit agreements); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641–96 (2003) (identifying reciprocal fairness as a source of indefinite agreements).

33. *See* Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 661–707 (2007) (providing a model to explain preliminary agreements, their breach, and errors in court enforcement); Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 389–428 (2004) (proposing partial enforcement for partially definite contracts).

34. The possibility that parties may deliberately choose ambiguous levels of legal enforceability is mentioned in passing in Scott, *supra* note 32, at 1685 n.172.

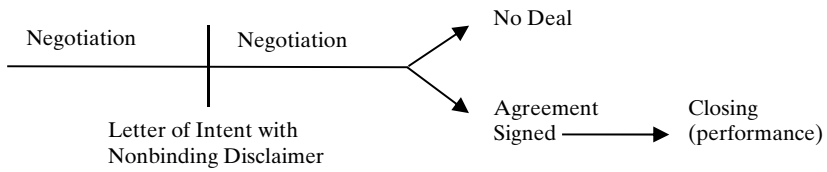
35. *See* Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 287 (1994) ("Within the common law system, most legal professionals . . . staunchly cling to the supreme value of certainty of result.").

imprudent for both client and attorney. Yet Hollywood appears to feel otherwise.

A. Conventional Contracting

The timeline of a conventional transaction is depicted below. First, after some initial discussion, the parties enter into a preliminary agreement, often called a "memorandum of understanding" or "letter of intent," which describes the basic terms of the proposed transaction and usually states that the document is nonbinding.[36] Negotiation of detailed terms and legal and financial diligence then proceeds simultaneously. If the process advances sufficiently, the parties negotiate, draft, and execute a package of final agreements, and finally close the deal (in a discrete transaction) or undertake other forms of performance (in a "relationship" transaction). In this conventional sequence, there is a clear demarcation between the negotiation period, in which there is no risk of contractual liability, and the performance period, in which there is clear contractual liability. Once the deal is executed, the parties commence performance under the assurance that all subsequent investments are governed by contractual terms that can be enforced in court.

Figure 2. The Conventional Deal



B. Hollywood Contracting

The high risk of commercial failure, combined with the holdup risk inherent in sequential investment and the disaggregated structure of the film industry, accounts for what the Hollywood press calls the

36. Exceptions to the "no liability" disclaimers are sometimes made with respect to confidentiality provisions or, in an acquisition transaction, "no shop" provisions barring the target firm from seeking bids from other acquirers. For further discussion, see RALPH B. LAKE & UGO DRAETTA, LETTERS OF INTENT AND OTHER PRECONTRACTUAL DOCUMENTS: COMPARATIVE ANALYSIS AND FORMS 15–16 (2d ed. Supp. 1996) (discussing enforcement of, and good-faith obligations in, agreements to negotiate).

"waiting game."[37] The studio or outside investor is not willing to commit to a project until the star is signed up, the star is not willing to commit until the investor is signed up, and the distributor is not willing to commit until both the star and investor are signed up.[38] To partially address this problem, Hollywood has developed a rich menu of time-limited option contracts that condition performance obligations on the occurrence of specified triggering events.[39] For example, a studio typically acquires a screenplay from a writer in exchange for an initial acquisition fee and the option to purchase the screenplay for an additional fee within a certain period.[40] In certain transactions, however, Hollywood does business differently. Rather than conditioning performance on the execution of a contract, or breaking up performance into stages on the basis of conditions precedent, the parties use what appears to be a cruder device. Talent and studios, among others, often commence performance under imperfectly specified obligations set forth in a mix of oral communications, email exchanges, letters, and unsigned draft contracts. In these unsigned deals, it is unclear when legal liability commences or ends.

1. *The Unsigned Deal.* The typical sequence of an unsigned deal between a studio and a star actor is depicted below. A *Daily Variety* article summarizes this sequence: First, an actor's agent or attorney makes an oral agreement with the studio. Next, the parties exchange a deal memo. Then "reams of paperwork" (meaning, draft long-form agreements) are exchanged. Finally, in *rare* cases, the long-form agreement is finalized and signed.[41] The deal memo, which is often or usually left unexecuted,[42] typically sets forth key terms such as the

37. *See, e.g.*, Kevin Jagernauth, *Will the Waiting Game for J.J. Abrams Cause "Star Trek 2" to Move From Summer to Winter 2012?*, INDIEWIRE (May 24, 2011, 11:22 AM), http://blogs.indiewire.com/theplaylist/archives/will_the_waiting_game_for_j.j._abrams_cause_star_trek_2_to_move_from.

38. *See* ALEXANDRA BROUWER & THOMAS LEE WRIGHT, WORKING IN HOLLYWOOD 50 (1990) (noting that studios are wary of committing to a movie until the talent package has been fully assembled); BASTIAN CLEVÉ, FILM PRODUCTION MANAGEMENT 108 (2d ed. 2000) (explaining that producers wait as long as possible to enter into contracts that "lock them into fixed starting dates").

39. For a full review, see generally SCHUYLER M. MOORE, THE BIZ: THE BASIC BUSINESS, LEGAL AND FINANCIAL ASPECTS OF THE FILM INDUSTRY (4th ed. 2011).

40. *Id.* at 199–200.

41. *See Double Trouble Irks Legal Eagles*, DAILY VARIETY, July 14, 1997.

42. According to three interviewees, the deal memo is typically not signed. Telephone Interview with Entm't Attorney I, in L.A., Cal. (May 31, 2011); Telephone Interview with

fixed compensation (and, in some cases, a "pay-or-play" commitment guaranteeing payment even if talent's services are not used); the actor's role; screen credit;[43] and, in summary form, the talent's contingent compensation based on the film's performance.[44] Before the start of shooting, studios generally insist that talent execute a "certificate of engagement" assigning to the studio all intellectual-property rights in talent's contribution to the project.[45] As shown below, three outcomes may result: the contract is executed during shooting;[46] the contract is executed after shooting has been completed;[47] or the contract is continuously negotiated—becoming a so-called "creeping contract"[48]—but is never executed, remaining in draft form.[49]

Entm't Attorney III, in L.A., Cal. (Apr. 9, 2013); Interview with Studio Exec., in L.A., Cal. (Apr. 16, 2013).

43. This refers to the manner in which the talent's role will be reflected in the "credits," including credits that appear in the motion picture and credits that appear in promotional materials. Parties contract over the prominence of the credit—in particular, placement and font size. *See* RICHARD CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 126–27 (2000)

44. For further discussion, see *infra* notes 145–48 and accompanying text.

45. Interview with Studio Counsel II, in L.A., Cal. (Mar. 2013); Telephone Interview with Studio Counsel III, in L.A. Cal. (Aug. 29, 2011); Telephone Interview with Entm't Attorney I, *supra* note 42.

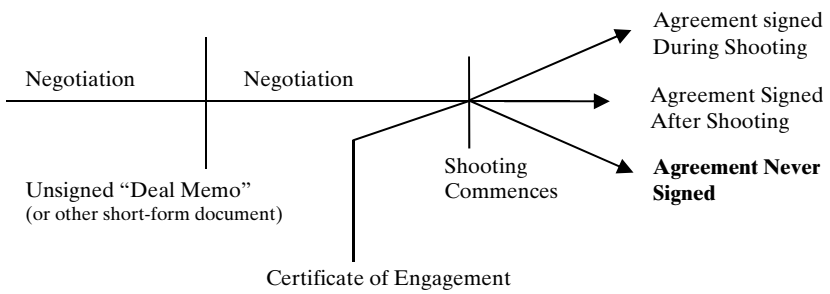
46. *See* Telephone Interview with Entm't Attorney III, *supra* note 42 (providing examples of a talent contract being executed at shooting); Telephone Interview with Studio Counsel III, *supra* note 45 (same).

47. *See* Harrison J. Dossick, *Resolving Disputes over Oral and Unsigned Film Agreements*, L.A. LAWYER, Apr. 1999; Telephone Interview with Entm't Attorney I, *supra* note 42.

48. *See* Dossick, *supra* note 47.

49. *See* Telephone Interview with Studio Counsel I, in L.A., Cal. (Feb. 8, 2011); Interview with Mini–Major Studio Counsel, in L.A., Cal. (Feb. 2011); Telephone Interview with Entm't Attorney III, *supra* note 42.

Figure 3. The "Unsigned Deal"



2. *Evidence on Soft-Contracting Practices in General.* To understand more precisely the extent to which soft-contracting practices are used in the film industry, I undertook four types of empirical inquiry: (1) I comprehensively surveyed the relevant practitioner literature; (2) I conducted interviews with different types of legal and business practitioners in the field;[50] (3) I reviewed all of the digital archives of *Daily Variety*, one of the industry's two leading trade journals, dating from the start of the film industry to the present;[51] and (4) I comprehensively surveyed the relevant litigation in all federal courts, California state courts, and New York state courts. All of these sources confirmed my general impression that unsigned deals are common throughout the industry. Such unsigned agreements include deals between studios and talent;[52] studios and individual producers;[53] independent production companies and studio–distributors;[54] independent production companies and foreign

50. For all information on interviews, s*ee infra* App. D.

51. The other leading trade journal is *The Hollywood Reporter*. I relied primarily on *Daily Variety* because it provides online access to all of its prior publications through a subscription-based digital archive.

52. *See* Telephone Interview with Entm't Attorney II, in L.A., Cal. (June 2, 2011); Interview with Studio Counsel II, *supra* note 45; Interview with Studio Exec., *supra* note 42; Telephone Interview with Entm't Attorney III, *supra* note 42; Interview with Mini–Major Studio Counsel, *supra* note 49.

53. *See* Linda Rapportoni, *Former Uni 'Deal-Maker' Testifies in 'Pirates' Trial*, DAILY VARIETY, June 6, 1991; Telephone Interview with Entm't Attorney III, *supra* note 42.

54. *See* JOHN W. CONES, THE FEATURE FILM DISTRIBUTION DEAL 35 (1997) (providing an example of a deal between an independent production company and a studio-distributor); Telephone Interview with Entm't Attorney II, *supra* note 52.

distributors;[55] talent and agents;[56] talent and managers;[57] and entertainment companies and merchandisers.[58] In a brief filed by the major studio Warner Bros. in the U.S. Court of Appeals for the Ninth Circuit, the studio asserted that "many business deals are never formalized" in the entertainment industry and that it is "standard" for parties to commence performance without a formalized contract.[59] Consistent with these assertions, a Los Angeles County Superior Court judge observed that "[m]otion picture development and production operates in a unique business universe . . . . Multi-million dollar film projects are developed and completed (or cancelled) on the basis of loose, artistic understandings without written, signed contracts."[60]

3. *Evidence on Deals Between Studios and Stars*. Unsigned deals are most consistently used in the case of talent–studio transactions and, in particular, in deals involving higher-value talent (or "stars").[61] I therefore chose to focus on that segment in conducting a more detailed empirical inquiry. Consistent with evidence produced in litigation,[62] interviewees reported that talent–studio agreements are

55. *See* Coudert Bros. LLP, *Industry Custom & Practice: The Important* [*sic*] *of Arbitration Clauses in International Entertainment Contracts*, FINDLAW.COM (Mar. 26, 2008), http://library.findlaw.com/1998/Jan/1/126624.html (providing an overview of the deal-making process between domestic production companies and foreign distributors).

56. *See* Telephone Interview with Entm't Attorney I, *supra* note 42.

57. *See* Ricardo Cestero, *Managers vs. Talent, or When BFFs Turn Nasty*, L. L. LAND (Apr. 28, 2010), http://www.lawlawlandblog.com/2010/04/managers_vs_talent_or_when_bff.html (discussing the recent rise in legal disputes between managers and talent).

58. *See* PMC, Inc. v. Saban Entm't, Inc., 52 Cal. Rptr. 2d 877, 880 (Ct. App. 1996) (suit brought by a manufacturer against the holder of "The Mighty Morphin Power Rangers" copyright over disputed licensing agreement).

59. Principal and Response Brief of Cross-Appellants and Appellees Warner Bros. Entertainment Inc. and DC Comics at 3, 28, Larson v. Warner Bros., 504 F. App'x 586 (2012) (Nos. 11-5863, 11-56034).

60. *See* Coppola v. Warner Bros., Inc., No. B126903 at 10–11 (Cal. Ct. App. Mar. 26, 2001), *available at* http://www.schleimerlaw.com/CourtAppealCoppola.htm (concerning a contract dispute between director Francis Ford Coppola and Warner Bros.).

61. *See* Stephen M. Kravit, *Business Affairs*, *in* THE MOVIE BUSINESS BOOK 197 (Jason Squire ed., 3d ed. 2004); Telephone Interview with Entm't Attorney III, *supra* note 42; Telephone Interview with Studio Counsel I, *supra* note 49; Telephone Interview with Studio Counsel III, *supra* note 45; Interview with Studio Exec., *supra* note 42.

62. In a suit between then-star Kim Basinger and an independent production company, the court found that Basinger had acted in all but two of her previous nine films without a signed contract. *See* Main Line Pictures, Inc. v. Basinger, No. B077509, 1994 WL 814244, at *2 (Cal. Ct. App. 1994). The court observed that "film industry contracts are frequently oral agreements based on unsigned 'deal memos.'" *Id.* Likewise, in a suit between Francis Ford Coppola and

often not memorialized in fully negotiated long-form documentation and, for part or all of the transactional timeline, proceed on the basis of some combination of incompletely formalized instruments: oral commitments, deal memos,[63] draft long-form agreements[64] or letters,[65] email exchanges, and other informal communication.[66]

Different studios and law firms appear to follow slightly different variations of this practice, which in turn could be adjusted to serve the needs of a particular project. In-house counsel reported that the studio will typically "green light" a project based on incompletely specified communications with talent attorneys and a mutual understanding to subsequently negotiate and draft a fully executed long-form agreement.[67] A studio executive reported that the studio sometimes commences shooting without a signed agreement but identifies, in its comments to outstanding drafts, the points that it considers to be unresolved.[68] In other cases, studio lawyers send a "reliance letter" indicating that an agreement had been reached based on the last negotiation draft (and that the negotiator's client is relying on that belief), which may in turn prompt a "counter-reliance letter" from the talent's attorney.[69] In the atypical case of a successful release, these dueling drafts can even play a role in postproduction accounting disputes over contingent-compensation provisions (known

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Warner Bros., the court found that Coppola, a world-famous director, had not entered into a signed contract in directing two previous films for the studio. *Coppola*, *supra* note 60.

63. *See* Telephone Interview with Entm't Attorney II, *supra* note 52; Interview with Studio Exec., *supra* note 42. This is consistent with the views expressed in Michael S. Bogner, Note, *The Problem with Handshakes: An Evaluation of Oral Agreements in the United States Film Industry*, 28 COLUM. J.L. & ARTS 359, 363 (2004).

64. *See* Telephone Interview with Entm't Attorney III, *supra* note 42.

65. *See* Interview with Studio Exec., *supra* note 42.

66. For further discussion, see DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES § 2.4 (4th ed. 2006); MARK LITWAK, REEL POWER: THE STRUGGLE FOR INFLUENCE AND SUCCESS IN THE NEW HOLLYWOOD 160–61 (1994). Another interviewee described the process in more detail: The talent attorney initially agrees on a deal with the studio's "business affairs" department, which sends a deal memo to the agent (without requesting a signature) and the studio's legal-affairs department. The legal-affairs department is then instructed to "work out" a long-form agreement with the talent's attorney. Telephone Interview with Entm't Attorney I, *supra* note 42. For similar accounts, see Interview with Mini–Major Studio Counsel, *supra* note 49; Telephone Interview with Studio Counsel I, *supra* note 49; Interview with Studio Counsel II, *supra* note 45; Telephone Interview with Studio Counsel III, *supra* note 45; Telephone Interview with Entm't Attorney II, *supra* note 52; Telephone Interview with Entm't Attorney III, *supra* note 42; Interview with Studio Exec., *supra* note 42.

67. *See* Telephone Interview with Studio Counsel III, *supra* note 45.

68. *See id.*; Telephone Interview with Entm't Attorney I, *supra* note 42.

69. *See* Dossick, *supra* note 47.

in the industry as "participation rights"); in fact, a cottage industry of auditing firms reportedly specializes in this practice.[70] Though the level of formalization used differs among different projects and different studios, it is clear that Hollywood studios and stars regularly enter into commercially significant undertakings in the absence of a fully formalized set of agreements.

C. Are Soft Contracts Legally Enforceable?

Do Hollywood's soft contracts give rise to a meaningful threat of legal liability? In a word, yes. As a matter of California and New York law (the two most relevant jurisdictions for the American entertainment industry), unsigned deals give rise to some prospect of contractual or other liability. As compared to a fully specified and executed long-form document, however, these forms of agreement impose liability with reduced certainty.

1. *The Indefiniteness Doctrine*. Because Hollywood's soft contracts are often characterized by incomplete levels of specificity, it is important to understand the extent to which courts will enforce a contract that does not explicitly set forth all terms. Historically, courts have required mutual agreement over all essential terms.[71] On that basis, courts sometimes declined to enforce "agreements to agree" or other preliminary or incompletely specified agreements.[72] Current law is more equivocal. Courts are sometimes willing to "fill in gaps" based on a reasonableness criterion, which restores contractual completeness and can potentially support a damages award.[73] Far less

70. Discussion with Accountant Specializing in the Entertainment Industry, L.A., Cal. (Sept. 2011). The absence of a signed agreement sometimes leads to litigation concerning the calculation of "net profit" compensation—that is, the portion of the "net profits" owing to talent after the studio has recovered its "costs" relating to the motion picture, in each case as the relevant term is defined in relevant documentation exchanged between the parties—or to litigation concerning other related issues. *See, e.g.*, Hermit's Glen Prods. Inc. v. Twentieth Century Fox Film Corp., No. BC147241, 1997 WL 302292 (L.A. Sup. Ct. 1997) (concerning a lawsuit filed by the writer–producer of the film *White Men Can't Jump*, against a studio, over an alleged breach of an oral agreement entitling him to a percentage of the film's gross receipts).

71. *See* Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 106 (1999) (referring to "the common law rule that indefinite contracts are not enforceable").

72. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

73. For the most comprehensive empirical account of existing case law, see Scott, *supra* note 32.

frequently, courts may imply an agreement to negotiate in good faith[74] or, even without sufficient mutuality, may award reduced damages on equitable grounds such as promissory estoppel or unjust enrichment.[75] Sophisticated parties can eliminate exposure to precontractual and extracontractual liability by stating up front that any preliminary communications are nonbinding. This simple prophylactic is standard practice in other business settings[76] and proves effective when tested in court.[77] But this simple precaution is apparently not consistently undertaken in talent–studio transactions—as illustrated by talent–studio disputes over the existence of a binding agreement, a question that would be moot in the presence of such a disclaimer. Effectively, entertainment lawyers are choosing *not* to fully opt out of a legal regime that can impose liability by the unpredictable fiat of a judge or jury.

2. *The Writing Requirement.* Because Hollywood's soft contracts are often communicated at least partly in oral form, it is important to understand the extent to which courts will enforce oral agreements. Under the common law, oral agreements are enforceable so long as they satisfy the consideration and mutuality requirements that are always a precondition for contractual enforceability. State and federal statutes of frauds may also impose an additional writing requirement. In California and New York, any contract that cannot be performed within one year of its "making" must be in writing and executed by

74. *See* SIGA Techs., Inc. v. PharmaAthene, Inc., 67 A.3d 330, 351–52 (Del. 2013) (establishing a right to seek damages for certain breaches of an agreement to negotiate in good faith); Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 498–99 (S.D.N.Y. 1987) (same).

75. For the classic example of promissory estoppel as a ground for extracontractual damages, see Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 276–77 (Wis. 1965). For an example of an award of damages under the quasi-contractual theory of unjust enrichment when the underlying verbal contract was unenforceable under the applicable statute of frauds, see Earhart v. William Low Co., 25 Cal.3d 503, 514 (1979).

76. LAKE, *supra* note 36, at 65; *see* Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 404, 478 (1999) (describing American courts' reliance on the parties' express disclaimers in such precontractual instruments).

77. *See* Rennick HHC v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 317–18 (9th Cir. 1996) (declining to enforce a "handshake" deal because other written communications included disclaimers of any legal liability before execution of a final written agreement); *see also* R.G. Grp., Inc. v. Horn & Hardart, Co., 751 F.2d 69, 74 (Cal. 1984) (refusing to enforce an agreement that included all material terms because it stated that the parties did not intend any legal liability until the execution of a complete written agreement).

the party against whom enforcement is sought.[78] A writing is useful to a studio-plaintiff under California law, which provides that, in personal-services contracts, negative injunctive relief—that is, an order preventing the talent-defendant from working for another employer during the term of the agreement in dispute—is available only if the writing requirement is satisfied.[79] The federal copyright statute provides that any exclusive transfer of a copyright interest must be in writing, broadly defined,[80] to be valid.[81] Curiously, studios and stars—who are all represented by sophisticated parties—nonetheless enter into incompletely formalized agreements that forfeit or endanger these legal advantages.

D. Are Soft Contracts Practically Enforceable?

This Section considers the extent to which soft contracts are likely to give rise to legal liability as a *practical* matter. As discussed below, soft contracts occupy an intermediate region between clearly enforceable and clearly unenforceable promissory communications. Without some reasonable anticipation of being held enforceable, soft contracts would exert no deterrent force, hold no settlement value for a potential plaintiff, impose few if any dispute-resolution costs on a potential defendant, and largely overlap with certainly unenforceable reputational agreements. Without some reasonable anticipation of *not* being held enforceable, soft contracts would largely overlap with certainly enforceable formal agreements.

1. *Litigation Behavior: Case Law and Trade-Press Survey*. To gain insight into litigation behavior, I surveyed the digital archives of

78. CAL. CIV. CODE § 1624(a)(1) (West 2014); N.Y. GEN. OBLIG. L. § 5-701 (McKinney 2014).

79. CAL. CIV. CODE § 3423 (West 2014).

80. The Ninth Circuit has stated that, for purposes of 17 U.S.C. § 204(a) (2012), the writing can be "a one-line pro forma statement." Effects Assoc. Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1999). Additionally, the writing need not contain any particular language. Radio-Television Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922, 927 (9th Cir. 1999). Finally, the writing can even be executed after the alleged transfer. Magnuson v. Video Yesteryear, 85 F.3d 1424, 1429 (9th Cir. 1996).

81. 17 U.S.C. § 204(a). This explains why, in transactions that are otherwise undocumented, the studio obtains a certificate of engagement from an actor or director even if the long-form agreement remains unsigned. The certificate of engagement transfers to the studio all copyright and other intellectual-property interests that talent may have in the motion picture or any derivative works. For further discussion, see Part IV.C.2.a. Interviewees reported that studios regularly insist on signing a definitive agreement with a screenwriter, perhaps due to the lack of any ambiguity over whether the screenwriter's contribution may be copyrighted.

Daily Variety and the Westlaw and Lexis-Nexis case-law databases for reports of contract-formation disputes between a studio and talent (meaning an actor, director, or writer) involving an actual or proposed film project.[82] I identified a total of sixty-nine reported "unsigned deal" disputes from the inception of the Hollywood film industry through the present, all of which involved some formal legal action. All but two arose after the end of the studio system, which this Article dates to the year 1947. From 1947 through July 2014, there has been on average slightly more than one reported talent–studio lawsuit per year concerning contract formation. Although both the total number of informal disputes and the total number of actual and proposed film projects are unknown, it can be safely asserted that studio and talent bear some meaningful legal exposure as a result of terminating involvement in a project with respect to which the parties have expressed a sufficiently firm commitment.

2. *Litigation Outcomes: Case-Law Survey*. I used the Lexis-Nexis and Westlaw case-law databases to identify reported decisions involving disputes between talent and a studio or other production entity concerning the enforceability of oral agreements, deal memoranda, draft agreements, and other incompletely specified or unexecuted agreements relating to a film or television project.[83] I surveyed the entire period from the date of each database's inception[84] through July 2014 in all federal courts and all New York and California state courts. Additionally, I surveyed the period from January 1980 to July 2014 for all other state courts.[85] Appendix A

82. For this purpose, I targeted disputes over the existence of a legally binding agreement between studio and talent, but excluded disputes with respect to a particular term of an agreement that the parties otherwise recognized as having been duly formed.

83. I included cases relating to the television industry in this survey on the assumption that judicial rulings concerning unsigned deals in television would influence expectations of parties transacting with respect to a film project. I excluded cases involving "idea submission" disputes, usually involving claims by a writer or producer that a network, studio or other production company used an idea that had been pitched to the network or studio. See *infra* App. A for further description of the data-inclusion criteria and sources.

84. The relevant Lexis-Nexis and Westlaw databases used in this search cover federal, New York and California law from the date on which each respective jurisdiction was established. As a practical matter, the search could obviously have located only cases decided since the start of the commercial film industry in the United States. The first commercial motion-picture exhibition in the United States took place in 1894 (the Edison Vitascope projection system). *See* DOUGLAS GOMERY, SHARED PLEASURES: A HISTORY OF MOVIE PRESENTATION IN THE UNITED STATES 7 (1992).

85. For purposes of surveying other state courts' decisions, I selected a shorter time period for reasons of manageability. On a separate point, it would be useful to learn whether any such

provides a complete list of all identified cases, a summary of relevant facts and holdings, and sources used.

a. Results. Not surprisingly, fully litigated cases rarely occur in this context. I have identified only thirty-nine such decisions for the entire period from the earliest reported decisions through July 2014 (all but two of which were issued after 1947). Of the thirty-nine cases, the courts declined to recognize a valid contract in twenty-eight—that is, almost 72 percent of the time, the court found that no contract existed. Assuming that more fully specified or more completely executed agreements are substantially more likely to be enforced, and less fully specified or less completely executed agreements are substantially less likely to be enforced, a soft contract represents a meaningful transactional alternative between the options of a purely formal or purely informal contract.[86] The distribution of outcomes, and underlying grounds for nonenforcement, are summarized in Table 1 below:

disputes are resolved by arbitration, which is currently the typical dispute-resolution procedure in Hollywood. I doubt, however, whether this would convey significant additional information. First, my trade-press review identified only a single reported contract-formation dispute between studio and talent that was resolved by arbitration. *See* App. A. Second, it is not clear that arbitration is typically available in contract-formation disputes between studio and talent. The "Basic Agreement," which governs relationships between talent and any production entity that is a signatory to the collective-bargaining agreement with the Screen Actors Guild (formerly "SAG," which is now known as "SAG-AFTRA"), subjects all disputes between those parties to mandatory arbitration and, in the case of performers who earn below a certain amount, identifies criteria by which to determine when a performer is deemed to be "definitely engaged" with a production. These largely follow the mutual-assent requirements of the common law of contract except that the Agreement provides that a binding contract is deemed to have been made if a producer delivers an unsigned contract to the performer and the performer executes it and returns it by the next business day. *See* PRODUCER-SCREEN ACTORS GUILD CODIFIED BASIC AGREEMENT OF 2005, at 243 (2005), *available at* http://www.sagaftra.org/files/sag/2005TheatricalAgreement.pdf. In the case of a document that is signed by neither party, it is not clear that this Agreement would apply. With respect to performers earning larger amounts, the Basic Agreement is silent on contract-formation disputes.

86. This assumes that plaintiffs' success rates with respect to contract-formation issues in breach-of-contract litigation involving fully executed agreements are significantly greater than 28 percent. That seems a reasonable assumption in any well-functioning system of contract law.

Table 1. Final Judicial Determinations Concerning the Enforceability of "Soft Contracts" in Film and Television Projects (through July 2014)[87]

			Grounds for Nonenforcement				
Outcome	**Total**	**Oral Agmt Only**	**State Stat. of Frauds**	**Federal Stat. of Frauds**	**Indefinite-ness**	**Lack of Intent to be Bound**	**Other**
Enforce	11	8					
Not Enforce	28	13	3	6	13	5	4

b. Evaluation. Considered in the aggregate, the data collected on litigation activity and outcomes support the view that parties engaged in soft-contracting relationships are exposed to some positive, but far from certain, risk of contractual or other legal liability. A brief overview of the case law in California courts—the leading venue for litigation relating to the motion-picture industry—illustrates this intermediate view.

Since at least the late 1940s, California courts have held that the typical Hollywood contracting sequence—shake hands, start production, and (maybe) work out the details later—may, but will not necessarily, result in a legally enforceable agreement. In the 1948 decision in *Columbia Pictures Corp. v. DeToth*,[88] involving an alleged oral agreement between a director and a studio, a California court observed that the fact that a "formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement."[89] This principle sometimes prevails. In the most well-known "unsigned deal" litigation, *Main Line Pictures, Inc. v. Basinger*,[90] a jury found that Kim Basinger (then considered to be star talent) had entered into a binding personal-services contract with an independent studio to appear in the film *Boxing Helena*.[91] The

87. Note that there may be more than one ground for nonenforcement in some cases. Hence, the number of cases under "Grounds for Nonenforcement" exceeds the total number of "Not Enforce" cases.

88. Columbia Pictures Corp. v. DeToth, 87 Cal. App. 2d 620 (Dist. Ct. App. 1948).

89. *Id.* at 629.

90. Main Line Pictures, Inc. v. Basinger, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994).

91. *Id.* at *1–3.

commitment was based on oral conversations, an unsigned deal memo, and five drafts of a long-form agreement.[92]

Notwithstanding the *Basinger* decision, it is still true that an oral or written agreement that is unexecuted or exhibits a low degree of specificity does not supply a strong basis for contract enforcement. That assertion is supported by the case-law survey described above: in more than 70 percent of the identified cases, courts declined to enforce underformalized or unexecuted agreements. The best-known recent example is the 1998 litigation *Coppola v. Warner Bros., Inc.*[93] between the famous director Francis Ford Coppola and major studio Warner Bros., over a proposed film based on the Pinocchio story. The trial court declined to find that Coppola was contractually barred from producing or directing a film based on the Pinocchio story for another studio, in part because the parties had never finalized certain elements of their production-services and directing-services agreements.[94]

As the divergent outcomes in the *Basinger* and *Coppola* cases illustrate, parties that elect to participate in transactions under incompletely specified or unexecuted agreements operate in a "no man's land" that is neither fully within nor fully outside contract law. In a business where nobody knows whether a film will succeed (and most ultimately do not), it is often the case that nobody knows whether a particular transaction is being undertaken pursuant to a legally and practically enforceable contract.

III. AN ECONOMIC ACCOUNT OF HOLLYWOOD CONTRACTING

Hollywood contracting is often dismissed as the result of sloppy lawyering or the recklessness of creative talent. In this Part, I propose

92. *Id.* Basinger ultimately prevailed on technical grounds. *Id.* at *6. The appeals court found that the district court had committed reversible error by failing to instruct the jury to reach separate liability determinations with respect to Basinger and her "loan-out" corporation. *Id.*

93. Coppola v. Warner Bros., Inc., No. BC135198 (L.A. Sup. Ct. July 12, 1998).

94. Warner Bros.'s argument rested mostly on the fact that Coppola had signed a certificate of employment that purported to transfer to Warner Bros. all copyright and other intellectual-property interests relating to Coppola's contribution to the Pinocchio project. The court rejected this argument, on grounds that the certificate of employment was "too vague" and did not meet the requirements of the Copyright Act's statute of frauds. *See* Joseph D. Schleimer, *Coppola Verdict's Impact on Studio/Talent Talks*, 14 ENTERTAINMENT L. & FIN. (1998), http://www.schleimerlaw.com/elf998.htm.

an account that identifies the economic rationale behind this seemingly imprudent transactional practice.

A. Existing Explanations

Existing explanations for Hollywood's soft-contracting practices do not fully account for this phenomenon. These explanations include: ignorance or recklessness, timing pressures to commit rapidly to a transaction, and reputational constraints.[95] Ignorance or recklessness is implausible: both studios and talent are represented by experienced agents, lawyers, and other advisors who operate in a competitive market. Timing explanations are unpersuasive for several reasons: sophisticated law firms routinely prepare complex agreements for high-stakes transactions in other fields in a matter of days; entertainment lawyers draft and negotiate highly specified contracts to govern financing and other transactions; entertainment lawyers have access to contract templates that often do not require considerable modification;[96] and there may be considerable time between talent's "commitment" to the project and the start of shooting (not to mention the end of shooting). Reputational factors, however, exert considerable influence in relationship-based industries such as Hollywood. This is the explanation provided for the use of legally unenforceable contracts in other settings,[97] and it will play an important role in the ensuing analysis. But an entirely reputation-based explanation falsely anticipates that Hollywood would avoid the

95. *See* Douglas Kari, *Basinger in the Box: Verbal Contracts in the Film Industry*, 15 ENT. L. REP. 3, 3 (1993) (observing that timing pressures explain why the film industry often does not formalize deals); Bogner, *supra* note 63, at 364–65 (observing that parties sometimes feel that negotiating over details of contracts may prevent a project from moving forward); Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 126–27 (2001) (noting that handshake deal practices in the entertainment industry are often attributed to timing pressures or creative artists' neglect of legal details, and arguing that reputational pressures might account for the practice); Rick Smith, Comment, *Here's Why Hollywood Should Kiss the Handshake Deal Goodbye*, 23 LOY. L.A. ENT. L. REV. 503, 509–10, 521–24 (2003) (noting that handshake deals are sometimes attributed to timing pressures and reputational constraints, but arguing that the practice is best attributed to studios' bargaining power).

96. *See* Telephone Interview with Entm't Attorney I, *supra* note 42.

97. *See* Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 525–31 (1993) (explaining extracontractual agreements in the context of the Maghribi traders of the eleventh century); *see also* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138–43 (1992) (analyzing extracontractual agreements in the diamond industry).

expense of contractual documentation altogether or, as is common in other business settings, incur the small cost of including a disclaimer to avoid unnecessary exposure to legal liability. A mixed explanation that integrates both legal and reputational sanctions is therefore required.

B. Theory: The Rationality of Soft Contracts

To appreciate why soft contracting may represent the most efficient transactional instrument in some talent–studio transactions, it is necessary to review two alternatives: (1) informal contracts governed by reputation and (2) formal (hard) contracts governed by law. A third alternative, vertical integration, is addressed later.

1. *Informal Contract (Reputation).* A reputation-based explanation for unsigned deal practices assumes that talent's or the studio's commitment is self-enforcing even without contractual liability. That requires assuming that no party will ever abandon a film project because doing so would curtail talent's expected profits on all future projects or would harm a studio's ability to recruit talent for future productions. Such unqualified optimism would be naïve. Hollywood is not usually depicted as a paragon of good-faith behavior (if anything, some would say quite the opposite!). The Hollywood press regularly reports cases of apparent opportunism: studios substitute even star actors during development,[98] producers delay moving forward with projects but keep actors indefinitely "on call,"[99] actors withdraw from projects shortly before the commencement of shooting, and, in rare cases, studios terminate actors and directors even after shooting has commenced.[100]

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98. In 1995, actor Laurence Fishburne was reportedly dropped from the cast of *Die Hard With a Vengeance* in favor of Samuel L. Jackson, who could be retained at a lower fee. Fishburne sued for breach of contract, despite the absence of a formal agreement. *See* Bogner, *supra* note 63, at 365 n.47. For a review of similar incidents involving Robin Williams, John Cusack, and other stars, *see* Ben Child, *Robin Williams Unamused by Pay Dispute*, THE GUARDIAN, Oct. 20, 2008, http://www.theguardian.com/film/2008/oct/20/1.

99. This type of action prompted a lawsuit by star actress Sharon Stone against producers in connection with *Basic Instinct 2.* Due to allegedly missed opportunities attributable to delays in production, she claimed $100 million in damages. *Basic Instinct 2 (2006): Trivia*, INTERNET MOVIE DATABASE (IMDB) (Mar. 18, 2012), http://www.imdb.com/title/tt0430912/trivia. The suit was settled out of court. *Id*.

100. Interview with Studio Exec., *supra* note 42. This type of action precipitated litigation by star actress Raquel Welch against MGM for wrongful termination from *Cannery Row*, ultimately resulting in a $10 million damages award against the studio for damage to the

This mixed record of compliance with stated commitments may reflect the fact that Hollywood exhibits some, but not all, of the characteristics of the close-knit environments in which reputation-based transacting has been most convincingly documented.[101] Hollywood is at best a *relatively* small world populated by firms and individuals that do business with each other repeatedly: six major studios, three major talent agencies, a handful of mini–major studios, a larger number of independent production companies, a small group of high-value talent, and a much larger group of lower-value talent consisting of tens of thousands of actors.

Moreover, membership in these constituencies can be unstable. Although studios and talent agencies have long lives, independent production companies, individual producers, and talent often have short careers.[102] Hence, no transacting party can safely assume that any given counterparty is a repeat player that values the long-term accumulation of reputational capital. Even repeat players may rationally deplete reputational capital to avoid an extremely large one-time loss or to capture an exceptionally large one-time gain. Because an exceptional hit is an infrequent occurrence, the temptation to abandon a losing project for an exceptionally promising opportunity may outweigh long-term reputational considerations. At best, reputation supplies studios and stars with a partial governance solution.

2. *Formal (Hard) Contract.* The ability of a contract to actually bind parties is always limited by ex ante specification costs and ex post enforcement costs. Both costs are high in talent–studio transactions.

a. Specification Costs. It is difficult for the parties to a contract to specify in verifiable language both the contingencies under which talent or the studio may "walk away," consistent with the parties' agreed-upon understanding, and any fee or other penalty that must be paid by the terminating party if it exercises the walkaway right. Even a simple termination clause that provides a walkaway right under certain circumstances subject to a breakup fee is prone to forecasting errors. The fee may be set too high or too low, resulting in

actress's reputation. *See* Welch v. Metro-Goldwyn-Mayer Film Co., 254 Cal. Rptr. 645, 647 (Dist. Ct. App. 1989).

101. *See supra* note 100.

102. *See* LITWAK, *supra* note 66, at 228–29.

a contract that is excessively rigid or flexible relative to the efficient contract design that would be negotiated under conditions of perfect information and zero transaction costs. In a reputation-rich environment, specifying a termination fee ex ante may introduce excessive rigidity into the size of the settlement payout, thereby impeding parties' ability to expeditiously reach a reasonable resolution following industry norms in any ex post termination scenario.[103] These inherent constraints mean that even a fully enforceable contract will not necessarily provide the parties with an efficient governance structure for the proposed transaction.

b. Enforcement Costs. The practical ability to enforce any agreement is limited for several reasons. It can be difficult to show breach of a performance obligation. In the film and television industries, actors who are dissatisfied with existing terms have been known to feign illness or "phone in" a performance—that is, underperform on set—until a resolution is reached.[104] Even assuming that a breach can be shown, the plaintiff-studio still faces numerous obstacles: given the uncertainty of film projects, it may be difficult to demonstrate expectation damages; the studio cannot obtain a remedy of specific performance to compel talent to perform an employment contract;[105] and under California law, the studio can obtain a negative injunction to bar talent from working for another production during the contract term only if the actor's services are deemed to be of a "unique" character.[106] To be sure, the threat of contractual liability for breach at least poses an in terrorem effect that may exert some deterrent force, in part due to the significant cost of defending against a legal claim. This threat, however, is far from a perfect enforcement mechanism.

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103. As will be discussed, contracts between talent and studios often adopt a bifurcated specification strategy with respect to termination. Although the agreement effectively specifies a liquidated-damages amount, as discounted by the likelihood of nonenforceability, payable by the studio in the event the studio does not use talent's services (the pay-or-play clause), no such fee is specified in the case of termination or nonperformance by talent. Therefore, terminating or nonperforming talent are exposed to potential expectation damages and negative injunctive relief, again as discounted by the likelihood of nonenforceability. *See infra* Part IV.C.2.b.

104. Telephone Interview with Entm't Attorney I, *supra* note 42; Interview with Studio Exec., *supra* note 42.

105. CAL. CIV. CODE § 3423 (West 2014).

106. *Id*.

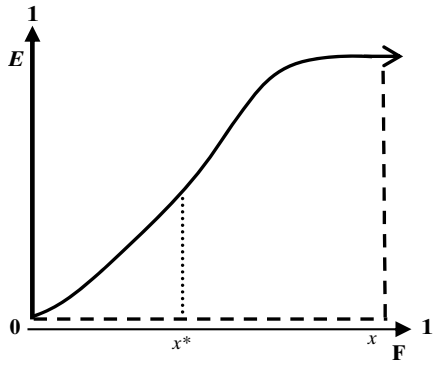
3. *The Unconventional Solution: Soft Contracts*. Soft contracting provides an intermediate governance mechanism that sometimes secures a higher expected value, net of transaction costs, relative to either a highly formalized and fully enforceable hard contract, which would rely entirely or mostly on legal action to secure parties' commitments, or an unformalized and certainly unenforceable informal contract, which would impose few transaction costs but rely entirely on reputational forces to secure compliance.

a. Contractual Formality as Risk Management. Contract scholars, as well as contract-law jurisprudence, neatly divide promissory communications into those that are enforceable in contract and those that are not. However, contractual enforceability is more precisely viewed in continuous terms as a probabilistic outcome, the likelihood of which is a positive function of contractual formality.[107] Formally, this can be rendered as follows: $E = f(F)$, where E denotes the likelihood of being held enforceable in court ($0 \leq E \leq 1$), and F denotes the level of formalization ($0 \leq F \leq 1$). As depicted in Figure 4 below, transacting parties select the value of F (and therefore E) by investing more or less effort in formalization.[108] Retaining a Wall Street law firm to draft and negotiate a detailed acquisition agreement requires hundreds of expensive attorney-hours, easily translating into tens or even hundreds of thousands of dollars in legal fees, but securing for the client an instrument with a high level of enforceability. In contrast, scribbling on a napkin in a Beverly Hills restaurant is virtually costless, but results in a low to moderate level of enforceability.

107. Enforceability also requires the exchange of "consideration." This is not much of a requirement: minimal values, or even recitals of consideration, are usually considered sufficient to satisfy this requirement. For extensive discussion, see 1464-Eight, Ltd. v. Joppich, 154 S.W.3d 101, 105–10 (Tex. 2004).

108. Note that the shape of the curve in Figure 4 has been drawn to reflect the reasonable assumption that, beyond a certain initial stage, additional investments in formalization yield sharply diminishing marginal returns in the form of increased likelihood of contractual enforceability. In any given jurisdiction, the relevant curve's shape will vary, as incremental formalization may translate into incremental enforceability at a different rate, depending on relevant case law and any individual court's actual behavior.

Figure 4. Formalization and Enforceability



Suppose that x represents the level of formalization at which there is complete certainty that a court will enforce the contract (that is, $E = 1$), and at any point below x, there is complete certainty that a court will *not* enforce the contract (that is, $E = 0$). If this were the case (as is conventionally assumed), then formalization effort would follow the step function depicted by the dashed line in Figure 4 above: where $F < x$, all formalization efforts are wasted, since the increased likelihood of enforcement is zero; where $F > x$, all further formalization efforts are wasted, since there are no marginal gains in the likelihood of enforcement. But this binary construction does not track contracting practices in business environments like Hollywood, where parties regularly select low to moderate values of F. The continuous function shown above reflects these practices. Provided there is some positive likelihood that courts will enforce contracts where $F < x$ (a reasonable assumption under current contract law), transacting parties will rationally select values well below x—for example, $F = x^*$, as shown above—if the cost of any incremental formalization would exceed incremental benefit in the form of increased enforceability. In any particular transaction, parties may elect to invest greater resources and enter into a "high-F" commitment (denoted by x) having a high degree of legal enforceability, or invest fewer resources and enter into a "low-F" commitment (denoted by x^*) having a low degree of legal enforceability.

This marginalist approach toward the enforceability of a contract can be viewed as a logical extension of the well-established marginalist approach taken among law-and-economics scholars

toward the enforceability of any particular contractual term. This approach assumes that parties rationally underinvest in specification efforts with respect to any particular term in order to economize on the expected sum of specification costs ex ante plus dispute-resolution costs ex post.[109] This nicely explains why even the most sophisticated contracts are inherently incomplete. By extension, we can anticipate that *parties may sometimes elect to underinvest in formalization efforts with respect to an agreement taken as a whole.* Specifically, parties will do so in order to endanger contract formation and thereby generate an implicit termination option that cannot be drafted more explicitly at a net positive return, taking into account the costs required to achieve a higher degree of formalization. The following examines this scenario in more detail.

Exercise of this implicit termination option is achieved by withdrawing or announcing withdrawal from the project. Upon withdrawal, the exercising party expects to pay an exercise price as follows: $p = d + l$, where d denotes the expected damages award or settlement payment in lieu of damages, and l denotes the expected litigation and other dispute-resolution costs. The value of d is a function of the expectation damages that would be awarded by a court in the event of breach, as discounted by the likelihood that the court would determine that the parties had entered into an enforceable contract.[110] By setting the likelihood of enforceability, the level of formalization operates as a "meta-term" that calibrates the price of exercising the termination option. Everything else being equal, low-F contracts result in lower expected damages and, as a result, lower settlement payouts, while high-F contracts have the opposite effect. The rationale is as follows. At high levels of formalization, nonbreaching parties can expect to incur lower costs in demonstrating contract formation and pose a more credible litigation threat, which means that, holding constant all substantive terms, breaching parties expect to pay higher amounts in order to avoid or halt litigation with a settlement payout. Conversely, at low levels of formalization, nonbreaching parties can expect to incur higher costs in demonstrating contract formation and pose a less-credible litigation threat, which means that, again holding constant all

109. *See* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1610 (2005).

110. I ignore for now the reputational cost of exercising the implicit termination right. Later, I integrate reputation effects into the analysis.

substantive terms, breaching parties expect to pay lower amounts in order to avoid or halt litigation with a settlement payout.

To illustrate, suppose an actor has made a low-*F* commitment to appear in a particular film: that is, he has entered into an uncertainly enforceable commitment that implies a positive but discounted penalty in case of termination.[111] The absence of an entirely reliable legal instrument to secure that commitment provides the actor with an implicit termination right that will be exercised whenever the actor believes that $g_m > p$, where g_m denotes the actor's expected marginal net gains on an alternative project.[112] At the same time, the presence of even an insecure legal instrument generates positive values for *d* and *l*, which together constitute the expected exercise price, *p*, that induces talent to perform within a certain range of circumstances in which he anticipates marginal net gains by moving to an alternative opportunity (that is, where $g_m > 0$ but $g_m < p$).[113] As reflected in Figure 5 below, talent will rationally perform, irrespective of any net positive outside opportunity, just up to *p*—that is, the point at which

111. For convenience, the following discussion analyzes the decision whether to perform or breach from the talent's perspective. The same framework could be applied from the studio's perspective. In practice, contracts between studio and talent—assuming legal enforceability—typically specify a liquidated-damages amount payable by the studio in the event that it does not employ talent's services (the pay-or-play clause), but contain no such clause in the case of termination or other nonperformance by talent, which therefore exposes talent to a combination of expected damages and negative injunctive relief. As discussed later, the enforceability of the pay-or-play clause is often in doubt due to certain contractual ambiguities. *See infra* notes 148–51 and accompanying text. Hence, even assuming perfect enforceability of the underlying agreement, the studio's legal exposure upon terminating an actor may be imprecisely defined.

112. More formally, $g_m = g_2 - g_1$, where g_1 equals the expected net gains on the existing project, and g_2 equals the expected net gains on an alternative project. Note that, for talent, gains and losses are not solely defined by short-term monetary outcomes. Participation in a "hit" can result in reputational gains that translate into higher compensation on future projects; the opposite outcome can result from participation in a "flop."

113. Of course, parties could replicate the incentive structure of a soft contract by entering into a fully formalized contract and inserting an appropriate termination fee or other liquidated-damages clause that enables one or both parties to withdraw whenever the costs of performance exceed a certain threshold. Soft contracts will therefore only provide a more-efficient alternative to a hard contract in circumstances where the former both imposes a lower specification-cost and negotiation-cost burden and secures approximately the same expected outcome that would result under a hard contract. As discussed later, these assumptions are most likely to be satisfied in repeat-play environments that enable parties to economize on formalization expenditures by relying in part on reputational sanctions to regulate counterparty opportunism.

the marginal net gains from an outside opportunity equal the penalty for exercising the implicit termination option.[114]

From the talent's perspective, we can anticipate three outcomes under a soft contract, as shown in Figure 5:

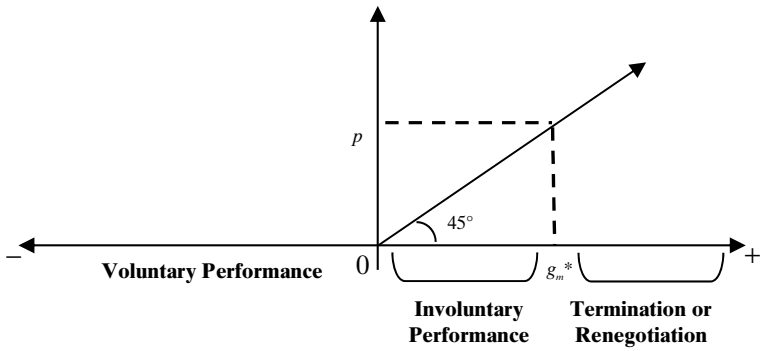
> 1. *Voluntary performance* ($g_m < 0$): Talent anticipates a net marginal gain under the contract and performs irrespective of any expected legal penalty.
>
> 2. *Involuntary performance* ($0 < g_m < g_m^*$): Talent anticipates a net marginal loss under the contract but performs due to the expected damages payment and legal costs that would be incurred upon termination.
>
> 3. *Termination* ($0 < g_m > g_m^*$): Talent anticipates a net marginal loss under the contract and terminates to capture incremental gains on an outside opportunity, even after taking into account the expected damages payment and legal costs that would be incurred upon termination.

Taken together, these three possible outcomes mean that talent effectively commits to perform except in the case of sufficiently high-value outside opportunities (that is, cases where $0 < g_m > g_m^*$). If these high-value outside opportunities arise, talent will either withhold performance, incur dispute-resolution costs, pay a settlement amount to the studio, and then capture the gains on the outside opportunity;[115] or continue performance and receive a continuation payoff that accounts for the forfeited marginal gains on the outside opportunity less the savings in avoided dispute-resolution costs and damages payments. The studio will deliver the continuation payoff so long as it is less than the expected cost the studio will incur in locating a substitute for the star or canceling the project *plus* the expected amount recoverable from the star in the event of litigation, net of legal fees. Whether talent elects termination or renegotiation, he is put in the same position and enjoys a net gain equal to $g_m - p$.

114. Note that Figure 5 holds constant the exercise price, p, but varies g_m, the party's expected marginal net gains on an alternative opportunity.

115. Note that, in practice, the talent's new employer will sometimes pay the settlement amount by "buying out" the talent's contract.

Figure 5. Possible Outcomes Under a Soft Contract



b. Reputational Constraints. While soft contracting saves on transaction costs relative to hard contracting, it does not supply a workable governance instrument in the absence of reputational penalties and common knowledge of market norms. Without a clear documentary point of reference enforceable by a court or some other adjudicative agent, participants must share, and usually conform to, a common understanding of the conditions under which it is "reasonable" and "unreasonable" to breach.[116] Otherwise soft-contracting environments are liable to suffer from deviations from the parties' implicitly agreed-upon set of termination-and-renegotiation options. These deviations can run in both directions. Nonperforming parties may terminate unreasonably, resulting in "overtermination" relative to the set of circumstances in which the parties had implicitly agreed to perform. Or performing parties may litigate against reasonably terminating parties, resulting in "undertermination" relative to the set of circumstances in which the parties had implicitly agreed *not* to perform. Anticipating those outcomes, parties would rationally revert to hard-contracting instruments in order to implement their agreement, even taking into account the transaction costs required to achieve higher degrees of formalization.

Overtermination: In the absence of a certainly enforceable agreement, opportunistic, uninformed, or misinformed parties can misuse the termination option embedded in a soft contract by withdrawing in a manner inconsistent with the parties' implicitly

116. For a similar view, see W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 65 J. ECON. LIT. 595, 595–628 (2007) ("For a given transaction, there will be a number of ways that parties can define breach.").

agreed-upon risk allocation. This would be equivalent to talent withdrawing from the project in cases not involving sufficiently high-value outside opportunities (that is, a case where $g_m < g_m^*$). The result is an excessively flexible contract that overexposes the studio to holdup risk ex post—or more precisely, exposes the studio to a level of holdup risk that was not reflected in the deal terms—and, by anticipation, would compel parties to incur additional specification costs ex ante or forego the transaction altogether. Reputational liability increases the exercise price due upon termination and thereby protects against downward shifts in the threshold point—that is, the threshold value of opportunity costs from continued participation—at which talent rationally terminates, or credibly seeks to renegotiate, further participation in the project.[117]

This can be illustrated by the following example. After the studio has commenced shooting, any high-value talent in a lead role should rationally hold up the studio for additional compensation in an amount approaching the studio's entire expected profit on the film. In practice, nothing close to this extreme form of holdup behavior actually occurs: even in the absence of a signed deal, talent attorneys report that they renegotiate open terms following production but refrain from renegotiating the fixed compensation.[118] This social restraint on transactional opportunism limits the studio's expected exposure to holdup by talent and enables the parties to enter into the project at a low level of formalization and with a large savings in transaction costs.

Undertermination: A soft contract implies both the absence of a certainly enforceable agreement *and* the presence of an uncertainly enforceable agreement. Given the latter effect, nonterminating parties can contest a "reasonable" exercise of the termination option through legal action or resist "reasonable" settlements to preempt or resolve any such legal action, even if the option is exercised in a manner that is consistent with the implicitly agreed-upon risk allocation. This would be equivalent to the terminating party being forced to incur dispute-resolution costs and make damages payments that discourage it from withdrawing from the project in cases

117. Formally, this requires a revision to the earlier formalization of a party's breach–compliance calculation. A party will now rationally perform whenever $g_m > p$, where $p = d + l + r$. Variables d and l are defined as above, and r is defined as the reputational cost associated with any observed breach.

118. *See* Telephone Interview with Entm't Attorney II, *supra* note 52; Telephone Interview with Entm't Attorney III, *supra* note 42.

involving sufficiently high-value outside opportunities (that is, a case where $g_m \geq g_m^*$). The result is an excessively rigid contract, which, by anticipation, would compel parties to incur greater specification costs ex ante or forego the transaction altogether. Reputational penalties against *non*-terminating parties inflate the cost of using legal action "aggressively" to contest exercise of the termination option, or to reject "reasonable" settlement terms, including continuation terms, offered by the terminating party (or, when talent breaches, the terminating party's new employer). Those reputational penalties protect against *upward* shifts in the threshold point—that is, the threshold level of opportunity costs from continued performance—at which a party may terminate involvement, subject to making an appropriate payment to the nonterminating party.

Reputational pressures explain why studios usually do not bring legal action against a high-value actor who terminates his participation in a film project, electing instead to expeditiously resolve the matter by mutual agreement and put an end to any actual or threatened litigation.[119] The most well-known unsigned-deal litigation, the *Basinger* case discussed above,[120] supplies the exception that proves the rule. Hollywood was surprised by both the production company's initial victory in this litigation as well as the fact that the production company brought suit at all. As one commentator has suggested, the unusually aggressive response to Basinger's withdrawal from the film may have been initiated because the counterparty was a small production company experiencing financial difficulties.[121] That corresponds to an "end-game" scenario whereby a party loses its rational incentive to preserve long-term reputational gains by conforming to a social norm that discourages initiating litigation in response to termination.

IV. APPLICATION: EXPLAINING FORMALIZATION CHOICES

Viewing contract formality as a deal term that serves as a proxy for legal enforceability, which in turn sets forth the parameters of a termination-and-renegotiation option, provides the basis for accounting for observed differences in contract formalization. Field interviews and trade-press coverage indicate that parties'

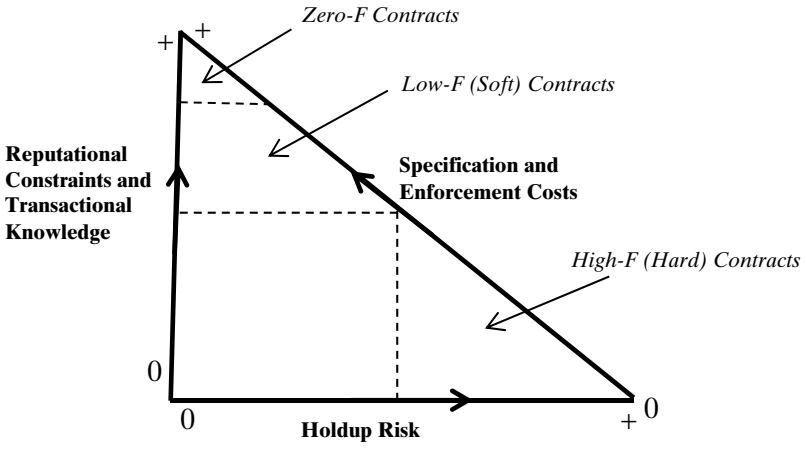
119. *See* Interview with Studio Exec., *supra* note 42.

120. *See supra* Part II.D.2.b.

121. *See* Kari, *supra* note 95, at 4–5. For the litigation, see Main Line Pictures, Inc. v. Basinger, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994).

formalization preferences differ not only across transactions but also with respect to different parties, elements, and stages of a transaction. As reflected in Figure 6 below, parties' formalization preferences are influenced by (1) the specification-cost and enforcement-cost expenditures required to replicate that same flexibility at a higher level of formality; (2) the holdup risk to which a party is exposed as it makes specific investments in the project; and (3) reputational constraints and transactional knowledge—that is, familiarity with industry norms—that limit parties' exposure to holdup risk even at reduced formalization levels. Hard (high-*F*) contracts are most likely to be used when specification costs and enforcement costs are sufficiently low, holdup risk is sufficiently high, and counterparties possess insufficient reputational capital and transactional knowledge to credibly pledge against opportunism. Soft (low-*F*) contracts are most likely to be used when these values are inverted: when enforcement costs and specification costs are sufficiently high, holdup risk is sufficiently low, and parties hold sufficient stocks of reputational capital and transactional knowledge to credibly pledge against opportunism. Informal (zero-*F*) instruments are used when these values are extremely inverted.

Figure 6. Factors that Influence Formalization Preferences



The result of this process of continuous adaptation is a document package consisting of multiple deal elements memorialized at different levels of formalization. Contrary to popular impressions, this apparently sloppy approach to contractual documentation is neither

reckless nor unintended. Rather, it reflects a calculated tradeoff—with respect to each deal element, deal stage, and deal participant—that weighs the marginal transactional flexibility and cost savings from reduced formalization against the marginal increased risk of holdup and other forms of counterparty opportunism.

A. Transaction Timeline

Over the course of a talent–studio transaction, there are three distinct stages at which either party could fail to conform to some, or all, elements of its commitment:

Stage I: At any time before shooting, talent or the studio may terminate its involvement in the project (or the studio may proceed with the project but terminate talent's involvement). Withdrawal by studio or talent prior to shooting is the fact pattern at issue in most of the contract-formation cases identified through the case-law and trade-press survey.[122] A variant of this fact pattern arises in the case of sequels, when stars threaten to withdraw pending resolution of an increase to the star's compensation.[123] Fear of this type of holdup scenario may explain why the studio that backed the *Lord of the Rings* trilogy undertook the enormous expense of shooting the entire trilogy at the same time.[124] By doing so, the studio eliminated its exposure to holdup risk in the event that either of the first two films in the anticipated series achieved commercial success.

Stage II: Once shooting has started, a party may terminate its involvement in the project. There are few reported cases of this type

122. *See* Apps. A, B.

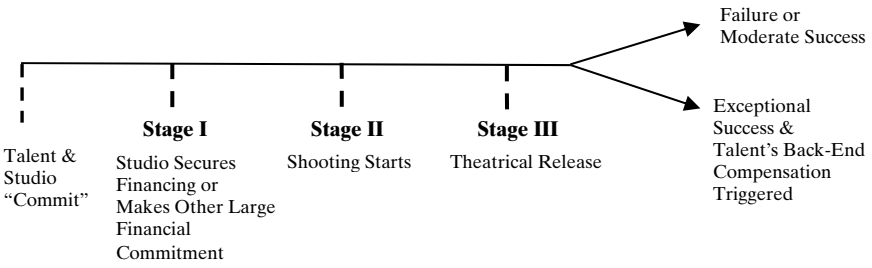
123. This type of behavior gave rise to a suit between Universal Pictures and Michael Oliver, a ten-year-old actor in the *Problem Child* movie series. Oliver's guardian renegotiated his salary before the shooting of the sequel, *Problem Child II*. Universal later refused to pay the additional amount on the ground that it had agreed to the increased compensation under duress, given its investment in production and other expenses. *See* Diana Haithman, *Problem Child Part III – The Courtroom*, L.A. TIMES, Apr. 23, 1992, *available at* PROQUEST ("In its complaint, Universal states that Oliver and Ponce forced Universal to renegotiate under 'economic duress.'"). A jury agreed, and the originally negotiated amount was reinstated. *Id.*

124. *See* Associated Press, *'Hobbit' Trilogy Cost $561M So Far*, VARIETY, Oct. 4, 2013, http://variety.com/2013/film/news/hobbit-trilogy-has-cost-561-million-so-far-1200694351 ("The trilogy also appears to be one of the most expensive movie productions in which two or more movies are shot at the same time."). I am grateful to Victor Goldberg for bringing this point to my attention. The same "film it all at once" strategy was used in the *Pirates of the Caribbean* sequels: *Pirates of the Caribbean: At World's End* and *Pirates of the Caribbean: Dead Man's Chest.*

of behavior in film projects, most likely due to the severe reputational sanctions that a party would suffer by terminating at this point.[125]

Stage III: After theatrical release, the studio may fail to distribute box-office revenues as had been promised to talent, or talent may claim to be owed "back-end" compensation—that is, a contractually agreed-upon portion of the film's net profits after the studio has recouped its costs—based on a position that is inconsistent with the parties' understanding. This type of behavior, typically resulting in complaints by talent against a studio, appears to be common, even in the case of hard contracts, and is usually resolved through a formalized "participation audit."[126]

Figure 7. Transaction Timeline (Talent–Studio)



125. I am aware of two such cases. The studio that made *Back to the Future* terminated the original lead (Eric Stoltz) for the movie after four weeks of shooting and then hired Michael J. Fox to play the lead role. This change, and associated reshooting, added $3 million to the movie's budget. *See Back to the Future Trivia*, INTERNET MOVIE DATABASE (IMDB), http://www.imdb.com/title/tt0088763/trivia (last visited Nov. 18, 2014) ("[R]eshooting Stolz's scenes added $3 million to the budget."). In another case, a studio terminated then-star Raquel Welch from a film, which resulted in litigation. For further details, see *supra* note 100. One interviewee reported that, in rare cases, studios have terminated directors and actors shortly after shooting has commenced if their performance is unsatisfactory. *See* Interview with Studio Exec., *supra* note 42.

126. For a description of recent disputes in this area, see Bryan M. Sullivan, *Audit Trend Puts Movie Studios Up in Lights*, LAW360 (Jan. 7, 2013), http://www.law360.com/articles/405212. These disputes typically arise due to the complex definitions and formulas used to identify and calculate the costs that a studio must recoup before its contractual commitment to provide talent with a portion of the remaining net profits is triggered. Obviously, the studio makes every effort to craft and interpret contractual clauses that preclude activation of any such payout from net profits.

B. Formalization Differences by Counterparty

Interviewee reports and trade commentary reveal a basic pattern in Hollywood's choice of soft- and hard-contracting instruments as a function of the type of counterparty involved. In the case of transactions involving lower-value talent, outside financing, and suppliers of other noncreative inputs, Hollywood tends to prefer hard contracts.[127] In the case of transactions involving higher-value talent, Hollywood sometimes prefers soft contracts.[128] This basic difference can be accounted for by simple differences in reputational capital and transactional knowledge. In the former case, the counterparty is likely to be lacking in both respects: as talent, it may be a newcomer to the industry; as an outside investor, it may be a one-shot player who misconstrues the implicit termination-and-renegotiation option embedded in a soft contract. In the latter case, both the star and the studio are parties that have (or are represented by an intermediary that has) observable reputational stock and transactional knowledge, which limits the anticipated level of opportunism risk. As a result, parties are rationally willing to make investments in a relationship under lower levels of formalization.[129]

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127. *See* Interview with Studio Exec., *supra* note 42; Interview with Entm't Attorney I, *supra* note 41.

128. *See* Interview with Entm't Attorney I, *supra* note 41; Interview with Entm't Attorney III, *supra* note 41; Interview with Studio Counsel II, *supra* note 44; Telephone Interview with Studio Counsel III, *supra* note 44; Interview with Mini–Major Studio Counsel, *supra* note 48. Major studios appear to differ in their perceived willingness to proceed on an "unsigned" basis with stars and other higher-value talent. Based on interviews with a selected set of industry participants, it appears that one of the six major studios has a reputation for historically requiring execution of a long-form agreement as a precondition for commencing shooting. Another of the major studios has a reputation for historically being more relaxed in allowing production to move forward without a signed long-form agreement, while views were mixed or unclear as to the historical or current policies at other studios. *See* Telephone Interview with Studio Counsel I, *supra* note 49; Interview with Studio Counsel II, *supra* note 45; Telephone Interview with Studio Counsel III, *supra* note 44; Interview with Mini–Major Studio Counsel, *supra* note 49; Telephone Interview with Entm't Attorney I, *supra* note 42; Telephone Interview with Entm't Attorney III, *supra* note 42. Views with respect to "unsigned deal policies" may differ within the same studio, s*ee* Interview with Entm't Attorney I, *supra* note 41, and those polices may change over time in response to market conditions, *see id.*; Telephone Interview with Studio Counsel III, *supra* note 44.

129. Some interviewees, trade commentators, and readers attribute unsigned deals between stars and studios to the latter's bargaining leverage. Although this is an intuitive explanation, it is difficult to reconcile with fully rational contracting behavior: compelling the studio to operate at a low level of formalization would not make the star any better off since the studio would presumably adjust other terms to reflect its greater anticipated exposure to holdup risk. It is therefore more coherent to say that the studio agrees to low formalization with a star because the latter can pledge its reputational capital against future opportunism, thereby limiting the

C. Differences by Time and Transaction Element

Studios' and stars' formalization preferences evolve throughout the course of a film's production and differ with respect to different elements of a transaction. These changes and differences in formalization preferences can be accounted for by reference to the factors mentioned above: specification and enforcement costs, holdup risk, and reputational constraints and transactional knowledge.

1. *Development*. At this stage, both studio and talent place a high value on being able to withdraw in the event that unfavorable information is received, and therefore typically agree on reduced contractual formality in the form of an oral agreement or unsigned deal memo. Both parties are exposed to the risk of positive and negative fluctuations in the expected value of the project (or the star[130]), as assessed relative to other opportunities, in which case any agreed-upon deal may turn out to be dramatically misvalued. For both the studio and the star, a soft contract provides the flexibility to respond to new information by terminating, or threatening to terminate, involvement at a reduced risk of legal liability. At a transaction-cost savings, this is equivalent to writing a fully formalized contract with a high degree of flexibility—for example, a broadly defined walkaway right and a low breakup fee in an acquisition transaction. Even if greater transactional certainty could be achieved through a more formalized contract, an unsigned deal may represent a rational underinvestment in specification and negotiation costs given the fact that most film projects are shelved or abandoned in the development stage,[131] in which case all investments, legal and otherwise, would be forfeited.

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studio's holdup risk at a transaction-cost savings relative to a more formalized contracting instrument. This is consistent with one interviewee's statement that tolerating an unsigned deal can benefit a studio by saving on concessions, Telephone Interview with Studio Counsel III, *supra* note 45, that would be required to reach a signed deal.

130. A star's expected value is dependent on, among other things, past observed performance in other productions. During the intervening period between the point at which a studio and talent commit to a particular project and the point at which production commences, the star's value may change depending on whether he or she has participated in a hit or a flop.

131. *See* Telephone Interview with Entm't Attorney I, *supra* note 42; *see also* RICHARD CAVES, CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE 113 (2002) ("A Twentieth Century Fox executive stated that the company receives 10,000 screenplays, treatments, books, and oral pitches yearly, puts 70 to 100 projects into development, but makes only twelve films.").

2. *Pre-Production*. At this stage, the studio's and the star's formalization preferences diverge to a certain extent. The studio now makes increased investments in the human and nonhuman assets required to execute a film project, and therefore places increased value on contractual formality to secure talent's participation and neutralize any exposure to holdup behavior. In the event that the star withdraws from the film, the studio may have breached a representation made to outside financiers concerning the use of a particular star,[132] and the financiers may then be able to withdraw their commitments or renegotiate financing terms to the studio's disadvantage.[133] However, high-value talent often resists the studio's demand for a finalized long-form agreement. Reportedly the talent's attorneys sometimes do so in order to preserve leverage on negotiating open deal points.[134] Some even explicitly recommend that clients seek to avoid liability by asserting that no contract ever existed and "being uncooperative" in order to "renegotiate the terms that really concern you."[135] In some cases, talent has used the nonexistence of a certainly binding contract "to shop the deal" to other interested studios, thereby precipitating a bidding contest that enables talent to capture more of the project's expected value and, consequently, expropriate part of the studio's sunk investment in the project.[136] Negotiation between studio and star over the level of contractual formality during this critical stage yields a patchwork result in which different levels of formalization apply to various terms of the transaction. Roughly speaking, the studio's and star's representatives appear to select increased formalization with respect to any particular element at any particular point in time as holdup risk increases and specification costs fall, and vice versa. This assumes that both parties hold a sufficient level of reputational capital and market knowledge—without which the parties would be compelled to select hard

132. *See* Telephone Interview with Studio Counsel III, *supra* note 45.

133. *See supra* text accompanying note 92.

134. *See Double Trouble Irks Legal Eagles*, *supra* note 41; Telephone Interview with Entm't Attorney III, *supra* note 42; Interview with Studio Exec., *supra* note 42.

135. *See* Dennis Ardi & Meredith Lobel, *How to Break a Contract*, DAILY VARIETY, Nov. 7, 1986.

136. This may describe the fate of Warner Bros. in a dispute with Francis Ford Coppola, who used the lack of a fully executed long-form agreement to argue (successfully) that he was free to "shop" to other studios a film project (*Pinocchio*) originally developed in partnership with Warner Bros. In that case, Warner Bros. executives testified that they often have great difficulty in obtaining written confirmations of oral commitments from talent's attorneys. *See* Schleimer, *supra* note 1.

contracting as the only viable transactional instrument. The typical resulting document package, organized by decreasing degree of formalization, is as follows.[137]

a. Certificate of Engagement. At the highest level of formalization, studios usually require that talent execute a "certificate of engagement," which assigns to the studio all of talent's intellectual-property rights in the film production.[138] The certificate of engagement protects the studio against the most salient holdup threat—for example, a lawsuit for injunctive relief on the eve of a movie's release—at a nominal specification cost.

b. Deal Memo; Pay-or-Play Clause. At an intermediate level of formalization, the deal memo typically sets forth some or all of the following terms: the fixed compensation; the talent's role; screen credit; the start and end dates of filming; in some cases, expenses and some perquisites; and, in abbreviated form, the contingent compensation based on the film's revenues.[139] The deal memo often includes a pay-or-play commitment that obligates the studio to pay talent all or part of the fixed compensation even if talent's services are not used, subject to triggering conditions and, in some cases, a force majeure clause.[140] Even if the deal memo is unsigned, as is a

137. Note that the document package described below is intended to be representative of soft-contracting transactions in general. Individual transactions may not include all the document types described below.

138. *See* Interview with Studio Counsel II, *supra* note 45.

139. This list is based on the terms that appeared most commonly in a review of short-form agreements disclosed in litigation, publicly available deal-memo templates, interviews with entertainment attorneys, and trade commentary. For further discussion, see also KELLY CHARLES CRABB, THE MOVIE BUSINESS: THE DEFINITIVE GUIDE TO THE LEGAL AND FINANCIAL SECRETS OF GETTING YOUR MOVIE MADE 151–64 (2005) (outlining these common terms and some others that may be included in talent–studio agreements). Interviewees differed over whether perquisites were part of the deal memo.

140. Those conditions are vital to determining the actual security provided by a pay-or-play commitment. Typically used conditions include agreements securing outside financing; the absence of a force majeure event; securing other talent on a pay-or-play basis; or, most aggressively, a "final approved bonded budget" (that is, the studio's final approval to commence shooting). *See* MOORE, *supra* note 39, at 197. Pay-or-play provisions granted to directors are often conditioned on approval by the studio of the final screenplay and engagement by the studio of the principal cast on a pay-or-play basis. *See* HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV AND NEW MEDIA 102–03 (Dina Appleton & Daniel Yankelevits eds., 2010) ("[T]he director will be deemed pay-or-play when . . . . [t]he studio has approved the final screenplay [and] . . . engaged the principal cast on a pay-or-play basis.").

common occurrence,[141] or the conditions to the pay-or-play commitment remain unspecified,[142] that commitment is partially supported by reputational forces and, in some cases, by an escrow mechanism.[143] Note that the pay-or-play commitment not only protects talent against losses incurred as a result of termination by the studio but, as a liquidated-damages clause, also protects the studio by capping the damages it owes talent in the event that the studio terminates the actor or the project. That protection is only partial, however, so long as the underlying instrument remains unsigned, the triggering conditions remain unspecified, or the commitment is subject to either strict triggering conditions or a broad force majeure clause—as is suggested by reported failures to honor pay-or-play commitments.[144]

c. Draft Long-Form Agreement. The remaining terms, as set forth in drafts of the long-form agreement, are subject to the lowest level of formalization and are therefore prone to renegotiation in the course of production. These primarily include all the terms set forth in the deal memo but now specified in significantly greater detail. Such terms include talent's screen and advertising credit, expenses, perquisites, contingent compensation, and the vesting schedule and triggering events for the pay-or-play commitment.[145] The studio may

141. *See* Interview with Studio Exec., *supra* note 42.

142. *Id.*

143. *See* CRABB, *supra* note 139, at 219 ("[A]gents in Hollywood are likely to demand that the actor's fee be put in an escrow account and paid out to the actor according to the actor's agreement.").

144. For litigation by stars who claimed that production entities had failed to honor an unsigned pay-or-play commitment, see Child, *supra* note 98 (involving Robin Williams); *Basic Instinct 2 (2006): Did You Know?*, *supra* note 99 (involving Sharon Stone). SAG maintains an "Unfair List" of production companies that cancel projects and then refuse to honor pay-or-play commitments to talent. The list had over one hundred entries for the period from September 2006 through June 2011. *The Unfair List*, SCREEN ACTORS GUILD (2011), http://www.sag.org/files/sag/documents/TheUnfairList_as_of_June2011.pdf.

145. Nonprice terms that typically appear in an actor's agreement include approval rights concerning use of talent's name, likeness, and image; creative-approval rights; post-production obligations (for example, terms for "retakes"); promotional obligations; a performance-standard and morals clause; definitions of default and force majeure events, which negate the pay-or-play commitment; auditing and accounting mechanisms relating to the contingent compensation; a specification of the governing law; and dispute-resolution mechanisms. A director's agreement includes terms similar to those in actors' agreements, in addition to the terms specific to the director's role. For useful discussion, see CRABB, *supra* note 139, at 217–23. For a sample actor's agreement, see Selz, *supra* note 21, App. A-21. For a sample director's agreement, see MARK LITWAK, DEALMAKING IN THE FILM AND TELEVISION INDUSTRY: FROM NEGOTIATION TO FINAL CONTRACTS 135–47 (3d ed. 2009).

elect to proceed without a "signed up" deal given the star's and his or her representatives' observable reputational capital, which reduces holdup risk, and the specification costs plus deal concessions,[146] which would have to be incurred to reach a fully signed-up deal.

3. *Production*. At this stage, the studio and the star have almost diametrically opposed formalization preferences. The studio places a high value on contractual formality since it has made a large irreversible investment in the star and other assets in a production predicated on the star's participation. Even the slightest delay in production translates immediately into significant costs and endangers completion because the cast has typically committed to perform only during a limited period. But high-value talent has little reason to enter into a contract at this stage. If, as is typical, the studio has made a pay-or-play commitment in existing draft documentation, the studio has a limited ability to disclaim that commitment once shooting has commenced, at least as a reputational matter. Additionally, the absence of executed long-form documentation enables the star's representative to engage in renegotiation of open nonprice terms, subject to reputational constraints.[147] Executing a fully formalized agreement would forfeit renegotiation opportunities while delivering little value in the form of protection against opportunism by the studio, which has few holdup opportunities given the difficulty of substituting comparable talent once shooting has commenced. Perhaps for that reason, star actor Charlton Heston boasted that he had never started production on a film with a signed completed contract.[148] That is, Heston always had sufficient reputational capital to preserve his renegotiation option and, as a difficult-to-replace human capital asset, had little reason to fear being held up by the studio.

V. WHY NOT VERTICAL INTEGRATION?

Holdup risk, severe uncertainty, high specification and enforcement costs, and positive but limited reputation effects are

146. *See* Interview with Studio Counsel III, *supra* note 45.

147. The studio is not always helpless on this front. One interviewee reported that studios sometimes hold back a certain percentage of talent's compensation contingent upon execution of a long-form agreement. *See* Telephone Interview with Entm't Attorney III, *supra* note 42.

148. *See* Charlton Heston, *Of Trust, Manners and How Hollywood Works*, L.A. TIMES (Apr. 12, 1993), http://articles.latimes.com/1993-04-12/entertainment/ca-21971_1_hollywood-works.

hardly unique to the movie industry. These challenging conditions are often addressed through a simpler alternative to contract: vertical integration that eliminates arm's-length transactions altogether. That well-known solution follows a basic principle of transaction-cost economics. When it is too costly to contract to protect against holdup risk, one party may acquire the other party and replace contract with the managerial fiat that governs relationships within an integrated corporate entity—in this case, converting the talent–studio relationship from a one-off contracting relationship to a long-term employment relationship. Conversely, when it is too costly to undertake the relevant activity within an internal firm-based structure, parties will transition to arm's-length contractual structures. Following Ronald Coase's fundamental proposition, observed transaction structures reflect the comparative costs of using market-based rather than firm-based structures.[149]

Roughly speaking, Hollywood appears to have migrated from a firm-based to a market-based system for coordinating the supply of creative and noncreative inputs for purposes of motion-picture production. However, closer scrutiny shows that Hollywood's transactional path is more nuanced and does not fully conform to this standard sequence.

From the 1920s through the late 1940s, Hollywood operated under a firm-based structure. The studio system secured both the studio's and talent's commitments to an unspecified series of film productions, which then took place within the confines of the studio.[150] Studios signed talent to multiyear contracts that guaranteed the talent fixed compensation during the contract term, akin to an extended pay-or-play commitment, subject to the studio's option to terminate or extend the contract at periodic intervals up to a total period of seven years per interval.[151] Any actor who refused to perform in a particular project would be "suspended" and the missed time added to the term of the contract.[152] The latter clause was effectively a pre-agreed negative injunction that mitigated the studio's exposure to holdup by talent that had accumulated (with the studio's

149. *See* Coase, *supra* note 10. For subsequent articulations of this thesis, see WILLIAMSON, *supra* note 17; Klein, *supra* note 17.

150. For the authoritative account of this period, see generally THOMAS SCHATZ, THE GENIUS OF THE SYSTEM: HOLLYWOOD FILMMAKING IN THE STUDIO ERA (2010).

151. *See* Kindem, *supra* note 22, at 84.

152. *See* SCHATZ, *supra* note 150, at 84.

assistance) valuable reputational capital.[153] The transactional security of a long-term employment arrangement both protected the studio against opportunistic renegotiation by a star—with some exceptions[154]—and, within the term of any option renewal, protected talent against opportunistic renegotiation by the studio.

Starting in the late 1940s, the advent of television reduced the volume of films demanded by the market and made it unprofitable for the studio to bear the cost of maintaining a standing pool of creative and technical personnel.[155] The standard sequence anticipated by transaction-cost economics anticipates that the industry would have then migrated to a governance structure based on market-based contractual agreements. This is partially true. Starting in the late 1940s, Hollywood evolved toward the disaggregated transactional structure familiar today: a hub of major studios that engage outside talent and production and other entities on a project-specific basis.[156] But these one-shot transactions do not operate subject exclusively to the soft-contracting mechanisms typically associated with market-based relationships. Rather, as this Article has demonstrated in detail, Hollywood operates subject to a mix of short-term hard contractual agreements, which rely primarily on formal enforcement, and repeat-play soft contractual agreements, which rely significantly on reputational enforcement.

Hollywood's historical shifts between firm-based and market-based relationships can be explained as an efficient response to the transactional hazards associated with film production and distribution. Historical evidence suggests that the soft contract took on greater prominence in Hollywood roughly when the studio system entered into decline. The surveys of reported litigation and case law described earlier found only one court decision, and one other reported dispute, relating to contract formation in connection with a film project before 1947—precisely the time at which the studio system began to unravel.[157] Moreover, those two disputes arose in the

153. This did not always work. Some of the most famous stars attempted to withdraw from their contracts, including James Cagney and Bette Davis. *See id.* at 138–39, 218–20.

154. *See supra* note 153.

155. *See* MICHAEL HAUPERT, THE ENTERTAINMENT INDUSTRY 117–18 (2006).

156. *See* Joseph Lampel & Jamal Shamsie, *Capabilities in Motion: New Organizational Forms and the Reshaping of the Hollywood Movie Industry,* 40 J. MGMT. STUD. 2189, 2207 (2003).

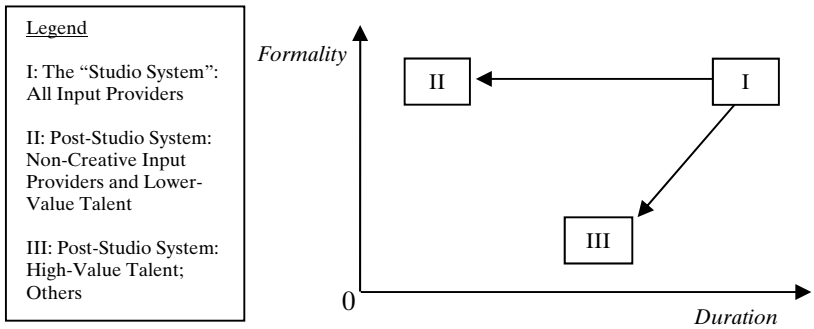
157. A California state-court case in 1936 involving the famous actor James Cagney concerned an oral agreement with respect to the number of films in which Cagney had agreed to

early 1920s, at the inception of the studio-system era. Although the timing may be merely suggestive, this sequence is consistent with an organizational narrative in which informal contracting, and the attendant holdup problems, appeared just *before* the start of the studio system, which then sought to resolve those contracting difficulties through vertical integration. As the studio system unraveled, these same problems reappeared. In response, Hollywood appears to have adopted both conventional one-shot contractual mechanisms and an unconventional transactional mechanism that lies somewhere between the alternatives of firm and market.

The soft contracts that govern relationships between studios and stars (and, less consistently, other segments of the industry) fall somewhere between three canonical transactional forms: long-term formal contracting, short-term formal contracting, and repeated informal contracting governed significantly by reputation effects. Exploiting the two vectors of duration and formality, these transactional options, and the Hollywood alternative, can be depicted as shown below. The old studio system primarily operated in *region I*: long-term formal contracting (interrupted by periodic renegotiations at each option renewal for a high-value star). The unraveling of that system appears to have pushed transactions between studios and the general class of input providers into two transactional alternatives. Transactions between a studio on the one side and noncreative input providers and lower-value creative input providers on the other side tend to operate in *region II*: short-term formal contracting. Transactions between a studio and high-value creative input providers, as well as some other parties, tend to operate in *region III*: a boundary zone occupied by the unsigned deal—that is, a substantially incomplete contractual instrument supported in part by repeat-play reputational constraints, which are reflected by a medium-term durational vector.

perform. *See Terms of Cagney Deal Taxes Warner Memory*, DAILY VARIETY, Mar. 5, 1936. This dispute—like many other disputes at the time between studios and major stars—did not contest the existence of a legally binding agreement between talent and the studio. Rather, such disputes concerned the interpretation of specific contractual terms or whether specific terms had been breached. *Id.*

Figure 8. A Transactional Typology of Film Production



VI. BROADER IMPLICATIONS

I began by treating Hollywood's predilection for soft contracting as an anomalous phenomenon considered from the perspective of conventional business-law practice. But the proposed economic rationale for soft contracting implies that Hollywood may not be the outlier it initially appears to be. Any industry that shares the characteristics of the film industry—high holdup risk and outcome uncertainty, high specification and enforcement costs, and positive but limited reputational effects—should be expected to adopt some form of soft-contracting instruments. If that is the case, then soft contracting may carry normative implications for contract law in general.

A. Soft Contracts Beyond Hollywood

Consistent with theoretical expectations, other markets also adopt some form of soft-contracting instruments. The use of open-ended precontractual agreements reportedly characterizes some technology-transfer, project-finance, and infrastructure projects, in which negotiation is prolonged concurrently with staged performance.[158] Soft-contracting instruments with uncertain enforceability even appear in conventional business environments: merchants exchange letters of credit with documentary defects;[159] rail-freight carriers and shippers use informal and legally unenforceable

158. *See* LAKE, *supra* note 36, at 54.

159. *See* Mann, *supra* note 32, at 2520.

contracts to implicitly alter regulatory constraints;[160] parent firms sometimes issue "comfort letters" or "keepwell agreements" in support of the financial obligations of a subsidiary;[161] underwriters commonly issue "best efforts" commitment letters to an issuer in connection with initial public offerings;[162] and cable-television operators enter into "unsigned but operative" agreements with video-programming distributors.[163] In refusing to enforce an unsigned LLC agreement under the applicable statute of frauds, the Delaware Chancery Court observed that private-equity funds sometimes use oral agreements and "roughly-outlined unsigned arrangements or draft agreements" in lieu of definitive LLC agreements.[164] These oral instruments are apparently so vital that private-equity funds successfully lobbied the Delaware legislature to clarify that the statute of frauds does not apply to those agreements.[165]

B. Why Soft Contracts Matter for Contract Law

The widespread use of soft-contracting practices implies an efficient purpose. Given that soft contracts require a legal regime in which courts sometimes enforce underformalized agreements, the historical relaxation of formalization thresholds in the common law of contract and the Uniform Commercial Code (U.C.C.)[166] may therefore rest on an efficiency rationale. In Hollywood and elsewhere, the relaxation of bright-line formalization thresholds creates a zone of legal ambiguity in which parties often prefer to transact. A legal regime that obfuscates the required level of

160. *See* Thomas M. Palay, *Avoiding Regulatory Constraints: Contracting Safeguards and the Role of Informal Agreements*, 1 J.L. ECON. & ORG. 155, 164–69 (1985) (highlighting the use of informal, legally unenforceable contracts between rail-freight carriers and shippers).

161. *See Guarantees and Other Forms of Explicit Support*, DBRS (Aug. 2010), http://www.dbrs.com/research/234322/dbrs-criteria-guarantees-and-other-forms-of-explicit-support.pdf (distinguishing guarantees from keepwell agreements and comfort letters).

162. *See* LAKE, *supra* note 36, at 14–15.

163. *See* United States v. Comcast Corp., No. 11:1-CV-106, 2011 WL 5402137, at *9 (D.D.C. Sept. 1, 2011).

164. *Delaware Court Rules LLC Operating Agreements are Subject to Statute of Frauds*, Milbank, Tweed, Hadley & McCloy LLP (Nov. 10, 2008), http://www.milbank.com/images/content/7/9/794/111008_Olson_v_Halvorsen.pdf (citing Olson v. Halversen, No. 1884-VCL, 2008 WL 4661831 (Del. Ch. Oct. 22, 2008), *aff'd* 986 A.2d 1150 (Del. 2009)).

165. 77 Del. Laws ch. 287 (2010). For discussion, see Milbank, *supra* note 164.

166. Section 1-201(3) of the U.C.C. discards the common law's traditional narrow definition of a legally enforceable contract in favor of a loose definition: "the bargain of the parties . . . as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade." U.C.C. § 1-201(3) (2001).

formalization expands the universe of transactional opportunities for efficient exchange.[167]

A brief thought experiment can illustrate this argument. Suppose California clarified and increased its formalization threshold. In this example, courts would be prohibited from finding any agreement to be enforceable absent mutual execution of a notarized agreement initialed by both parties on each page of the document with representation by a licensed attorney. That requirement eliminates virtually all ambiguity over the availability of legal recourse but, for the same reason, may distort parties' efficient choice of contracting form, and may even prevent certain transactions altogether. In an environment characterized by sufficiently high specification costs and sufficiently weak reputation effects, neither formal contract nor reputational forces can independently induce participation by talent and studio, which therefore bargain toward an intermediate level of formalization that implies a limited likelihood of judicial enforcement. Under the hypothetical California regime, however, studio and talent would be precluded from using a soft-contracting instrument, which would have no legal force and would therefore be equivalent to entering into an informal agreement secured by nothing but reputational pressures. As a result, studio and talent would be forced to operate under a higher-than-desired level of formalization, which would either require them to incur avoidable transaction costs or, depending on the total value at stake, preclude the relevant transaction altogether.

Ambiguous enforceability enables parties to operate in a low-*F* contracting zone that relies on a mix of reputational and legal liability to secure parties' agreed-upon commitments at the lowest transaction-cost burden. Upward adjustments in the formality requirement would eliminate or curtail that ambiguous zone by clarifying that low-*F* contracts entail zero legal risk. That would compel parties to elect one of two inferior options: either high-*F* agreements that are certainly enforceable but necessitate greater transaction-cost expenditures to achieve the same expected outcome, or agreements at all lower values of *F* that would now be certainly

167. Professor Geis makes a related argument with respect to parties' use of strategic ambiguity in the drafting of contracts, which he attributes to parties' rational gamble on judicial interpretation of the relevant terms ex post given their inability to reach agreement on the meaning of those terms ex ante. That strategy depends on courts' willingness to fill in gaps in contracts that suffer from indefiniteness rather than deeming such contracts to be invalid. Geis, *supra* note 31, at 1664.

unenforceable and that would therefore convert to a zero-*F* contract relying solely on reputational liability to constrain counterparty opportunism.[168] Given that parties already elect to operate in the low-*F* zone, which is characterized by limited expected liability and could voluntarily substitute high-*F* or zero-*F* instruments, eliminating the low-*F* zone entirely by raising the formality threshold for contract enforceability to encompass only high-*F* contracts would necessarily compel parties to adopt less efficient transactional forms. In extreme cases, transactions would be entirely blocked: the high-*F* contracts would impose excessive transactional burdens, while the remaining option of a zero-*F* contract would leave parties vulnerable to counterparty opportunism.[169]

CONCLUSION

Conventional wisdom and standard business-law practice assume that sophisticated parties prefer clearly enforceable contracts over oral agreements or other informal communications that are uncertainly enforceable. Hollywood appears to be an exception: there, sophisticated parties in high-stakes transactions regularly select intermediate levels of contractual formality that leave the enforceability of the parties' commitments unclear.

Hollywood dealmakers are neither reckless nor imprudent. Legally ambiguous contracts provide the most efficient governance mechanism whenever any alternative instrument, ranging from formal contract to reputational exchange, cannot independently achieve a superior expected outcome net of specification and enforcement costs. Hollywood's finely tailored transactional choices reflect a continuous assessment of the marginal value of increased formalization efforts in an environment in which holdup risk and

168. This actually seems to be the case with respect to transactions involving studios and writers. As noted previously, interviewees reported that agreements with writers were always done on a fully signed-up basis due to the statute of frauds with respect to the transfer of copyright interests under the Copyright Act. *See supra* note 81. The statutory formalization requirement therefore truncates a portion of the transactional universe in studio–writer relationships.

169. This is not intended as a definitive argument in favor of relaxed formalization requirements. As is widely argued, reducing the formalization threshold may allow courts to protect unsophisticated parties who unwittingly rely on insufficiently formalized commitments due to ignorance of the law. But the opposite can also be true: reducing formalization thresholds may enable sophisticated parties to exploit unsophisticated parties who unwittingly take on contractual liability due to ignorance of the law. The precise balancing of these social costs and benefits is inherently indeterminate.

outcome uncertainty are high, formal contracting requires significant specification and enforcement expenditures, reputation effects are salient but unreliable, and vertical integration is no longer economically viable. Close analysis shows that Hollywood's predilection for ambiguously enforceable contracts is neither anomalous nor irrational. Rather, it illustrates an overlooked alternative on the transactional spectrum that extends from formal markets of single-shot contracting parties protected by law, to informal communities of repeat players constrained by reputation.

APPENDIX A

REPORTED CONTRACT-FORMATION DISPUTES INVOLVING TALENT AND STUDIO OR OTHER PRODUCTION ENTITY IN FILM AND TELEVISION PROJECTS (THROUGH JULY 2014)[170]

Legend:
T = talent; *S* = studio (or other production entity or individual producer)
O = oral; *W* = written
U = unknown

Year	Parties (T/S)	Film or Television Project (Actual or Proposed)	Type of Agmt	Party in Alleged Breach	Outcome
1923	A. Jolson/D.W. Griffith	*His Darker Self*	O	T	Enforced
1924	D. Collins/Bennett et al.	*Queen of the Flat Top*	O	S	U
1947	Johnston/20th C. Fox	*The Clock Struck Twelve*	O	S	Enforced
1948	De Toth/Columbia Pictures	n/a (long-term contract)	O	T	Enforced
1949	Mason/Rose	n/a (series of movies)[171]	W	S	Not Enforced
1950	N. Algren/Roberts Prods. Inc.	*The Man with the Golden Arm*	O	T	U
1950	B. Davis/Ramon Romero	*Mrs. Lincoln*	O	T	U
1952	Werker/M. Briskin, Morjay Prods. et al.	*Cry Tough*	O/W	S	U
1952	Unidentified Actress/RKO	Not specified	O	S	U
1955	Skirball/RKO	*Appointment in Samarra*	O	S	Enforced
1955	H. Lloyd/California Pictures Corp.	*Mad Wednesday*	O	S	Remanded
1956	B. Donlevy/Carthy Prods.	*King of Hearts*	O	T	U
1956	S. Hayden/Warner Bros.	*Tension at Table Rock*	O	S	U
1957	C. Heston/Warner Bros.	*Darby's Rangers*	U	S	Settled
1958	K. Briggs/MGM et al.	*High School Confidential*	O	S	U
1958	Holden/Paramount	*The Horse Soldiers*	O	T	Not Enforced

170. I gathered all the information presented here through the Lexis-Nexis and Westlaw databases, the *Daily Variety* digital archives, and other trade-press sources. All disputes involve the filing of lawsuits except two matters (as indicated) and an arbitration through the Writers Guild of America (WGA), which is also indicated. Any dispute for which the outcome is indicated as "enforced" or "not enforced" indicates that a court or jury reached a final determination, in which case the dispute is included in the list of judicial opinions in App. B. Sources for all other items were located through the *Daily Variety* archives and other trade publications, which can be found by the source's year of publication and party's name as listed in App. C. I restricted my search to contract-formation disputes involving talent (that is, writers, directors, and actors) and a studio (including any type of production company or individual producer). I excluded talent–studio disputes involving claimed contracts relating to a particular term of an agreement but that did not raise any doubt as to talent's or studio's commitment to perform, and "idea submission" disputes involving allegations by a writer or producer that a studio or other production entity misappropriated an idea pitched to the studio or production entity. For brevity, I do not always list all parties' names.

171. Joint venture to form a production company.

Year	Parties (T/S)	Film or Television Project (Actual or Proposed)	Type of Agmt	Party in Alleged Breach	Outcome
1959	K. Frings/United Artists et al.	*Two for the Seesaw*	O	S	U
1959	Carter/Milestone	*Operation Mad Ball*	W	S	Not Enforced
1960	R. Parrish/Omat Prods.	*Brotherhood of Evil*	O	S	U
1961	J. Landis/J. Gentile	*Tragedy in a Small Town*	O	S	U[172]
1963	B. Breen/Samuel Goldwyn Co.	*Porgy & Bess*	O	T	Not Enforced
1963	C. Odets/MGM	*The Actor*	O	S	U
1964	A. Quinn/United Artists	*The Magnificent Seven*	O	S	Not Enforced
1964	Boyd/T. Mann, Benton Film Prods.	*The U Battle*	O	S	U
1965	D. Murphy/G. Conway et al.	*This Hero Breed*	O	T	U
1968	F. Dunaway/O. Preminger	*Hurry Sundown*	O	T	Settled
1968	P. Lawford/Embassy Pictures and Paramount	*Something Beginning with M*	O	T	U
1968	E. Taylor, R. Burton/J. Blaustein	*The Taming of the Shrew*	O	T	Dismissed
1969	E. Silverstein/Warner Bros.	*Nobody Loves a Drunken Indian*	O	S	U
1971	M. von Sydow, L. Ullman/MGM	*Man's Fate*	O	S	U
1972	J. Palance/S. Peckinpah et al.	*The Getaway*	O	T	U
1973	N. Montex/20th C. Fox	*Che*	O	S	Dismissed
1976	F. Dolan/Columbia Pictures	*Ann Carver's Profession*	O	S	U
1984	M. Steenburgen/MGM	*Roadshow*	O	S	Settled
1986	F. De Felitta/Polygram	*Sea Trial*	O	S	U
1987	R. Dangerfield/Warner Bros.	*Caddyshack II*	O	S	Settled
1988	B. Lancaster/Columbia Pictures	*The Old Gringo*	O/W	S	U
1989	A. Pacino/E. Kastner, Cinema Corp.	*Carlito's Way*	O	T	U
1989	B. De Palma, O. Litto/Orion Pictures	*Dressed to Kill*	O	S	U
1989	Pinckney/Valente-Kritzer	*Callenetics*	O	S	Not Enforced
1991	E. Lloyd/Orion Pictures	*Mermaids*	O	S	Settled
1991	García Márquez/Roth	*Love in the Time of Cholera*	W	T	Not Enforced
1992	J. Mattson/De Laurentiis Productions	*Milk Money*	O	T	U
1992	H. King/Inspiration Pictures	*Romola*	O	S	Settled[173]

172. WGA arbitration.

173. Settlement is assumed based on the fact that the plaintiff-director who claimed breach by the studio directed the film. *See Romola (1924)—IMDb*, IMDB, http://www.imdb.com/title/tt0015289 (last visited Nov. 18, 2014).

Year	Parties (T/S)	Film or Television Project (Actual or Proposed)	Type of Agmt	Party in Alleged Breach	Outcome
1992	R. Mulcahy/Davis-Panzer Prods.	*Highlander III*	O	T	U
1993	Konigsberg/Rice	*The Mummy*	O	T	Not Enforced
1993	K. Basinger/Main Line	*Boxing Helena*	O	T	Enforced
1993	A. Bening/Samuel Goldwyn Co.	*The Playboys*	O	T	Settled
1993	J. Milius/Price Entertainment	*Texas Rangers*	O	S	U
1993	W. Goldberg/T Rex Prod. Co.	*T. Rex*	O	T	Settled
1995	P. Anderson/Private Movie Co.	*Hello, She Lied*	O	T	Not Enforced
1997	J. Travolta/Mandalay Entertainment	*The Double*	O	T	Settled
1997	J. Foster/Polygram	*The Game*	O	S	U
1997	F. Dunaway/L. Persky	*Master Class*	O	S	Settled
1998	M. Myers/Universal	*Dieter*	O	T	Settled
1998	F.F. Coppola/Warner Bros.	*Pinocchio*	O/W	T	Not Enforced
2000	Rappaport/Buske	*Fabulously Fit and Famous*	O	S	Not Enforced
2001	S. Stone/Unnamed Prod. Co.	*Basic Instinct 2*	O	S	Suit With-drawn
2002	T. Kaye/Flashwork Prods.	*Victim of Deceit*	O	T	Dismissed
2002	Lombardo/Mauriello	*Mother and Child*	W	S	Enforced
2003	Rai/Unidentified Studio	*The Rising*	O	T	U
2003	D. Lane/Intermedia Films	*Me Again*	W	S	Settled
2007	B. Pitt/Universal	*State of Play*	O	S	Settled[174]
2007	J. Goodman/Constantin Films	*Pope Joan*	O	T	Settled
2008	Hansen/Geisler	*Desperadoes*	W	S	Not enforced
2009	Shade/Gorman	*American Heroes*	W	S	Not Enforced
2010	Fiat Risus (R. Williams)/Gold Circle Films	*Cop Out* (formerly titled *A Couple of Dicks*)	W	T	Not Enforced
2012	Fraser/Moyer et al.	Not specified	W	S	Pending
2013	C. Scorsese/Jumpview Entertainment	*Campus Life*	O	S	Pending
2014	Howard/Arnett	*Overcoming Life's Trauma*	O	T	Enforced

174. No lawsuit was filed. The parties resolved their dispute once an acceptable replacement for Brad Pitt was found. *See* Baz Bamigboye, *Russell Crowe in Secret Deal to Save Brad Pitt from Lawsuit*, MAIL ONLINE, Apr. 23, 2009, *available at* http://www.dailymail.co.uk/tvshowbiz/article-1172991/BAZ-BAMIGBOYE-Russell-Crow-secret-deal-save-Brad-Pitt-lawsuit.html.

APPENDIX B

PUBLISHED OR OTHER REPORTED JUDICIAL DECISIONS INVOLVING CONTRACT-FORMATION DISPUTES IN FILM AND TELEVISION PROJECTS (THROUGH JULY 2014)[175]

Legend:
O = oral agreement
W = written agreement (deal memo, letter agreement, unsigned long-form agreement)
Def. = definite (certainty, agreement on all material terms)
Indef. = indefinite (uncertainty, lack of agreement on essential terms, vagueness)

Case (Year)	**Type of Agmt**	**Parties**	**Enf'd?**	**Grounds**	**Governing Law**[176]
D.W. Griffith Co. v. Jolson (1923) (*Jolson, Out of Film, Sued for $571,696*, N.Y. TIMES, Apr. 25, 1924, at 20)	O	Studio/actor	Y	Def.	New York
Johnston v. Twentieth Century Fox Film Corp., 187 P.2d 474 (Cal. Ct. App. 1947)	O	Writer/studio	Y	Def.	California
Columbia Pictures Corp. v. De Toth, 197 P.2d 580 (Cal. Ct. App. 1948)	O	Studio/director	Y	Def.	California
Mason v. Rose, 176 F.2d 486 (2d Cir. 1949)	W	Actor/studio[177]	N	Indef.	United Kingdom; California
Skirball v. RKO Radio Pictures, 286 P.2d 954 (Cal. Ct. App. 1955)	O	Producer/ studio	Y	Def.	California
Paramount Pictures Corp. v. Holden, 166 F. Supp. 684 (C.D. Cal. 1958)	O	Studio/actor	N[178]	No injunctive relief for oral contracts.	California

175. I identified the cases presented here through the Westlaw and Lexis-Nexis databases, with the following geographic and date limitations: all federal, New York, and California courts from start of database coverage through July 31, 2014; and all state courts (except New York and California) from January 1, 1980, through July 31, 2014. As noted above, some opinions appear in the electronic database but are unpublished. Various search terms were used for purposes of identifying fully litigated cases that primarily involved a film or television production and addressed the enforceability of an oral or written agreement—excluding cases that addressed only the enforceability of a particular term in an otherwise-enforceable oral or written agreement and cases that involved idea submission scenarios. As indicated above, two cases were identified solely through trade-press sources. See App. C. for full citation information.

176. Governing law refers to state law as selected in a claimed written contract; state law as designated by the court in the case of a claimed oral contract or claimed written contract that did not specify governing law; and federal law in the case of a claimed violation of § 204(a) of the Copyright Act (its statute-of-frauds provision).

177. Joint venture to form production company.

Case (Year)	Type of Agmt	Parties	Enf'd?	Grounds	Governing Law[176]
Carter v. Milestone, 338 P.2d 569 (Cal. Ct. App. 1959)	W	Writer/ producer	N	Indef.	California
Breen v. Samuel Goldwyn Co. (1963) (Los Angeles Superior Court) (Daily Variety 1963)	O	Director/ producer	N	Not stated	California
Anthony Quinn v. United Artists, et al. (Los Angeles Superior Court, 1964) (Daily Variety 1964)	O	Actor/studio	N	Not stated	California
Metro-Goldwyn-Mayer, Inc. v. Scheider, 352 N.Y.S.2d 205 (App. Div. 1974)	O	Studio/actor	Y	Statute of frauds defense unavailable	New York
Sawyer v. Sickinger, 366 N.Y.S.2d 435 (App. Div. 1975)	O	Producer/ producer	N	Statute of frauds	New York
Jillcy Film Enters., Inc. v. Home Box Office, Inc., 593 F. Supp. 515 (S.D.N.Y. 1984)	W/O	Producer/ network	N	Statute of frauds; indef.	New York
Winston v. Mediafare Entm't Corp., 777 F.2d 78 (2d Cir. 1985)	W/O	Agent/ producer	N	No intent to be bound	New York
Valente-Kritzer Video v. Pinckney, 881 F.2d 772 (9th Cir. 1989)	O	Producer/ writer	N	Copyright statute of frauds	Federal; California
Effects Ass'ns, Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990)	O	Video-effects firm/producer	Y	Implied nonexclusive license	Federal
Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. Cal. 1991)	W	Producer/ writer	N	Indef.; agreement to agree	California
Geoquest Prods., Ltd. v. Embassy Home Entm't, 593 N.E.2d 727 (Ill. App. 1992)	O	Producer/ videocassette distributor	N	Def.	Illinois
Konigsberg Int'l, Inc. v. Rice, 16 F.3d 355 (9th Cir. 1993)	O	Producer/ writer	N	Copyright statute of frauds	Federal
Main Line Pictures, Inc. v. Basinger, 1994 WL 814244 (Cal. App. 1994)	W/O	Studio/actor	Y	Def.	California
Trimark Pictures, Inc. v. August Entm't, Inc., No. B089266 (Cal. App. Dec. 12, 1996)	W	Producer/ distributor	N	Statute of frauds	Federal

178. The court declined to rule on the existence of a binding contract (the determination of which was remanded to the lower court), but also declined to issue an injunction against the actor's working for another employer during the contract term due to the absence of a written agreement. I therefore treat this outcome as the functional equivalent of the court's having declined to enforce the claimed contract.

Case (Year)	Type of Agmt	Parties	Enf'd?	Grounds	Governing Law[176]
The Private Movie Co., Inc. v. Pamela Anderson, No. BC 136805 (Cal. Super. Ct. Oct. 10, 1995)	O	Studio/actor	N	Indef.	California
Coppola et al. v. Warner Bros., Inc., No. BC 135198 (Cal. Super. Ct. July 12, 1998)	W/O	Director/ studio	N	Indef., statute of frauds	Federal; California
Radio TV Espanola S.A. v. New World Entm't, Ltd., 183 F.3d 922 (9th Cir. 1999)	W	Network/ production company	N	Copyright statute of frauds	Federal
Rappaport v. Buske, 2000 WL 1224828 (S.D.N.Y. Aug. 29, 2000)	O	News reporter/ producer	N	Indef.; lack of intent to be bound.	New York
Lombardo v. Mauriello, 2002 WL 31492393 (Mass. Super. Ct. 2002)	W	Writer/ producer	Y	Def.	Massachu-setts
Zenga v. Brillstein-Grey Entm't, 2003 WL 22482067 (Cal. App. 2003)	O	Producer/ studio	N	Indef.	California
Baer v. Chase, 392 F.3d 609 (3d Cir. 2004)	O	Producer/ consultant	N	Indef.	New Jersey
Portman v. Zoetrope, Corp., 2005 WL 1077504 (Cal. App. 2005)	W	Producer/ producer	N	Indef.	California
In re My Left Hook, LLC, 129 F. App'x 352 (9th Cir. 2005)	W	Production company/ financiers	N	Indef.	California
Lyrick Studios, Inc. v. Big Idea Prods., Inc., 420 F.3d 388 (5th Cir. 2005)	W	Studio-distributor/ production company	N	Copyright statute of frauds	Federal
Network Enters. v. APBA Offshore Prods., Inc., 427 F. Supp. 2d 463 (S.D.N.Y. 2005)	W/O	Cable network/ producer (broadcast of sports event)	Y[179]	Intent to be bound	New York
Hansen v. Geisler, 2008 WL 5375241 (S. Ct. N.Y. Dec. 4, 2008)	W	Writer/ producer	N	No consideration	New York
The Weinstein Co. v. Smokewood Entm't Grp., LLC, 664 F. Supp. 2d 332 (S.D.N.Y 2009)	O	Studio/ producer	N	Copyright statute of frauds; lack of intention to be bound	Federal; New York
Shade v. Gorman, 2009 WL 196400 (N.D. Cal. 2009)	W	Videographer/ studio	N	Disclaimer of intent to be bound	California
Fiat Risus, Inc. v. Frank and Beans Productions LLC, No. BC400180 (Cal. Super. Ct. Feb. 5, 2010)	W	Actor/ production company	N	Indef.	California
Trademark Props., Inc. v. A&E Television Networks, 422 F. App'x 199 (4th Cir. 2011)	O	Creator/televisi on network	Y	Def.	New York

179. Agreement to negotiate in good faith.

Case (Year)	**Type of Agmt**	**Parties**	**Enf'd?**	**Grounds**	**Governing Law**[176]
Swan Media Grp., Inc. v. Staub, 841 F. Supp. 2d 804 (S.D.N.Y. 2012)	W	Media group/actor	N	Indef.	New York
Queen v. Schultz, 888 F. Supp. 2d 145 (D.D.C. 2012), *rev'd on other grounds*, 747 F.3d 879 (D.C. Cir. 2014)	O	Consultant/TV show host	N	Indef.	D.C.
Arnett v. Howard, No. 2:13-cv-591, 2014 WL 1165851 (D. Utah Mar. 21, 2014)	O	Director/ producer; performer	Y	Def.	Utah

APPENDIX C

TRADE-PRESS SOURCES FOR UNSIGNED-DEAL DISPUTES[180]

Legend:
DV = *Daily Variety*
HR = *Hollywood Reporter*

Date	Author	Title	Publication
1924 (Nov. 5)	n/a	Dana Collins in Court Over Lost Picture Role.	DV
1924 (Apr. 25)	n/a	Jolson, Out of Film, Sued for $571,696.	N.Y. Times
1936 (Mar. 5)	n/a	Terms of Cagney Deal Taxes Warner Memory.	DV
1946 (Apr. 11)	n/a	20th Loses $20,000 Suit on Oral "Flat Tops" Deal.	DV
1949 (Oct.)	n/a	Hollywood Inside.	DV
1950 (Feb. 13)	n/a	Golden Arms' Rights Subject to Suit.	DV
1950 (Jan. 17)	n/a	Ramon Romero Sues Bette Davis for 142G.	DV
1952 (July 2)	n/a	RKO Letterheads Cited in Stars' Suit.	DV
1952 (July 17)	n/a	Hughes Ponders Signing Settlement or Taking Stand in Simmons Trial.	DV
1952 (Oct. 22)	n/a	Werker Sues Mori Briskin; Charges Oral Pad Breach.	DV
1956 (Aug. 2)	n/a	Carthy Sues Donlevy.	DV
1956 (Aug. 23)	n/a	Hayden Suit Charges RKO Breached Oral Agreement; Asks 35G.	DV
1958 (June 26)	n/a	17-Year-Old Girl Sues Over Metro 'High School Confidential'.	DV
1959 (Sept. 8)	n/a	Ketti Frings' 75G Suit Charging Breach vs. UA, SA, Mirisch on 'Seesaw'.	DV
1960 (May 12)	n/a	Red Button Sues for 40G; 3d Claim Damages Against Ill-Fated 'Evil'.	DV
1961 (Mar. 17)	n/a	WGA To Arbitrate 'Small' Plot Dispute.	DV
1963 (Mar. 12)	n/a	Attorney Jams Himself Trying It On Goldwyn in Bob Breen's Action.	DV
1963 (June 5)	n/a	Odets Sez Deal Favoring Actor Ruined Writer's Profit.	DV
1963 (Mar. 27)	n/a	Breen Fails in Suit; Sam Goldwyn Pleased	DV
1964 (Apr. 16)	n/a	Boyd Sues Tony Mann.	DV
1964 (Dec. 2)	n/a	Not Legally Binding: Tony Quinn Loses Action on Brynner 'Promise'.	DV
1965 (Aug. 13)	n/a	Legal Heroics: Actors, Producer Sue Film Writer For $1,254,804.	DV
1968 (Jan. 17)	n/a	N.Y. Court Stalls Prem Injunction Against Dunaway.	DV
1968 (Apr. 23)	n/a	Lawford Sues Par, Embassy for 150G.	DV
1968 (Nov. 27)	n/a	Dismiss Blaustein Suit.	DV
1970 (Sept. 18)	n/a	Silverstein Sues Warner for 351G.	DV
1971 (Oct. 28)	n/a	Max von Sydow and Liz Ullman Sue Over 'Man's Fate'.	DV
1972 (June 8)	n/a	Jack Palance Sues Sam Peckinpah.	DV
1972 (Oct. 30)	n/a	20th Wins Dismissal of Nene Montez Suit.	DV
1975 (June 5)	Tusher	Troubled Tandem Hails Warning to Balky Stars.	HR
1976 (June 30)	n/a	Fired Much Too Soon, Dolan Sues Columbia.	DV
1984 (Sept. 5)	n/a	Steenburgen Sues MGM for 10 Mil.	DV

180. All *Daily Variety* articles were accessed through the *Variety* digital archive.

Date	Author	Title	Publication
1986 (Mar. 13)	n/a	De Fellita Sues Polygram Over 'Trial' Rights.	DV
1988 (June 8)	n/a	Lancaster Slaps Col With Suit For 'Old Gringo' Firing.	DV
1988 (Sept. 27)	Beck	Dangerfield is picky about scripts for his movies.	St. Petersburg Times
1989 (May 12)	n/a	Kastern Sues Pacino For Contract Breach.	DV
1989 (Nov. 1)	Lieberman	DePalma and Litto Testify as "Dressed" Trial Opens.	DV
1991 (June 6)	Rapportoni	Former Uni 'Deal-Maker' Testifies in 'Pirates' Trial.	DV
1992 (Oct. 8)	n/a	King Can't Cut Romola.	DV
1992 (Nov. 24)	n/a	De Laurentiis Sues Scripter, Agent.	DV
1992 (Dec. 5)	n/a	Mulcahy Sued Over 'Highlander III'.	DV
1993 (Apr. 5)	n/a	In Basinger's Wake, Bening Settles Suit.	DV
1993 (Sept. 18)	Pristin	Whoopi Goldberg Ends Breach-of-Contract Suit.	L.A. Times
1997 (July 14)	n/a	Double trouble irks legal eagles.	DV
1997 (Oct. 31)	Archerd	Just for Variety.	DV
2002 (Apr. 2)	Bing	Kaye's Cautionary Tale.	DV
2003 (Nov. 24)	Bharataniyer	Thesp's success leads to salary strife.	DV
2004 (May 12)	n/a	Diane Lane settles suit with film house.	UPI
2006 (Mar. 31)	n/a	Basic Instinct 2 (2006): Did You Know?	IMDb
2007 (Aug. 4)	Meza	Goodman Sued After Refusing 'Joan' Job.	DV
2007 (Nov. 23)	n/a	Brad Pitt Pulls Out of Universal film, risking lawsuit.	AFP
2008 (Oct. 20)	Child	Robin Williams unamused by pay dispute.	The Guardian
2010 (Feb. 5)	n/a	Robin Williams Loses $6 Million Lawsuit.	Reuters
2012 (May 11)	Gardner	Hollywood Docket: Brendan Fraser sues.	HR
2013 (July 8)	Gardner	Martin Scorsese Plays Odd Role in Daughter's Legal Dispute.	HR

APPENDIX D

INTERVIEWS

All interviews were conducted by telephone or in-person (as specified below) on an anonymous basis, in Los Angeles, and on the dates indicated below. All interviewees are active participants in the film and television industries located in Southern California, either in a legal, business, or mixed legal and business capacity. The reference term is that used to refer to each interview in the text of the article.

Date(s)	Interviewee	Reference Term
Studio Counsel		
February 8, 2011	Former general counsel at major studio	Studio Counsel Interview I
Multiple dates in February–December 2011, March 2013	In-house counsel at major studio	Studio Counsel Interview II
August 29, 2011	In-house counsel at major studio	Studio Counsel Interview III
Multiple dates in February–December, 2011; March 2013	General counsel at "mini–major" independent studio	Mini–Major Counsel Interview
Studio Executives		
April 16, 2013	Former chief executive of major studio	Studio Executive Interview
Entertainment Attorneys		
May 31, 2011; email communication, Sept. 9, 2012	Senior attorney with entertainment practice	Entertainment Attorney Interview I
June 2, 2011	Law-firm partner with entertainment practice	Entertainment Attorney Interview II
April 9, 2013	Law-firm partner with entertainment practice	Entertainment Attorney Interview III