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The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000

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This history of screen credit and the Writers Guild of America focuses on the union's administration of private intellectual property rights to facilitate the labor market for writers and the market for ideas, scripts, and treatments for film and TV. Screen credit is one of the few forms of intellectual property in the modern economy that is designed by workers for workers, and without the involvement of the corporations that control most intellectual property policy. Based on research in the archives of the Writers Guild not available to the public, this article argues that the Guild survived conditions that might lead to de-unionization because of the value it provides writers and employers in managing markets for labor and ideas. In particular, the Writers Guild administers two private intellectual

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property rights systems—the screen credit system and the script registry—that facilitate transactions between writers and producers. The experience of the Guild suggests that under the right circumstances unions can support innovation by developing creative private intellectual property rights systems to address structural problems in labor markets for talented short-term workers and the start-up enterprises that hire them.

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INTRODUCTION

When you watch a movie or TV show and the title card says it was “written by” or “created by” so-and-so, you are witnessing the product of seventy-five years of work by a labor union: the Writers Guild of America (WGA or “Guild”). The WGA—the labor union representing TV and film writers—plays no role in determining who gets hired or what gets written, but it does determine who is credited for writing. Credit determinations, in turn, affect what writers get paid, whether they will be hired in the future,

and future uses and interpretations of their work. Credit establishes a career. Through residuals tied to credit, the Guild plays a substantial role in the allocation of the stream of revenues associated with copyright ownership, even though writers, as a condition of hire, sign away the copyrights to their work, and their legal rights as authors.¹ Credit also influences the judgments of film critics, agents, producers, and knowledgeable consumers. It affects how studios evaluate ideas and how they attract investment capital to finance production. Through controlling the allocation of credit, the WGA manages the most vexing labor and intellectual property issues in the knowledge economy.² Much has been written about the transformation of labor markets, especially in knowledge work, and the regulatory gap left by the decline of private sector unionism.³ And much has been written about private intellectual property rights and other forms of “soft” law that shape behavior in the absence of effective government regulation. This article shows how the Writers Guild has turned attribution (credit) into a valuable private intellectual property right, and suggests a role for collective representation associations (whether labor unions or other groups) that is constructive for both employers and employees in the knowledge economy.

The Guild’s role in determining authorship of movies and TV is constrained by the fact that the writers do not own the copyright to their work and thus have little control over what becomes of it. The owner of any copyrighted work that is created as a work for hire has all the rights of copyright owners, including the right to decide whether to produce it into a film for theatrical release, directly for DVD, for television, or not to produce it at all. Authors have long been frustrated when studios allow scripts to languish without producing them, chagrined when their stories are

1. 17 U.S.C. § 201 (2006).

2. Determining credit has long been reported as one of the most important things that the WGA does. See, e.g., Charles Schreger, *Screen Credits: Who Gets What—and How*, L.A. TIMES, Apr. 16, 1979 at F1 (quoting the WGA Executive Director on the importance of credit determinations). While many cinema scholars have written on the authorship of motion pictures from the standpoint of interpreting them, only recently has there developed a body of literature in media studies focusing on the labor of film and TV production. See, e.g., JOHN THORNTON CALDWELL, *PRODUCTION CULTURE: INDUSTRIAL REFLEXIVITY AND CRITICAL PRACTICE IN FILM AND TELEVISION* (2008); *PRODUCTION STUDIES: CULTURAL STUDIES OF MEDIA INDUSTRIES* (Vicki Mayer, Miranda J. Banks & John Thornton Caldwell, eds., 2009). Legal scholars have also paid relatively little attention to the labor issues underlying authorship of motion pictures and television. The best work on the topic is F. Jay Dougherty’s *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225 (2001), which, as the title suggests, focuses mainly on the copyright issues surrounding motion picture production and not on the labor issues.

3. See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI.-KENT L. REV. 839 (2005); KATHERINE VAN WEZEL STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004).

changed, and irate when they receive no credit for their work. For example, the tragic and grim denouement of *Chinatown* (1974) was not in the script Robert Towne wrote, and it was not the ending he wanted. Yet he won an Oscar and made his name on the film.⁴ Blacklisted writer Michael Wilson received no credit for *Friendly Persuasion* (1957), which was nominated for Academy Awards and won the Palme d'Or at Cannes; the film was credited to no writer because the studio refused on account of Wilson's political views.⁵ In short, because of copyright's work for hire doctrine, legal authorship of a motion picture is not factual authorship and is often a legal fiction in every sense of the term. As one screenwriter put it: "We regularly sign our names to work we have not written . . . Behavior that would be a disgrace for a novelist and grounds for dismissal of an academic is business as usual for us. Our defense is that we do it openly, and everyone knows it's being done. It's part of the lore of the movie business."⁶

Between 1940 and 1990, a profound transformation in Hollywood enterprise organization, associated with the decline of the studio system, created high-velocity markets⁷ for both creative labor and new ideas.⁸ It altered not only the employment status of writers but also the regime of intellectual property rights for new film and television formats, as the idea generation process expanded beyond the context of relatively stable employment relationships. In today's post-industrial Hollywood labor market of freelancers and single project enterprises, the effort of talent is rewarded through bonuses, reputation enhancements, residual payments, and separated rights, all of which are tied to screen credit.⁹ The Writers

4. DAVID THOMSON, *THE WHOLE EQUATION: A HISTORY OF HOLLYWOOD* 9 (2004).

5. See *infra* note 107.

6. Files of the Screen Credits Review Comm., WGAW (2009) (on file with WGA).

7. So far as I know, Alan Hyde coined the term "high velocity labor market"—an apt description of a labor market in which people switch jobs frequently, often from one start-up enterprise to another. See ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003).

8. On the Hollywood labor market, see Robert R. Faulkner & Andy B. Anderson, *Short-Term Projects and Emergent Careers: Evidence from Hollywood*, 92 AM. J. SOC. 879 (1987). Even in the studio era of the 1930s and 1940s employment for the vast majority of members of the Writers Guild was unstable. See Anthony A.P. Dawson, *Hollywood's Labor Troubles*, 1 INDUS. & LAB. REL. REV. 638, 641 (1948). For an analysis of the transformation of production in Hollywood, see Michael Storper & Susan Christopherson, *Flexible Specialization and Regional Industrial Agglomerations: The Case of the U.S. Motion Picture Industry*, 77 ANNALS OF ASS'N OF AM. GEOGRAPHERS 104 (1987), and for its effects on the labor market, see Susan Christopherson & Michael Storper, *The Effects of Flexible Specialization on Industrial Politics and the Labor Market: The Motion Picture Industry*, 42 INDUS. & LAB. REL. REV. 331 (1989).

9. "Above-the-line" refers generally to directors, writers, producers, actors, and certain other "creative" workers (such as cinematographers, directors of photography, and editors). "Below-the-line" workers generally include those performing "technical" work, including gaffers, grips, electrical and lighting technicians, stunt personnel, and the like. Many above-the-line workers are paid on a salaried basis or by the job (e.g., the actor gets \$X million to appear in a film), plus some percentage of profits.

Guild is a crucial labor market and an idea market intermediary;¹⁰ it negotiates and enforces minimum compensation and other protections for writers on an industry-wide basis, serves as a clearinghouse for information about employment in the industry, franchises agents, facilitates deals, and offers networking and training in the art of writing. It is a collective rights organization that reduces transaction, monitoring and enforcement costs in the idea development process and in the sharing of profits from distribution of content.¹¹ It also created and administers the script registry, another system of private intellectual property rights akin to copyright registration that facilitates the sharing of ideas, stories, treatments and scripts between writers and prospective buyers or employers.

Most important, the Guild determines screen credit. Credit enables both the fair attribution of work—which is necessary to assess talent for future projects—and profit-sharing for successful work in a market in which it is extremely difficult to predict which works will find success. Screen credit supports a system of revenue-sharing (residuals) and of unbundling the rights encompassed in a copyright (separated rights) that compensates writers during periods of slack employment, thus keeping their human capital in the industry. The Guild has thus used the power it has under labor law as the exclusive representative of writers in collective negotiations with production companies to modify the effects of the work for hire doctrine in copyright law and to create a system of moral rights.¹²

In contrast, below-the-line workers are generally paid by the hour or by the day and generally do not participate in profit sharing. The distinction refers to traditional accounting practices in motion picture finance and does not actually reflect creative as opposed to non-creative workers.

10. For reasons of historical circumstance too complex to explain and not relevant here, the WGA is actually two separate unions: WGA East and WGA West (“WGAW”). Except where noted, I refer to them collectively as the WGA.

11. See Robert Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

12. The Guild is not the only labor market intermediary in Hollywood, of course; talent agents find work for their clients and negotiate individual terms of employment. Since at least the late 1940s, talent agents have played a crucial role in Hollywood. See DOUGLAS GOMERY, *THE HOLLYWOOD STUDIO SYSTEM: A HISTORY* 204-11, 304-07 (2005); TOM KEMPER, *HIDDEN TALENT: THE EMERGENCE OF HOLLYWOOD AGENTS* (2010) (on talent agencies in the 1930s and 1940s). The WGA franchises talent agents to ensure that they negotiate contracts that comply with the collective agreement but it does not otherwise regulate talent agencies; talent agents must be licensed and their practices are regulated in New York and California by the state labor commissioner. DONALD E. BIEDERMAN, ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 7-10, 28-61 (5th ed. 2007) (discussing the role of talent agents and the law regulating them). The Guild plays a role in identifying talent agents for writers (by maintaining a list of agents) and some production companies prefer to deal with agents recognized by the WGA. See *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1079 (C.D. Cal. 2005) (noting evidence offered by Twentieth Century Fox in litigation that Fox did not accept submissions of material made by agents not registered with WGA). On the role of talent agencies in the labor market for screenwriters, see William T. Bielby & Denise D. Bielby, *Organizational Mediation of Project-Based Labor Markets: Talent Agencies and the Careers of Screenwriters*, 64 AM. SOC. REV. 64 (1999).

Although screen credit, residuals, and separated rights operate according to elaborate procedural and substantive rules, they represent a system of privately negotiated and privately enforced law in which courts play virtually no role. This is not a system of “order without law,”¹³ this is a system of law without the state. It is a system of law that workers develop and enforce for themselves through their union, and it is only the existence of the union that enables the writers and producers to overcome the considerable collective action problems that would otherwise prevent the negotiation of mutually beneficial arrangements.

Despite the financial and cultural significance and legal novelty of screen credit and the script registry, and the interest of intellectual property scholars in private intellectual property rights regimes and in whether copyright law should include attribution rights,¹⁴ neither the WGA nor the screen credit regime has received much attention from historians or legal scholars.¹⁵ This article is based on research in the archives of the WGA from the 1940s to the 2000s, a rich trove of previously unavailable documents revealing how people claimed credit as writers, how disputes were resolved, and how screen credit shaped the Hollywood labor market. The article will also show the constructive role that a labor union can play in managing some of the labor market issues that have proven most vexing for both employers and employees in the contemporary knowledge economy of freelancers, short-term projects, and single-project enterprises.

Part I of this article shows that accurate screen credit determinations was one of the core goals of writers who organized the Guild in the 1930s. The Guild’s management of the screen credit system enabled the union to survive the transformation of Hollywood associated with the decline of the studio system and the rise of television and the blockbuster model of film production. Part I also shows how the WGA used its control over credit

13. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

14. *E.g.*, Rebecca Tushnet, *Naming Rights: Attribution and the Law*, 2007 UTAH L. REV. 789 (2007); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. L. REV. 985 (2002); Merges, *supra* note 11.

15. A handful of student law review notes and articles by practitioners address screen credit. *See* Rick Mortensen, *D.I.Y. After Dastar: Protecting Creators’ Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335, 356-62 (2006); Dana N. Glasser, Note, *Stranding Dorothy in Oz and Keeping the Wizard Behind the Curtain?: Writer’s Guild Determination of Screenwriting Credits Through Arbitration*, 3 PEPP. DISP. RESOL. L.J. 271 (2002-2003); Shawn K. Judge, Note & Comment, *Giving Credit Where Credit is Due? The Unusual Use of Arbitration in Determining Screenwriting Credits*, 13 OHIO ST. J. ON DISP. RESOL. 221 (1997); Karen L. Gulick, Note, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53 (1994-1995); Bayard F. Berman & Sol Rosenthal, *Screen Credit and the Law*, 9 UCLA L. REV. 156 (1962). In addition, a fine student note on copying television format ideas briefly proposes the script registry as a solution to the dearth of effective regulation of plagiarism of TV formats. *See* Jay Rubin, Note, *Television Formats: Caught in the Abyss of the Idea/Expression Dichotomy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 661, 704 (2006).

determinations to negotiate various forms of profit-sharing for writers, including separated rights and residuals, and to protect the rights of television writers as TV production became increasingly entrepreneurial and freelance. Part II of the article explains how the credit system shapes the labor market for writers. Part III examines the impact of the Guild control of credits—particularly their reliability and the democratic way in which the rules are derived—on the markets for ideas and for the products that the ideas generate. The conclusion reflects on what the WGA's experience can teach about the role of collective action and private intellectual property regimes in the contemporary knowledge economy.

I.

THE ORIGINS AND EVOLUTION OF THE WRITERS GUILD AND SCREEN CREDIT

Film and television production is a densely unionized industry. While there are substantial non-union sectors in non-drama cable and reality television, a very substantial percentage of all motion pictures and television shows (both episodic and made-for-TV movies) are produced by workers where everyone from the director, actors, and writers to the gaffers, grips, and drivers belongs to a union.¹⁶ The labor market structure and working practices of film and television differ in significant ways, and have changed over time. In film—whether theatrical motion pictures or made-for-TV movies—many writers work as independent contractors or short-term employees. In television drama and comedy series, writers are likely to work for a sustained period and in a single location as staff writers. The WGA represents all of them.

Legal rules and legal processes are deeply involved in defining authorship of film and TV. The predominance of legal rules and legal processes in determining who will be deemed the author of a screenplay or a teleplay has existed almost since the Guild gained control of the determination of screen credit for writers in the 1940s. *Law* defined *authors* once writers rather than the studios controlled the designation of screenplay authorship. The collectively bargained Minimum Basic Agreement (MBA) between the WGA and the Alliance of Motion Picture and Television Producers states that “credits for screen authorship shall be given only pursuant to the terms of and in the manner prescribed in” the

16. Relatively little labor law scholarship has been written about Hollywood. One notable exception is Robert A. Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians*, 37 Sw. L.J. 697 (1983-1984).

Theatrical Schedule A, a thirty-page addendum to the MBA.¹⁷ Theatrical Schedule A specifies the criteria for awarding screen credit for writers.¹⁸ Its provisions are supplemented by the Screen Credits Manual, which is drafted by the WGA and adopted by vote of WGA members.¹⁹ Under Schedule A and the Screen Credits Manual, credit determinations are both procedurally and substantively complex. They consume a significant amount of WGA professional staff time. In addition, the union has elaborate processes for studying and evaluating its current substantive and procedural rules governing credit; standing committees of members study the rules, member preferences are polled, membership meetings debate proposed changes, and all members periodically vote.

Although individual hiring contracts supplement the MBA on scores of issues and tend to be quite lengthy and detailed, on screen credit they are very short: credit will be determined according to the MBA.²⁰ Credit and things tied to it, especially separated rights and residuals, are the one area covered in the MBA for which writers cannot negotiate individual deals.²¹ Even hiring contracts for writers on projects not covered by the MBA often stipulate “credit per WGA.”²² Writers worked hard to achieve this state of dominance in determining writing credits.

A. *Why and How Writers Unionized: The Role of Credit*

It took Hollywood writers two decades of struggle to form an effective union and obtain a collective bargaining agreement.²³ One of the most hotly contested issues was control over screen credit. In the 1920s and 1930s, many film writers were employed on a weekly salary by the

17. WGA, ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS THEATRICAL AND TELEVISION BASIC AGREEMENT, 29 (2008) [hereinafter 2008 MBA], available at http://www.wga.org/uploadedFiles/writers_resources/contracts/MBA08.pdf.

18. Theatrical Schedule A to the Basic Agreement has provided without substantial change for several decades that the “decision of the Guild Arbitration Committee, and any Policy Review Board established by the Guild in connection therewith, with respect to writing credits, insofar as it is rendered within the limitations of this Schedule A, shall be final, and the Company will accept and follow the designation of screen credits contained in such decision and all writers shall be bound thereby.” See Schedule A, 2008 MBA, *supra* note 17, at 270.

19. WGA, SCREEN CREDITS MANUAL (2010) [hereinafter SCREEN CREDITS MANUAL], available at http://www.wga.org/uploadedFiles/writers_resources/credits/screenscredits_manual10.pdf.

20. See 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT ch. 5 (2011) [hereinafter NIMMER ON COPYRIGHT] (form contracts for hiring for writing services or sale of screenplay).

21. *Id.*

22. I owe this insight to Jonathan Handel, a Hollywood lawyer and expert on credit and residuals.

23. On the history of writers in Hollywood, see generally LIZZIE FRANCKE, SCRIPT GIRLS: WOMEN SCREENWRITERS IN HOLLYWOOD (1994); TODD GITLIN, INSIDE PRIME TIME (1983); IAN HAMILTON, WRITERS IN HOLLYWOOD, 1915-1951 (1991); MARC NORMAN, WHAT HAPPENS NEXT: A HISTORY OF AMERICAN SCREENWRITING 141-42 (2007); NANCY LYNN SCHWARTZ, THE HOLLYWOOD WRITERS' WARS (1982).

studios.²⁴ The studios were “vertically integrated motion picture factories—large, hierarchically organized firms engaged in the development, financing, production, distribution, and exhibition of feature films.”²⁵ While some writers had the market power to force the studios to acquiesce to their desire to work at home, many worked from 9:00 a.m. to 6:00 p.m. or longer, and on weekends. Many writers worked in offices on the back lots just like any other employee, churning out stories, screenplays and treatments, adapting stories and novels, and polishing plots, characters, settings, and dialogue.²⁶ Producers and studios would buy the rights to large numbers of books, plays, songs, and vaudeville sketches with familiar or catchy titles and then pay writers a flat rate of about \$200 per week to spin a story around the title or the idea.²⁷ As one described it in 1939, screenwriters “punched a clock, sat in cubbyholes, writing to order like tailors cutting a suit.”²⁸

From the beginning, writers at all levels of pay and prestige were frustrated by four main issues: compensation, notice of termination, creative control, and credit. As to the first, writers objected to sudden and drastic cuts in pay, and many writers wanted to be paid a percentage of returns on the film in addition to their weekly rate, but only some writers were able to negotiate such arrangements. Each individual negotiation involved difficult questions, such as whether the studios should calculate the writer’s share as

24. See Bielby & Bielby, *supra* note 12, at 65 (“In the 1930s and 1940s, most screenwriters . . . were salaried employees of the major studios.”) (citing multiple sources); RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* ch. 5 (2000) (economic analysis of the contracting system between studios and talent and of the reasons for the decline of the studio system); Christopherson & Storper, *supra* note 8.

25. Bielby & Bielby, *supra* note 12, at 65.

26. The trade press in the early 1930s reported the efforts of the major studios to systematize the process of script writing, see *Christie Short Subject Department Disbanded*, HOLLYWOOD REP., Oct. 10, 1930, at 1 (after Christie opted to purchase all story material off the open market, it disbanded its short story department and fired its entire writing staff), and quoted writers, producers, and reviewers on the difficulties of producing high-quality scripts on the relatively short production and pre-production schedule that was then typical for movies. See, e.g., *Fox to Try New Story System*, HOLLYWOOD REP., Sept. 9, 1930, at 4 (Fox will attempt to read every worthwhile play, novel, short story and article to find suitable material and will require writers to complete their [scripts] and get them approved three months before the production start date); *Talbot and Flynn Off to Write “Yankee,”* HOLLYWOOD REP., Sept. 18, 1930, at 2 (screenwriters working on remake of “A Connecticut Yankee,” claiming the atmosphere at Fox is detrimental to new ideas, are flying to Catalina Island to work); *MGM Writers Are Now in Seclusion*, HOLLYWOOD REP., Oct. 16, 1930, at 2 (believing writers are more creative off the main studio lot, MGM granted select writers the privilege of using bungalows adjacent to the main Culver City studio lot).

27. See *Par. Using Book Title for Farce*, HOLLYWOOD REP., Sept. 22, 1930, at 2; *Old Copyrights Sought for Titles*, HOLLYWOOD REP., Sept. 23, 1930, at 2; *More Than \$17,630,000 Tied Up in Story Material By Producers: Some Will Never Reach Screen*, HOLLYWOOD REP., Oct. 1, 1930, at 1.

28. GERALD HORNE, *CLASS STRUGGLE IN HOLLYWOOD, 1930-1950: MOGULS, MOBSTERS, STARS, REDS & TRADE UNIONISTS* 45 (Univ. of Texas Press, 2001) (quoting Joseph North, *The New Hollywood*, 32 *THE NEW MASSES* 14, July 11, 1939).

a percentage of gross returns or net, and how royalties should be calculated and paid.²⁹ Notice of termination was a major issue for writers, technicians, extras and others as the Great Depression hit studio profits and studios summarily fired thousands.³⁰ Even in good times, writers wanted advance notice of termination in order to have time to find a new job.

As to creative control, many accepted that the pace and budget of production and the collaborative nature of filmmaking meant that writers could not expect to control their own creative process or its results as if they were novelists or playwrights. Nevertheless, the amount of rewriting and the absence of creative control frustrated even successful and highly paid writers. Famed screenwriter Frances Marion complained in the 1930s that writing a screenplay was “like writing on sand with the wind blowing.”³¹ Writers at Paramount described an “assembly line” run by producers “who doled out dramatis personae, one each to a team of five writers—the writer was then instructed to supply ‘his’ character with lines of dialogue but to avoid consultation with other members of the team: the idea, so far as anybody understood it, was that the producer would ‘assemble’ the five contributions, jigsaw style, into a final script.”³² One writer later quipped that he “considered himself fortunate to be given ‘a sailor with a parrot’: at least *his* character had someone to talk to.”³³ Writers sought greater responsibility for their work “from its inception to its ultimate presentation on the screen,” and to be given “a hand and a voice in the actual production of the picture.”³⁴ Prior to the formation of the WGA, however they were unsuccessful.

The absurdity of the effort to transform collaborative writing into a factory model could be laughed off. But once a script was finished and a

29. See, e.g., W.R. Wilkerson, *Tradeviews*, HOLLYWOOD REP., Sept. 18, 1930, at 1 (discussing a contract between producer Samuel Goldwyn and writer Frederick Lonsdale which provided for profit-sharing but left unresolved various issues in the calculation of the writer’s share).

30. On the history of unionization in Hollywood, see generally HORNE, *supra* note 28; SCHWARTZ, *supra* note 23; FRANCKE, *supra* note 23; DANAE CLARK, *NEGOTIATING HOLLYWOOD: THE CULTURAL POLITICS OF ACTORS’ LABOR* (1995); TOM SITO, *DRAWING THE LINE: THE UNTOLD STORY OF ANIMATION UNIONS FROM BOSKO TO BART SIMPSON* (2006). A short summary, with particular focus on the relationship between labor and studio business strategies is chapters 14 and 22 of GOMERY, *supra* note 12.

31. FRANCKE, *supra* note 23, at 41 (quoting DeWitt Bodeen, *Frances Marion: Part II*, FILMS IN REVIEW, Mar. 1969, at 129, 139). Then as now, many tried to become producers or directors in order to gain more creative control, and Marion herself became so frustrated with being rewritten that she determined to become a director or producer. *Id.* Fox, for example, used more than a dozen writers to rewrite each other’s work in adapting Mark Twain’s *Connecticut Yankee in King Arthur’s Court*. See *Boylan Will Do Yankee Dialog*, HOLLYWOOD REP., Sept. 29, 1930, at 3; *Counselman Hired for “Yankee” Treatment*, HOLLYWOOD REP., Oct. 16, 1930, at 2.

32. HAMILTON, *supra* note 23, at 184.

33. *Id.*

34. Letter from Al Cohn, Chairman, Writers Branch, to Bud Schulberg, Chairman, Producers Branch (July 10, 1931) (on file with WGA). WGA File Blacklist AMPAS & Screen Writers Guild Correspondence.

film was made, it was worse than exasperating for a writer to discover that she got no screen credit for a script she wrote, because the denial of credit made it hard for the writer to get hired by another studio or to get a pay raise. During the 1930s, writing credit was entirely up to the studio, and stories abound about the arbitrariness and corruption of studios in granting credit to someone who had not worked on the script, including producers, writers whose names had marquee value, and the family or friends of studio moguls.³⁵ Not surprisingly, writers schemed and fought over credit; as one recalled:

The first thing you had to learn as a writer if you wanted to get screen credit was to hold off until you knew they were going to start shooting. Then your agent would suggest you might be able to help It was the third or fourth writer that always got the screen credit. If you could possibly screw-up another writer's script, it wasn't beyond you to do that so your script would come through at the end. It became a game to be the last one before they started shooting.³⁶

Abuses of screen credit became one of the major issues driving the campaign to form a writers' union.

In 1927, the producers and several leading actors and other talent formed the Academy of Motion Picture Arts and Sciences.³⁷ Although the Academy is known today primarily for the Oscars, it was founded with a broader set of purposes, including representing writers, directors and actors in collective negotiations with producers. From the start, the studios controlled the Academy and used it to thwart independent union organizing. Membership in the Academy was by invitation and was conferred only on the basis of distinguished accomplishment in film production. The Academy obtained a few concessions for writers in 1932, including one week's notice before termination of a writer's employment, and an agreement that producers would give all the writers who worked on a film twenty-four hours to decide on screen credit.³⁸ But the agreement empowered producers to decide screen credit for writers in the event that

35. NORMAN, *supra* note 23, at 141. Ogden Nash skewered moguls' favoritism to family and friends in a famous couplet: "Carl Laemmle/ Has a very large faemmle." HAMILTON, *supra* note 23, at 91-92.

36. Quoted in NORMAN, *supra* note 23, at 142. The same quote appears in HAMILTON, *supra* note 23, at 91.

37. See *History & Organization of the Academy*, ACAD. OF MOTION PICTURE ARTS & SCI., <http://www.oscars.org/academy/history-organization/index.html> (last visited Oct. 12, 2011).

38. Academy of Motion Picture Arts & Sci., Revised Admin. Procedure and Reprint of Text of Writer-Producer Code of Practice, Writers Branch Bulletin (July 14, 1934) (on file with WGA). WGA File Blacklist AMPAS & Screen Writers Guild Correspondence. This document includes the 1932 Code and the 1934 proposal for revision of the administrative procedure on credits.

they could not reach unanimous agreement on one or two names.³⁹ Moreover, the Academy acquiesced in 1933 to the studios' demand that talent take a huge pay cut. For these and other reasons, the Academy was perceived by many writers, actors, and others as a company union. In 1933, when the National Industrial Recovery Act granted rights to unionize and bargain collectively, both writers and actors formed independent unions: the Screen Actors Guild and the Screen Writers Guild.⁴⁰ The Screen Writers Guild (SWG) changed its name to the Writers Guild of America (WGA) in 1954.⁴¹

In 1935, when the National Industrial Recovery Act was declared unconstitutional⁴² and before the newly-enacted National Labor Relations Act (N.L.R.A.) took effect,⁴³ the producers renewed their effort to revive the writers' branch of the Academy.⁴⁴ The Academy drew up a new basic agreement and writer-producer code of practice. Among the most galling provisions to writers was the proposal for credit. The pact gave producers a right to tentatively determine credits based on an assessment of substantial contributions. A writer who disagreed could appeal to the Writers Adjustment Committee of the Academy, but even if that body found that the producer had improperly allocated credit, the producer was not obligated to change it.⁴⁵ This, among other issues, convinced many writers that the Academy would not protect their interests. As a result, 1936 proved to be a pivotal year in the struggles to establish the Writers Guild as an independent union. Writers Guild members boycotted the 1936 Academy Awards, and Dudley Nichols, one of the highest-paid writers in Hollywood, whose script for *The Informer* won the Oscar for best screenplay, turned down the award in a letter that rebuked the Academy for failing to respect the writers' choice of bargaining representative.⁴⁶ In addition to protection against pay cuts, blacklists, and dismissal without notice, the "right to accept other employment" when idle at one studio, the Guild's top demands in its fight with the producers included "an equitable practical deal on credits," "an end to the system whereby the writer gives up every idea even if it's unused that comes into his head while under

39. HUGH LOVELL & TASILE CARTER, COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY: A STRUGGLE FOR STABILITY 35-36 (1955).

40. SCHWARTZ, *supra* note 23, at 27-29.

41. www.wgaw.org/history/timeline.html.

42. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

43. 29 U.S.C. §§ 150-169 (1976).

44. LOVELL & CARTER, *supra* note 39, at 37.

45. SCHWARTZ, *supra* note 23, at 49.

46. *Id.* at 51-54.

contract,” and “not to give up every conceivable undiscovered right in the sale of original material.”⁴⁷

As writers left the Academy in favor of the Guild, conflict between the left and the right within the Guild flared.⁴⁸ The dispute came to a head in 1936, when a rival faction formed a separate union, the Screen Playwrights (SP), with the support of the producers.⁴⁹ The producers agreed to give the SP power to determine screen credits, and some writers believed the SP used that power to enhance the status of SP members at the expense of Guild members. In 1939, for example, an SP member, Malcolm Boylan, disputed the proposed grant of shared writing credit to him along with two SWG members, Sy Bartlett and Olive Cooper, on the film *The Lady's From Kentucky*. The SP arbitrated the dispute and awarded exclusive credit to Boylan, the SP member.⁵⁰

In 1937, the Guild sought recognition from the National Labor Relations Board (N.L.R.B. or “Board”) as the union of Hollywood writers. After a prolonged struggle, culminating in a seventeen-day hearing before the N.L.R.B. Regional Office in Los Angeles and then an appeal to the N.L.R.B. in Washington, DC, the Board determined in 1938 that screenwriters were employees within the meaning of the N.L.R.A.⁵¹ The studios had argued that the writers were not employees because the services they performed were “creative and professional in character, whereas the Act applies to the more standardized and mechanical employments.”⁵² Further, the studios argued that the protections of the N.L.R.A. were intended for “wage earners in the lower income brackets” and that screenwriters “receive[d] high salaries.”⁵³ Most important, the studios insisted that the writers were not required “to observe regular office hours or to maintain office discipline; that they [were] not required to produce any fixed amount of work; and that they [were] free to develop screen material in accordance with their own ideas.”⁵⁴

The studios’ argument was, in today’s doctrinal terms, that writers were independent contractors and professionals and, therefore, not entitled

47. Notice from “The Executive Board of the Screen Writers Guild” to “All Members of the Screen Writers Guild” in anticipation of a May 1936 meeting. WGA File Blacklist AMPAS & Screen Writers Guild Correspondence (on file with WGA).

48. At the time, some writers were either members of or sympathetic to the communist party and others were not; the political disagreements among writers tended to shade into disagreements over union strategy and governance. See SCHWARTZ, *supra* note 23, at 41-81.

49. *Id.* at 71.

50. *Id.* at 135.

51. Metro-Goldwyn-Mayer Studios (*MGM*), 7 NLRB 662 (1938).

52. *Id.* at 686.

53. *Id.*

54. *Id.* at 686-87.

to unionize and bargain collectively. At the time there was no explicit statutory basis for excluding them; the N.L.R.A. simply provided that an “employee” included “any employee,” and during the drafting process Congress omitted a proposed provision requiring that a worker must be under the continuing authority of the employer to qualify as an employee.⁵⁵ Nevertheless, the N.L.R.B. exercised discretion to conclude that independent contractors were not employees and sometimes used the right of control test that is used today. But it did not apply that discretionary exception to writers.

In finding writers to be employees, the Board emphasized the power of producers to dictate the content of writers’ work, to assign parts of stories, to stipulate where writers were to write even if rules with respect to hours and location of work were not observed.⁵⁶ The Board also emphasized the terms of individual hiring agreements that—like all boilerplate employment agreements of that era—obligated the writer to “‘devote his entire time and attention and best talents and abilities exclusively to the service of the Corporation and/or such other person, firm, or corporation, as when, and where the Corporation may direct for the term’ of such employment.”⁵⁷ The Board also noted language in the individual hiring contracts providing that the writer was hired “to write and compose original stories . . . and generally to perform such other services, as a motion picture writer, as the Corporation may direct . . . at its studios at Hollywood, California, and/or at such other studios and/or on such locations as the Corporation may from time to time designate.”⁵⁸ The Board noted but found unimportant that some writers were employed on a “free-lance basis under contracts providing for a week-to-week continuation of the employment or for the completion of a certain piece of work at a specified aggregate compensation,” because “there is no essential difference between a free-lance writer and a writer working under contract for a term in the manner in which they performed their work and that the only difference between the two is one of length and tenure of employment.”⁵⁹

55. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW 37-38 (2d ed. 2004).

56. *MGM*, 7 NLRB at 687-89.

57. *Id.* at 689.

58. *Id.*

59. *Id.* at 687. Were the Board to decide this case today, the result might be different. Under current labor law, almost all screenwriters and TV writers who are not on the staff of a regular show might be deemed independent contractors under the N.L.R.A. Although they perform functions that are an essential part of the employer’s business (writing scripts), they receive no training and almost no supervision from the production company, they are not generally under the control of the company as to the manner and means by which they do their work, they have a substantial proprietary investment in the instrumentalities they use to perform their work (i.e., their personal computers and software), and they have significant entrepreneurial opportunity for gain or loss “through their own efforts or ingenuity.” The test for distinguishing employees from independent contracts under the N.L.R.A. inquires whether

Once the Board determined writers were employees eligible to form a union, it scheduled an election for employees to decide whether or which union to elect as their bargaining representative.⁶⁰ Writers affiliated with SWG and the SP fought hard to convince eligible writers to vote for their side, and in 1938, the SWG won the representation election. Litigation ensued about the continuing validity of the SP contract with the studios, and a particular bone of contention was whether the SP would still have authority to determine screen credits.⁶¹ Finally, in 1940 the SP collapsed and its remaining members joined the SWG.

The SWG fought for another two years to get the producers to accept an agreement. One of the most important demands writers made in the negotiations was that writing credits should be determined by writers. In October 1940, the producers agreed to a clause in the collective bargaining agreement providing that the SWG would handle the allocation of screen credit for writers, and that disputes over credit would be subject to arbitration. But the provision languished on the bargaining table as the studios resisted other Guild demands until January 1942 when pressure to mobilize for the war effort prompted the producers, as one said, to “sign this goddamn contract and make pictures for the boys.”⁶² The first contract was only five pages long and it did little other than give writers a minimum wage and control over screen credit determinations.⁶³

The credit determination process has changed remarkably little since 1942. Under the MBA, when a film is in post-production the studio makes

the workers operate independent businesses, perform functions that are an essential part of the putative employer's business, receive training or supervision from the company, are under the control of the company as they perform services for it as to the manner and means by which they do their work, have a substantial proprietary investment in the instrumentalities they use to perform their work, and have significant entrepreneurial opportunity for gain or loss “through their own efforts or ingenuity.” *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842 (1998) (finding delivery truck drivers to be employees); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1968) (upholding NLRB's finding that debit agents are employees of insurance company); Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329 (1998). In 1938, by contrast, the Board applied a different test for distinguishing employees from independent contractors that placed greater emphasis on the contractual power of the employer to control the worker. In 1942, the Board announced a more expansive test emphasizing the economic dependence of the worker as the determinative factor and finding that corner newspaper sellers were employees of the newspaper publisher. *Hearst Publ'ns, Inc.*, 39 N.L.R.B. 1245 (1942). The Supreme Court embraced the Board's more expansive test. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944). Congress did not, and in the Taft-Hartley Act, Congress specified that independent contractors could not be deemed employees. 29 U.S.C. § 152(3). See generally GORMAN & FINKIN, *supra* note 55, at 39.

60. *MGM*, 7 N.L.R.B. 662.

61. SCHWARTZ, *supra* note 23, at 139-40.

62. *Id.* at 188. The agreement was backdated to 1940. See *History*, WGAW, www.wga.org/history/timeline.html (last visited Dec. 12, 2011).

63. See Seth Freeman, *Some Relevant History on Credits*, CREDITS FORUM (Credits Review Committee) (June 2002) (on file with WGA).

a tentative determination of writing credits and sends notice of it to the Guild and to all writers who worked on the film. If no writer objects, the credits are as determined by the studio. If any participating writer objects, the Guild arbitrates. Three Guild members read all the literary material, including the final shooting script, and determine which writers made the most significant contributions to the film as it was finally shot. As described in more detail below, in evaluating significance of contributions, the arbitration committee considers plot, characters, scenes, and dialogue.⁶⁴ The credit arbitration system rapidly became established practice in the industry.

The Guild and the credit system were well established at the beginning of the 1950s when television began to transform Hollywood. For example, between November 1951 and November 1952, the Guild's Credits Committee oversaw eighty-two arbitrations, sixty-one of which were from the major studios (including four for TV), and twenty-one from independent production companies (including one for TV).⁶⁵ The Guild had a relatively stable bargaining relationship with movie studios and was reorganizing its own operations in order to unite the various guilds that represented writers in the West and in the East and in different media, including radio and the emerging television industry.⁶⁶ The Guild had negotiated minimum rates of compensation for writers working as employees of studios and those working in freelance relationships or under contracts for single deals.⁶⁷ When the first television negotiations began in 1950, studios had begun shifting from the factory model of production to financing and distributing independently produced feature films, many of which were filmed on location. This meant that even the most successful film writers became less likely to be employed for an extended period directly by a studio and to

64. See *infra* text accompanying notes 126-129, 143-165.

65. In nine cases the arbitration was automatic because a production executive was proposed to be credited (and in three of those nine cases the arbiters determined that the production executive should not receive it). In twelve cases the matter was arbitrated because the studio proposed to give credit to more than two writers, and in ten of those cases the arbiters agreed. In nine cases, there was arbitration over whether a writer deserved the "additional dialogue" end credit (and the arbiters granted it in only eight). In four cases the studio made no tentative determination and asked the Guild to handle it. And in thirty one cases arbitration was instituted because of a protest by a writer and in nineteen of those cases the protesting writer won the arbitration. There were five cases (one in TV) in which the writer wished to withdraw his or her name. There were five arbitrations over who was entitled to story credit, seven over adaptation credit and twenty nine over screenplay credit. Report from Marvin Borowsky, Chairman, on the Credits Comm. (on file with WGA).

66. Jordan Segall, *A Guild Don't Go Its Own Way, It's Nothing: The Reorganization of the Authors League, 1951-1954* (unpublished manuscript) (on file with WGA).

67. LOVELL & CARTER, *supra* note 39, at 39-41. *Screen Composers Assn Gets Authors League TV Protection*, DAILY VARIETY, July 3, 1950 (Screen Composers League joined with SWG, Radio Writers Guild, Dramatists Guild, Authors Guild and Television Writers Group to present a united writers' front in negotiation with TV producers, networks, and ad agencies).

work on a studio lot.⁶⁸ Television production offered a potentially profitable use for the writing staff, sound stages, back lots and production facilities and employees that would otherwise have gone to waste, enabling studios to get some return on fixed costs. Writing for TV became the kind of semi-stable bureaucratic employment that film writing had once been.⁶⁹ Moreover, in contrast to the rise of the blockbuster financing regime, in which expensive independent productions offered the possibility of huge payoffs but tied up large portions of studio funding for up to two years of pre- and post-production work, television production offered the promise of meeting the expenses of studio overhead and improving cash flow.⁷⁰ The Guild demanded and, after prolonged negotiations and a threatened strike, eventually secured compensation for TV writers, including separated rights for writers working in television and revenue percentages for writers who wrote films that were later shown on television.⁷¹

B. Credit and The Blacklist

Perhaps the gravest challenge to the Guild's existence, and to its control over credit, began in 1947 when screen credit as a form of symbolic politics became the front line in the conflict over the alleged communist sympathies of well-known writers. The Guild proved unwilling or unable to protect its members from discriminatory treatment on the basis of political ideology. As a result, it effectively ceded for over a decade the power to control screen credit for suspected communists, even while the machinery of the credit determination process cranked on. While the

68. See, e.g., *Writers, Actors, Meggers Cut in Economy Drive*, DAILY VARIETY, May 13, 1948, at 1 (as a result of the box office dip, studios switched to hiring actors, writers, and directors by the picture rather than on long-term contracts); *Par Drops Contract Scribes*, DAILY VARIETY, March 22, 1948, at 51 (with the exception of a few on longer-term contracts, Paramount writers all work on week-to-week basis as part of retrenchment scheme).

69. See CHRISTOPHER ANDERSON, *HOLLYWOOD TV: THE STUDIO SYSTEM IN THE FIFTIES* 156, 249 (1994) (describing the financing and management of TV in the 1950s as an "intricately organized, high-volume factory system"); see also ERIK BARNOUW, *THE TELEVISION WRITER* 16 (1962); *HOLLYWOOD IN THE AGE OF TELEVISION* (Tito Balio ed., 1990).

70. ANDERSON, *supra* note 69, at 159.

71. *Indies Face Split on TV*, DAILY VARIETY, April 3, 1951, at 1 (summarizing proposals for the MBA covering independent producers); *SWG Seeks Pact with Indies*, DAILY VARIETY, Mar. 6, 1951, at 1 (with MBA for major studios in effect, Guild negotiating similar agreements with two different associations of independent producers); *\$500 to \$750 Tilt Offered Screen Writers by Prods*, DAILY VARIETY, Jan. 25, 1950 (separated rights provision in new MBA with film producers "still needs clarifying and will be subject to further negotiation"); *Guild Taps Screen Scribes for Coin to Build Kitty*, DAILY VARIETY, Apr. 10, 1950 (SWG members asked to increase dues to build emergency fund in event negotiators fail to come to terms over SWG's demand for separated rights covering TV rights); *SWG Seeks Per-Usage TV Pact*, DAILY VARIETY, Aug. 25, 1950 (describing writers' bargaining demands entering TV negotiations as including that writers would sell original material for only one use or performance on TV and would retain all rights to material and be paid a percentage of the total sale of the package to a sponsor).

Hollywood blacklist has generally been understood by lawyers in terms of whether exercise of First Amendment and Fifth Amendment rights can be punished by contempt of Congress or by firing from employment, a major and untold story of the blacklist was the fact that it operated mainly through the denial of screen credit. What is also not well known, even among writers, is that the Guild continued to conduct credit arbitrations at the request of blacklisted writers, even though it knew that the studios would ignore the Guild's determination. The fact that the credit arbitration machinery continued to operate even when it was futile paved the way for the Guild to regain power over credits when the blacklist began to fall apart in 1960. This is, thus, a story both about the significance of attribution and the significance of legal processes in preserving institutional power during times of extreme political pressure.

In October 1947, more than two dozen successful Hollywood writers, including Dalton Trumbo, Ring Lardner, Jr., and John Howard Lawson, were subpoenaed to appear before the House Un-American Activities Committee (HUAC) to answer two incendiary questions: "Are you a member of the Screen Writers Guild?" and "Are you now, or have you ever been, a member of the Communist Party?"⁷² Because the HUAC chair was militantly anti-union as well as anti-communist, the question about Guild membership was almost as accusatory as the question about Communist Party membership, particularly since he believed that the Guild was a communist-dominated organization.

Ten witnesses famously refused to answer directly and were convicted of contempt of Congress and sentenced to prison.⁷³ Although initially the producers and studios had expressed outrage (or at least reservations) about HUAC's attempt to pressure the studios to blacklist suspected communists, after the "Unfriendly Ten" were convicted of contempt of Congress and pilloried in the press, the studios changed their tune. Fifty top studio executives met at the Waldorf-Astoria hotel in New York in November 1947 and issued a joint statement condemning the Ten and promising that they would "forthwith discharge or suspend without compensation [members of the Ten] in our employ," and henceforth would not "knowingly employ a communist or a member of any party or group which

72. On the long story of attempts to repress leftists in Hollywood, see generally LARRY CEPLAIR & STEVEN ENGLUND, *THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-1960* (Univ. of Cal. Press paperback ed. 1983) (1979). On HUAC and the Hollywood Ten, see *id.* at 254-98, 325-60. See also VICTOR S. NAVASKY, *NAMING NAMES* 78-196 (Hill & Wang 2003) (1980); SCHWARTZ, *supra* note 23, at 220-80.

73. See, e.g., *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949) (upholding the convictions of John Howard Lawson and Dalton Trumbo for refusal to respond to HUAC inquiries); see also CEPLAIR & ENGLUND, *supra* note 72, at 254-98, 325-60 (discussing convictions for contempt of Congress).

advocates the overthrow of the Government of the United States by force or by illegal or unconstitutional methods.”⁷⁴

In the same month, a fierce leadership battle occurred within the membership of the Guild. A moderate slate was voted in, purging the Executive Board of any writer who had communist sympathies.⁷⁵ But even the moderates on the new Executive Board were appalled by the Waldorf-Astoria statement and, regardless of their views on communism, feared that a political test for writers would be disastrous for their membership. In December and January 1947-48, the Guild decided to initiate litigation against the studios to challenge the blacklist. The Executive Board hired Thurman Arnold, the New Dealer, antitrust expert and former federal judge who founded Arnold, Fortas & Porter, to file a suit against the studios challenging the Waldorf-Astoria statement as a conspiracy in restraint of trade.⁷⁶

At the same time, writers among the Unfriendly Ten (later known as the Hollywood Ten) filed a series of cases challenging the studios' effort both to discharge them and to deny them screen credit based on their refusal to testify before HUAC.⁷⁷ The studios had invoked the morals clause in their individual employment contracts, arguing that the writers' contempt of Congress in refusing to answer questions before HUAC constituted conduct that would tend to degrade them in society, to bring them into public hatred or contempt, to shock or offend the community, and to prejudice their employers.⁷⁸ Counsel for the Guild made a number of arguments about

74. The Waldorf statement is printed in full as Appendix 6 to CEPLAIR & ENGLUND, *supra* note 72, at 455.

75. *Id.* at 250-51, 292-97.

76. *Writers Will Sue Prods*, DAILY VARIETY, May 28, 1948, at 1; *SWG Sues 7 Majors on Blacklist*, DAILY VARIETY, June 2, 1948, at 1 (summarizing complaint's allegations); Chronology on Blacklist Suit (on file with WGA).

77. See, e.g., *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957) (holding writer-director Adrian Scott was properly fired for breach of morals clause based on contempt of Congress citation for refusal to answer questions before HUAC); *Twentieth-Century Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954) (holding writer Ring Lardner, Jr. was properly fired for breach of morals clause based on contempt of Congress citation for refusal to answer questions before HUAC); *Loew's, Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950) (holding screenwriter Lester Cole was properly suspended without pay for breach of morals clause after contempt of Congress citation for refusal to answer questions before HUAC); *RKO Radio Pictures, Inc. v. Jarrico*, 274 P.2d 928 (1954) (holding screenwriter Paul Jarrico was properly refused screen credit for breach of morals clause after contempt of Congress citation for refusal to answer questions before HUAC).

78. The language of the morals clauses varied slightly among the contracts, but the differences did not affect the courts' conclusion that writers could be fired for running afoul of HUAC. See *supra* note 77. See also Berman & Rosenthal, *supra* note 15, at 188 (law review article by two Hollywood entertainment lawyers providing sample language of morals clause in talent contracts). The morals clause of the form contract RKO entered with Paul Jarrico provided:

In addition to the services of the Writer, an essential consideration to the Corporation under this agreement is the popularity and good reputation of the Writer with the public. From the date hereof, and continuing throughout the production and distribution of the Pictures, the

why the studios lacked the right to deny screen credit to suspected communists or to those who refused to testify. First, the morals clause did not trump the MBA, which did not contain any provision entitling the studio to fire or to deny credit to writers based on allegedly immoral behavior. Second, an August 1951 arbitration decision involving the Radio Writers Guild and CBS, in which CBS had asserted that the morals clause of an individual hiring contract allowed it to terminate the employment of writers who did anything to offend the community or reflect unfavorably on CBS or its advertisers, determined that the morals clause was invalid because it gave CBS a power that the MBA did not.⁷⁹ Third, one studio had deleted from its individual hiring contracts the provision that allowed it to deny credit to writers who allegedly violated the morals clause, which showed that the studio itself did not believe it had the contractual right to deny screen credit to writers who violated the morals clause.⁸⁰ Finally, the Guild argued that writers' political affiliations could not possibly harm the studios because, unlike actors, writers and their personal lives are unknown to the public.⁸¹

None of these arguments succeeded. In the case of Ring Lardner, Jr., the Ninth Circuit found that his refusal to state whether he was a communist harmed the studio's reputation, explicitly linking his status as credited writer with the studio's reputation:

The screen writers never have had the publicity buildups as individuals that screen actors have had. There may have been a tendency for the ten men, all acting about alike before the committee, to be lost in anonymity as so many screen writers. Yet the conduct of and the ultimate conviction of Lardner in the circumstances of the case could not help but hurt Fox and everybody else in the motion picture business. It is true, as the record shows, that some people supported the ten men. But how could it be said that as a result of Lardner's conduct the employer sustained a net gain, or even held its own? Fox just necessarily suffered a net loss in public prestige.⁸²

Writer will conduct himself with due regard to public conventions and morals, and will not do anything which shall constitute a penal offense involving moral turpitude, or which will tend to degrade him or bring him or the Corporation or the motion picture industry into public disgrace, obloquy, ill will or ridicule, or which will offend public morals or decency.

The clause further provided that breach of it would relieve the company of the obligation to accord credit. RKO Radio Pictures, Inc. Agreement with Paul Jarrico, (Jan. 17, 1951) (on file with WGA).

79. Am. Arb. Ass'n, Adm'r Voluntary Labor Arb. Tribunal, In the Matter of the Arb. between Radio Writers Guild and Columbia Broad. Sys., L-7847, NY-1-211-51 (Arbitrators Lewis Gannett, Albert Gilbert & Harold Taylor) (on file with WGA).

80. Letter from Gordon Stulberg, Counsel for the Writers Guild, to Ross Hastings, of RKO (Jan. 10, 1952) (on file with WGA).

81. *Id.*

82. *Lardner*, 216 F.2d 844, 851 (holding writer Ring Lardner, Jr. was properly fired for breach of morals clause based on contempt of Congress citation for refusal to answer questions before HUAC.).

While some Guild members thought the Guild should do more for the blacklisted writers, the majority of the Executive Board concluded that to defend suspected or confessed communists would harm the Guild and its members, so it largely sat on the sidelines.⁸³

The battle over screen credit for suspected communists was even more threatening to the Guild and its members than was the battle over their firing. The Guild had long existed in a world in which there was no just cause provision in the MBA governing the hiring and firing of writers; this allowed studios to hire and fire writers at will. Once hired though, writers were entitled to the protections of the MBA, and one of the most fundamental was the right to screen credit. If the studios could disregard the MBA provisions on credit for some writers, all writers were at risk. Some studios had begun to ask writers to sign individual agreements waiving credit as a condition of hire, and the Guild feared that individual agreements contrary to the MBA's minimum protections would undermine the whole collective bargaining system.⁸⁴

The conflict came to a head when Howard Hughes, the irascible and reactionary head of RKO studios, publicly refused to give screen credit to Paul Jarrico, one of the Hollywood Ten, for *The Las Vegas Story*. RKO had hired Jarrico in January 1951 at \$2,000 per week to write a script for a project then known as *The Miami Story*.⁸⁵ At the time he was hired, Jarrico had already served his prison sentence for contempt of Congress and, like most of the other blacklisted writers, was still struggling to find work. When principal photography on the movie was done, RKO advised the Guild and the two other participating writers that it proposed to give screenplay credit to someone other than Jarrico. Its handling of the matter was entirely bureaucratic on the surface: the notice of tentative writing credits looked just like any of the dozens of such notices the studios sent to the Guild each year.⁸⁶ Jarrico objected, as did two other writers who had worked on script. The Guild, following its customary processes, appointed three of its members to serve anonymously as arbiters to determine writing

83. Specifically, Guild members disagreed on whether the Guild should pay Arnold's retainer, and if so, how it should define the scope of the representation. This conflict raised questions over whether the Guild should ever support one side on issues of politics and whether it had a duty to represent the screenwriters it found reprehensible on grounds of politics or morality. See, e.g., *Writers Tussle on Arnold Fee*, DAILY VARIETY, Mar.22, 1948, at 51; Minutes of SWG Exec. Bd. meetings (Jan. - Mar. 1948) (on file with WGA). See generally CEPLAIR & ENGLUND, *supra* note 72, at 249-53, 361-97 (describing internal conflict within SWG in the autumn of 1947 and the struggles once H.U.A.C. focused again on Hollywood in 1951).

84. SWG Memorandum from Frances Inglis (Dec. 28, 1951) (on file with WGA) (reporting a phone call from an agent about a studio request that a writer sign a credit waiver; Inglis wrote that she told the agent to tell the writer that credit is determined by the Guild and not to sign the waiver).

85. RKO Radio Pictures, Inc. Agreement with Paul Jarrico (Jan. 17, 1951) (on file with WGA).

86. WGA File Blacklist RKO Lawsuit 1951-1953 (on file with WGA).

credits on the picture. The arbiters unanimously determined that Paul Jarrico and two of the others should receive the "Screenplay by" credit, with a "Story by" credit for the third. This was protested by one writer, who asked the arbiters to read a final version of what was actually filmed which had not previously been provided to them. When RKO submitted the final version, the arbiters switched the order of two names, and the Guild sent its form letter to RKO announcing the arbitration committee decision.⁸⁷

Three months later, the Guild learned that RKO intended to omit Jarrico's name from the credits. The Guild's lawyer protested to RKO but received no reply. When advertisements for the movie appeared without Jarrico's name, the Guild invoked the conciliation and arbitration mechanism of the MBA, but RKO refused to participate.⁸⁸ Then Howard Hughes attacked the Guild in the press for allegedly trying to force the company "to submit to the demands of Jarrico" and dared the Guild to strike to enforce the contract.⁸⁹ Hughes created both a legal and a public relations challenge for the Guild. The Guild could not risk the loss of all its contract rights by allowing a producer to defy the MBA with impunity, but it was leery of being seen as doing anything to support communists. After a tense meeting, an anxious Executive Board issued a carefully-worded press release insisting that RKO had breached its contract with the Guild by refusing to abide by the credit arbitration and that matter "does not involve the political beliefs of Mr. Jarrico, however repugnant they might be to you or us." The Guild defended its involvement in the Jarrico suit as a matter of institutional obligation:

By the terms of our corporate charter, by terms of our agreement with RKO Radio and all major motion picture studios, we are obligated to extend Guild membership to, and protect the rights of, any writer you choose to employ. You chose to employ Mr. Jarrico. We have no choice but to protect his professional rights.⁹⁰

RKO then sued Jarrico alleging it was not obligated to accord him credit; Jarrico counterclaimed challenging RKO's refusal to abide by the Guild's contractually-mandated credit determination. That was litigation that the Guild could not sit out. Unlike the litigation over refusals to hire, the Guild considered its right to determine screen credit a core protection of all writers, so it filed an amicus brief. Meanwhile, the Guild filed an action

87. *Id.*

88. *Id.* Memorandum from Frances Inglis, Exec. Sec'y (Feb. 12, 1952) (on file with WGA) (describing conversation with SWG lawyer Gordon Stulberg in which he requested Executive Board to give him authority to go to court for temporary injunctive relief against RKO for breach of the MBA; a hand-written note on the memo dated Feb. 13 says: "Gordon says cannot find law to support this").

89. Letter from Howard Hughes to Screen Writers Guild (Mar. 27, 1952) (on file with WGA).

90. Minutes of a Special Meeting of the Exec. Bd. (Mar. 28, 1952) (on file with WGA); Press Release for Monday, Mar. 31, 1952 (on file with WGA).

in California state court seeking to compel appointment of an arbitrator, but the courts refused to issue such an order.

After a bench trial in Jarrico's individual suit, in which his lawyer had attempted to prove that Jarrico had written the substantial part of the final shooting script and was thus entitled to credit, the court held that Jarrico's refusal to cooperate with HUAC justified the denial of screen credit.⁹¹ Although Jarrico argued (correctly) that screen credit is determined exclusively under the MBA, which contained no provision governing a writer's political affiliations, morals or any other basis for the studio's refusal to grant screen credit, the court held that the refusal to testify violated the morals clause in Jarrico's individual contract and that the individual contract's morals clause trumped the MBA. The court addressed the conflict between the individual contract's morals clause and the MBA with the legally dubious assertion that "the Guild is without power to prevent that freedom of contract guaranteed by the Constitution."⁹²

In May of 1952, just before a Guild membership meeting to vote on authorization of the Guild's suit in support of Jarrico and credit, fifteen blacklisted writers, including Jarrico and other members of the Ten, wrote to the members of the Guild urging them to support the Guild in its opposition to Hughes: "The Guild's right to determine screen credits is an historic right, won from the corporations after years of negotiation. If we surrender this right to RKO, we surrender it to every company in town. Our Board's efforts to enforce our contract in the courts will be supported by every screenwriter who remembers the abuses before Schedule A was won."⁹³ The letter then reminded the membership that capitulation to RKO in the case of Jarrico would not save writers who thought they could distance themselves from communists, invoking the primacy of the notion of authorship to oppose the blacklist:

It has been a long time since that producer spokesman appeared at our Guild meeting and pled with us to accept the blacklisting of ten men. Remember?

91. *RKO Radio Pictures, Inc. v. Jarrico*, 274 P.2d 928 (Cal. Ct. App. 1954). The morals clause of Jarrico's individual contract provided:

In addition to the services of the Writer, an essential consideration to the Corporation under this agreement is the popularity and good reputation of the Writer with the public. From the date hereof, and continuing throughout the production and distribution of the Pictures, the Writer will conduct himself with due regard to public conventions and morals, and will not do anything which shall constitute a penal offense involving moral turpitude, or which will tend to degrade him or bring him or the Corporation or the motion picture industry into public disgrace, obloquy, ill will or ridicule, or which will offend public morals or decency.

The clause further provided that breach of it would relieve the company of the obligation to accord credit. *RKO Radio Pictures, Inc. Agreement with Paul Jarrico* (Jan. 17, 1951) (on file with WGA).

92. *Jarrico*, 274 P.2d at 930.

93. "Dear Guild Member" letter signed by Lester Cole, Edward Huebsch, John Howard Lawson, and others (May 10, 1952) (on file with WGA). The letter was released by Jarrico to *The Hollywood Reporter*.

It was the fall of 1947. ‘Give us these ten men,’ he said in effect, ‘and here it will end.’

The ten became twenty, the twenty fifty, and the fifty became a hundred. Each new group of blacklisted writers has warned, ‘It will not end with us.’ Yet when the House Committee on Un-American Activities wound up its sessions here last September, one could hear again the sigh of relief: ‘Now it is finished.’

Hughes thinks it has hardly begun.

It is in no spirit of we-told-you-so that we now warn again: Blacklisting is aimed not only at those it excludes from the industry but that those who remain in it. Its purpose is to intimidate our entire membership. The Blacklist cannot be contained by surrendering to it....

Our case is strong. Today we preserve our elementary right to have our names on the screen. Tomorrow our Guild will gain other rights of authorship, not only in TV but in motion pictures. No matter what the patrioteering pretext of our adversaries, we shall not yield our goal—the recognition that we, not the corporations, are the Authors.⁹⁴

The letter sparked concern on the Executive Board that anti-communist writers would feel that supporting the Guild’s position in the Jarrico suit was tantamount to supporting communists, as Hughes had insinuated. The Board purchased an ad in the trade papers responding to the letter, chastising the blacklisted writers for extending “the simple, clear-cut issue of a contract breach into the realm of politics,” and reminding industry members that “the Guild’s functions are economic, professional and non-political.”⁹⁵ The membership passed a resolution at its May 21, 1952 meeting in which it “reiterate[d] its historic stand against communism and communists within and without the Guild,” and emphasized that it was “pressing the Thurman Arnold case to establish protection for those innocent of communist belief or affiliation, who may be carelessly or inaccurately identified as being in the communist camp.”⁹⁶

When RKO won both the individual suit against Jarrico and the litigation with the Guild about whether denial of credit violated the MBA, many Guild members felt the Guild had run out of options. They were unwilling to challenge the power of studios to deny screen credit to blacklisted writers, fearing that any sympathy toward suspected communists would leave them vulnerable to blacklisting themselves. The fear was

94. *Id.*

95. Advertisement “To members of the Screen Writers Guild” appearing in *Variety* and *The Hollywood Reporter* (May 21, 1952)(on file with WGA).

96. Chronology on Blacklist Suit (on file with WGA).

sufficiently widespread that some writers seeking a new employment contract wrote to the Guild asking for a letter certifying that they had not signed petitions supporting members of the Ten for election to the Guild Executive Board or taken other stances within the union that would suggest communist sympathy.⁹⁷ Many writers complained about being unfairly labeled a communist based on the most innocuous memberships or activities, and others complained about being confused with another writer based on similar names. For a time, the Guild talked with other talent guilds and with producers about forming a committee of the Motion Picture Industry Council (an anti-communist organization of which Ronald Reagan was the secretary) whose purpose was to decide who was a communist and who was not.⁹⁸ Although the Guild ultimately voted to oppose the plan, the debate over it was contentious.⁹⁹ Thurman Arnold called the Guild's Executive Secretary to express grave reservations about any Guild involvement in such a committee:

I am really concerned about the attitude of your Guild. I have had a feeling every meeting I have attended that the Guild was getting more and more worried about the public relations involved in this suit. . . . All I can say is if you set up some kind of tribunal to protect the innocent, then you can't complain about the motion picture companies because that is what they wanted done from the beginning. . . . [I]f I had it to do all over again I would not have brought the suit because the Guild is terrorized and I feel I have no more clients. . . . That makes it pretty tough as a suit when your clients don't stand with you.¹⁰⁰

In February 1953, the Guild membership voted to settle the Thurman Arnold blacklist suit based on a statement from the producers that they would not conspire and never had conspired to blacklist writers. The settlement was, as Arnold himself put it, mainly a face-saving gesture once the Guild's membership lost the will to fight the blacklist.¹⁰¹ As part of the

97. See, e.g., Letter from Mary McCall to Loew's Inc. ("This will confirm that Robert Pirosh's name does not appear on the petition to nominate Lester Cole and Ring Lardner to the slate for election to the 1948-1949 Executive Board") (June 23, 1952) (on file with WGA); Letter from Frances Inglis to Art Cohn ("I have searched our records and can find no support by you at any time of the Hugo Butler Resolution passed at the membership meeting of November 17, 1948") (Apr. 14, 1952) (on file with WGA). WGA File Committee Blacklist & Anti, 1948-1959.

98. Letter from Curtis Kenyon to Louis Pollock (Dec. 31, 1959) (on file with WGA); Letter from Fred Schiller to Bob Chandler, *DAILY VARIETY* ("your article about Louis Pollock having been blacklisted for the past five years through a case of mistaken identity has shocked and distressed me immensely") (Dec. 20, 1959) (on file with WGA). WGA File Committee Blacklist & Anti, 1948-59.

99. Exec. Bd. Minutes July 28, 1952. WGA File Exec. Bd. Misc. Correspondence 1952 (on file with WGA).

100. Telephone Conversation with Judge Thurman Arnold (June 2, 1952), in WGA File Blacklist Credits Comm. Memos & Letters 1950s (on file with WGA).

101. Telegram from Frances Inglis to Thurman Arnold announcing that the membership voted to settle (Feb. 5, 1953) (on file with WGA).

settlement, the Guild agreed to an amendment to the MBA permitting the producers to refuse credit to any member of the Communist Party or any writer who declined to answer questions about communist affiliations before federal or state legislative bodies. At the same time, the Guild also secured an amendment to the MBA that reaffirmed the Guild's right to make credit determinations, which had been called into question by the RKO action toward Jarrico and in other cases.¹⁰²

Thus, while conceding the power of the producers to deny credit to communists and those who refused to testify about their political affiliations, the Guild insisted on its power to control credits. It considered the orderly operation of its credit process so important that it conducted credit arbitrations at the request of writers whom the Guild knew would never be given credit by the studios.¹⁰³ The Guild conducted a credit arbitration *whenever* a writer who had been employed on the picture challenged the denial of credit, and it made no exception for blacklisted writers. Of course, because the arbitration process is and was anonymous, the arbiters did not know they might be deciding to award credit to a blacklisted writer. When the arbiters finished, the Guild's long-time credits administrator, Mary Dorfman, would translate the arbiters' decision ("Writer A should receive Screenplay by credit") into its usual form letter, stating in a few sentences that the arbitration committee had decided what form of writing credit to give and to whom. After the Guild approved the MBA amendment allowing denial of credit to suspected communists, the Guild's usual form letter to the studio announcing the results of the arbitration simply included an additional sentence: "We understand that [name of writer] will not be given credit on the screen pursuant to the provisions of the second paragraph of Article 6 of the Producer-Writers Guild of America, West, Inc. Amended Minimum Basic Agreement of 1955."¹⁰⁴

In 1956, when the only writer on a film (Michael Wilson, on *The Friendly Persuasion*) was blacklisted, the studio informed the Guild that it would give writing credit on the film to the producer-director's brother and

102. Article 6 of the MBA was approved by the Guild at a contentious meeting on April 22, 1953. See *SWG OK's Removal of Commies' Credit*, HOLLYWOOD REP., Apr. 23, 1953, at 1; see also Berman & Rosenthal, *supra* note 15 at 188-89; NAVASKY, *supra* note 72, at 184.

103. In a letter to Albert Maltz on April 1, 1957, Melville Nimmer, then counsel for the Guild, explained the MBA provisions denying credit to writers who refused to state whether they were communists or who falsely denied it. He concluded: "As a matter of policy, the Guild continues to determine credit pursuant to its usual credit determination machinery in all circumstances where it may properly do so, even if such credit may not ultimately appear on the screen." WGA File Committee Blacklist & Anti 1948-59 (on file with WGA).

104. Letter from Mary Dorfman to Columbia Pictures (Aug. 16, 1957) (on file with WGA), Memorandum from Gordon Stulberg, Counsel for the Writers' Guild (Mar. 30, 1953) (on file with WGA) (concerning settlement of RKO lawsuit), Blacklist RKO Lawsuit Clippings, in WGA File (on file with author).

to Jessamyn West, the author of the short stories on which the film had been based. Wilson objected, and the Guild's arbitration committee determined that Wilson should receive sole screenplay credit and that West's credit should be "From the book by."¹⁰⁵ Immediately after receiving the Guild's notice of the credit determination, a studio executive informed the WGA that the film would have no writing credit at all.¹⁰⁶ The studio's strategy backfired. As Wilson recalled many years later, after the film was nominated for five Oscars, won the Palme d'Or at Cannes, and won a WGA award for best adapted screenplay, "my noncredit on the film gained me more recognition than I would have received had my name been on it."¹⁰⁷

The blacklist lasted for over a decade, and remained controversial. In 1959, the blacklist was a top priority for the Guild's negotiating team, along with getting paid for movies rebroadcast on TV and the extension of separated rights.¹⁰⁸ In the June 1959 negotiations, the Guild negotiating team tried to get the producers to agree that they would not invoke Article 6 (the denial of credit provision) when the producers knew that the writer was a communist. After discussion, it was suggested that the clause should prevent producers from denying credit when they "knowingly hire" a communist, but the meeting adjourned with the Guild committee asking for the producers' negotiating committee's definitive proposal.¹⁰⁹

The fact that the credit arbitration machinery continued even when it was futile paved the way for the Guild to regain power over credits when the blacklist began to fall apart in 1960 and some producers began to credit blacklisted writers.¹¹⁰ At that point, the law governing credit was an

105. Letter from Mary Dorfman, Credits Adm'r, WGA, to Allied Artists, in WGA File Blacklist RKO Lawsuit—Clippings, etc. (Mar. 22, 1956) (on file with WGA).

106. Letter from Allied Artists Legal Dep't to Mary Dorfman, Credits Adm'r, WGA (Mar. 26, 1956) (on file with WGA).

107. NAVASKY, *supra* note 72, at 185. According to imdb.com, the film was nominated for a sixth Oscar for best adapted screenplay. *Friendly Persuasion (1956) – Awards*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0049233/awards> (last visited Oct. 29, 2011). Under the Academy by-laws, the writing achievement could be given an award even if under the by-laws Wilson himself was not eligible to receive it. *Id.* However, because there was no other writer on the project and there would be no one to receive the award if the film should win, the Academy ordered Price Waterhouse not to list the nomination on the ballot for voting. *Id.* Thus, in 1957, there were only four nominees instead of the usual five for best adapted screenplay (*Around the World in Eighty Days* won). In the same year, the winner in the category for Best Original Screenplay was also a blacklisted writer, Dalton Trumbo, for *The Brave One*; in his case, the writer listed was Robert Rich, the nephew of the producer who had no connection to the film industry. It was widely rumored at the time that Trumbo had written the script, which also added notoriety to the omission of the nomination for *The Friendly Persuasion*. NAVASKY, *supra* note 72, at 185.

108. Meeting of the Screen Branch Negotiating Comm. (Mar. 11, 1959) (on file with WGA).

109. *Id.*

110. See CEPLAIR & ENGLUND, *supra* note 72, at 418-19 (Dalton Trumbo revealed in 1959 that he was the writer behind the fictional name who won the academy award for *The Brave One*; Otto

uncertain amalgam of the formal Guild processes, which continued to govern writing credits for non-blacklisted writers, and producers' discretionary denials of credit to certain writers regardless of the Guild's determinations, discretion which they exercised only for blacklisted writers. The rules governing credit, thus, had an overlay of individual contract on top of the collective agreement. Two entertainment lawyers published a law review article on screen credit in 1960 that analyzed credit as being primarily an issue of individual contract, with some collectively bargained rules, and also as raising some issues of fair trade practices and false advertising.¹¹¹ The authors asserted that "the public interest against deception" deserved more attention in determining the existence or validity of a waiver of screen credit. In support of their argument that denials of credit constituted false advertising, the writers said:

In explaining his intention to give screen credit for *Exodus* to script writer Dalton Trumbo, despite Trumbo's conviction for contempt of Congress in refusing to answer questions about alleged Communist associations, Producer Otto Preminger is reported to have said: "I think if someone is employed and that fact is hidden, it constitutes cheating the public. The honest thing to do is to be explicit about it."¹¹²

The fact that Hollywood lawyers felt free to write an article implicitly criticizing the blacklist as a form of false advertising, and the *UCLA Law Review* felt free to publish it, was evidence that the blacklist was already in decline.

Decades later, the Guild retrospectively corrected the record. The Guild formed a committee of former officers and writers, some of whom had been blacklisted, to conduct inquiries into the correct attribution of dozens of films produced during the blacklist period. The process raised complex issues for the Guild, because correcting credits often required taking away credit from one Guild member, who may have worked on the film and done a favor for a fellow writer by serving as a front, to give it to another. Reputations and feelings were hurt.¹¹³ Moreover, blacklisted writers and their descendants often had difficulty finding evidence to prove who had really written which scripts, so the Committee had to balance access to evidence against the desire for accuracy.¹¹⁴ Committee approval

Preminger revealed in 1960 that Trumbo had written *Exodus*; and Kirk Douglas gave Trumbo screen credit for *Spartacus*; see also Berman & Rosenthal, *supra* note 15.

111. Berman & Rosenthal, *supra* note 15.

112. *Id.* at 162.

113. See CEPLAIR & ENGLUND, *supra* note 72 at 419-21.

114. At one point, writer Del Reisman, blacklisted writer Paul Jarrico, and former WGA president George Kirgo were working on WGA's Blacklist Credit Committee (BCC). *WGA Announces Six Credit Corrections for Films Written by Blacklisted Writers*, WGA NEWS, Mar. 12, 2005, available at http://marlowesghost.com/yahoo_site_admin/assets/docs/Microsoft_Word_-_WGA_Announces_Six_Credit_Corrections.5372755.pdf. In weighing the interests of accuracy versus access to evidence, the Committee favored accuracy. "The research was rigorous and conservative, and

was often the first step in getting studios to change the writing credit on new prints and video rereleases, which paved the way for the Academy to change its records. However, since the WGA was loath to re-arbitrate old credit disputes, the author, his front, or his descendants were required to come forward with definitive evidence of blacklist credit. For pseudonyms, the Committee recommended a credit change “when there is sufficient information to identify a writer with a pseudonym and confirm that the writer used the pseudonym because of the blacklist.”¹¹⁵ Since the blacklist did not have an official end, some writers kept using their pseudonyms in the 1960s. For fronts, the Committee relied on information from individuals with first-hand knowledge and other documentation to support its recommendations. Ultimately, the Guild issued corrected screen credits for ninety-four films.¹¹⁶ The Academy also got on board and bestowed Academy Awards on screenplay writers that had originally gone to writers who had served as fronts. Thus, for example, Dalton Trumbo was finally recognized as the writer of *Roman Holiday* (which won an Oscar for best screenplay in 1954) and Trumbo was posthumously awarded the Oscar in 1993.¹¹⁷

The economic importance of credit in Hollywood was underscored both to the industry and to the public by the fact that the blacklist operated because of and through screen credit. The credit regime proved to be as vulnerable as were the civil liberties of the Hollywood Ten and blacklisted writers; neither the courts, nor the First and Fifth Amendments, nor the Guild and its screen credit determination process could withstand the hysteria over communism. Yet the Guild’s insistence on continuing to operate the credits process for all writers regardless of the blacklist enabled it to retake control of credits quickly once the producers abandoned the blacklist. The bureaucratic processing of credits for all writers kept the contract rules alive, preserving the system in an amber of Weberian rationality until the blacklist collapsed, the amber cracked, and Guild credit determinations were once again regarded by the studios as obligatory.

for all the credits it amended, the Guild reluctantly denied many that could not be substantiated,” says Stephen Bowie, a freelance writer and film historian. See Stephen Bowie, *Another Good Reason to Hate the Internet Movie Database*, CLASSIC TV HISTORY BLOG (Jan. 28, 2008), <http://classicvhistory.wordpress.com/2008/01/28/another-good-reason-to-hate-the-internet-movie-database/>; *Getting Credit Where It’s Due*, DAILY VARIETY, Sept. 11, 1996.

115. *Id.*

116. See *Corrected Blacklist Credits*, WGAW (July 17, 2000), http://www.wga.org/content/subpage_writersresources.aspx?id=1958.

117. The screen credit and Oscar were originally given to Ian McLellan Hunter, who fronted for Trumbo during the blacklist because he was never subpoenaed, although Hunter himself was then blacklisted too. CEPLAIR & ENGLUND, *supra* note 72, at 371. The Academy changed its records in 1992 and awarded the Oscar to Trumbo’s widow in 1993.

C. *The Evolution of Credit*

The Guild uses the design and administration of credits to achieve three goals. First, it treats authorship as an historical fact reflecting degrees of creative contribution to be deduced based on the significance of the various writers' work. In this sense, authorship designations are focused on *authenticity* and are necessary for writing credits to retain meaning to authors. Second, the Guild concentrates credit on one or two people to create the impression that the screenplay (and thus the film) reflects the creative vision of those persons; this is a strategic use of the concept of authorship to enhance the status of writers vis à vis directors. Third, the credit rules—particularly the inability of celebrity writers to remove their names from a project if they have been paid especially handsomely¹¹⁸—treat authorship as a form of trademark. The author's name is attached to a project whether or not the final product represents his or her distinct creative work because the writer's reputation is occasionally a commodity that can help sell the film. The authenticity, status, and trademark meanings of screen authorship exist in tension. The Guild relies on the legal processes to fudge the conflict among these meanings so that all the participants in the industry will continue to support the Guild in its effort to protect writers.

The union's reliance on law is no accident. Legal rules and legal processes enable the union to make difficult and extremely high stakes choices about which of its members will get the considerable financial rewards of credit in an environment in which all participants know that authorship is collective but credit determinations are individual. A democratic process for adopting the rules and a regularized process for applying them protect the union. The democratic and legal processes for determining authorship also protect the various contenders in the screenwriting process.

Legal rules and processes often play mediating roles in society. What is particularly interesting about the Guild is that the law that it uses to make author determinations is entirely privatized. Even before the Supreme Court held in *Dastar v. Twentieth Century Fox* that there is no trademark or other statutory claim for misattribution of films,¹¹⁹ it has been clear that no

118. 2008 MBA, *supra* note 17; SCREEN CREDITS MANUAL, *supra* note 19.

119. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, Twentieth Century Fox had contracted for rights to distribute videos of a television series about World War II the copyright to which had expired. When *Dastar*, a competitor, released videos using the original version of the TV series (which was in the public domain), Fox sued for a violation of section 43(a) of the Lanham Act and state unfair competition law, asserting that the release of the videos without screen credit to Fox (which had owned the rights to the original TV series) constituted "reverse passing off." Reverse passing off is the misrepresentation of someone else's goods as one's own. Section 43(a) prohibits the "false designation of origin, false or misleading description of fact" which is "likely to cause confusion ... as to the origin ... of goods." 15 U.S.C. § 1125(a)(1) (2006). The Court held that

statutory or common law governs screen credit. Although the Court in *Dastar* insisted that copyright should be the sole law to govern screen credit, copyright in reality has little impact on credit for writers because all motion pictures and TV programs are works for hire. Because, by contract, the Guild is solely responsible for credit determinations, the only regulation of credit is litigation under the union's duty of fair representation (DFR), which is typically brought also as a hybrid DFR-breach of the collective bargaining agreement against the union and the production company.¹²⁰ The duty of fair representation simply requires the Guild to avoid arbitrary, discriminatory, or bad faith conduct.¹²¹ At the urging of the WGA's lawyers, courts have resisted every effort to add more searching judicial oversight to the union's administration of the credit system.¹²² This has the effect of enhancing the power of the Guild, the seriousness with which everyone takes its role in credit determinations, and the Guild's ability to make trade-offs among competing goals.

The screen credit regime is studied carefully and frequently by those to whom it applies and it is changed through a deliberative process by majority vote. It is thus one of the very few forms of intellectual property in the modern economy that is designed by workers for workers and without the involvement of the corporations that control most intellectual property policy. Credits rules begin in the Credits Review Committee, a standing committee of Guild members charged with overseeing the

the failure to grant credit was not a false designation of origin because the "origin" of the goods, for purposes of the statute, was *Dastar* (the seller). *Dastar*, 539 U.S. at 38. The Court noted that the law of copyright is the sole source of protection for authors of motion pictures, and that it contains no requirement of designating the actual author except as to the authors of "works of visual art" under the Visual Artists Rights Act, 17 U.S.C. § 106A(a)(1)(A) (2006). The Court further reasoned that to allow the use of trademark law to force distributors to credit creators of works "would create a species of mutant copyright law that limits the public's federal right to copy and to use expired copyrights," and would also be difficult to administer because so many works are derivative of other works that it would be nearly impossible to decide who is the "origin" of an idea. *Dastar*, 539 U.S. at 34, 35. The Court gave the example of a video of the MGM film *Carmen Jones*, after the copyright expired, might have to be attributed not only to MGM, but also "to Oscar Hammerstein II (who wrote the musical on which the film was based), to Georges Bizet (who wrote the opera on which the musical was based), and to Prosper Merimee (who wrote the novel on which the opera was based)." *Id.* at 35.

120. See *Stone v. Writers Guild of Am. W., Inc.*, 101 F.3d 1312, 1314 (9th Cir. 1996) (holding state law claims for fraud and intentional infliction of emotional distress are preempted by federal labor law); *Marino v. Writers Guild of Am. E., Inc.*, 992 F.2d 1480, 1481 (9th Cir. 1993).

121. In *Marino*, the Ninth Circuit held that when the Guild's decision is "procedural or ministerial," its conduct violates the duty of fair representation only if it is arbitrary, discriminatory or in bad faith. If the union's conduct involves an exercise of judgment, the standard is discriminatory or bad faith. 992 F.2d at 1486.

122. See *supra* note 120; see also *Eddy v. Radar Pictures, Inc.*, 215 Fed. App'x. 575 (9th Cir. 2006) (rejecting claims that WGA's participating writer determination was arbitrary, discriminatory or in bad faith; finding other claims against union and production companies preempted).

system.¹²³ From the 1940s until the institutionalization of the Credits Review Committee as a standing committee in about 2000, the Guild had relied on ad hoc committees of members to study and revise the credits rules.¹²⁴ According to the WGA, the Committee is a diverse group appointed to represent theatrical and TV film writers with differing viewpoints on the roles of the first writer, subsequent writers, production executives, and the manner in which credit arbiters should perform their duties. The Committee examines the operation of the credit system and, from time to time, votes to recommend that the WGA membership approve changes to the credits rules. As with all union rules, a majority vote of WGA members is necessary to make any change to the credits rules or procedures.¹²⁵ Crafting the rules guiding the arbitration process is the aspect of the Guild's work that involves the most unconstrained deliberation about the meaning of authorship in a collaborative process like a major film.

In contrast with the Credits Review Committee, arbitration committees approach the determination of credit for a particular film as a technical question of fact. Their job is to determine which of the many writers who worked on the various scripts, stories, treatments, and other literary material contributed the most to what ultimately became the final shooting script.¹²⁶ Under the collective bargaining agreement between the WGA and the motion picture studios, the studio will send a "Notice of Tentative Writing Credits" and a copy of the final shooting script to each participating writer

123. Statement prepared by the Credits Review Comm. and sent to all WGA members in June 2008 proposing amendments to the Screen Credits Manual. Credits Review Comm. (2008) (on file with WGA).

124. Screen Credits Review Committee File (2009) (on file with WGA) (describing ad hoc committee system in 1989).

125. Constitution and By-Laws of WGAW, Art. VII, § 6 (revised June 17, 2009), available at http://www.wga.org/uploadedFiles/who_we_are/leadership/constitution09.pdf.

126. Occasionally, a question will arise whether a writer is entitled to invoke the credit determination arbitration process. Under the MBA, "a writer who has participated in the writing of a screenplay, or a writer who has been employed by the Company on the story" is a participating writer. 2008 MBA, *supra* note 17, at 267; SCREEN CREDITS MANUAL, *supra* note 19, at 4; WGA, TELEVISION CREDITS MANUAL 4 (2010) [hereinafter TELEVISION CREDITS MANUAL], http://www.wga.org/uploadedFiles/writers_resources/credits/tvcredits_manual10.pdf. Disputes over whether a writer meets this definition sometimes arise, usually having to do with whether the writer worked on the same project that ultimately became the movie. Since 1990 the determination of participating writer status has been subject to arbitration. Any writer may submit materials to the Guild showing that s/he is a participant. The Guild then refers the materials to a volunteer arbiter to determine whether the writer worked on essentially the same project that ultimately became the film or TV show. The "same project" determination is based on the following factors: (1) Was one writer hired to rewrite the literary material written by a previous writer? (2) Were there significant lapses of time between the writing services performed by the writers? (3) Did common production executives work with the writers? (4) Were the same stars and/or director contemplated for the project? (5) Was it the same subject matter? (6) Was the same source material given to the writers? (7) Were the writers employed by the same production company? If not, is there a chain of title between the production companies with regard to the literary material? See *Eddy v. Radar Pictures, Inc.*, 215 Fed. App'x. 575 (9th Cir. 2006).

and to the Guild.¹²⁷ If no one protests the company's proposed writing credits, they become final. A written protest from a participating writer triggers the arbitration process. The WGA selects three volunteer arbiters from a list it maintains of WGA members eligible to serve as credit arbiters, which means that they must have been WGA members for at least five years or have received three screen credits. At least two of the three arbiters must have served as credit arbiters at least twice before. Participating writers may peremptorily strike arbiters from the list before the three are selected, but once the three are chosen, their names remain confidential. The names of participating writers are not revealed to the arbiters or to the other writers.

Each participating writer is entitled to prepare a written statement for the arbiters explaining why he or she should receive screen credit. The arbiters also review all the literary material, including scripts, stories, and treatments that have been verified by the Guild, the company, and the participating writers as being part of the project. Each arbiter then reads all the material and makes a decision based on the Screen Credits Manual guidelines for determining credit. Each arbiter makes an individual decision, but when the arbiters are not unanimous, they conduct a conference call to discuss their decisions in an effort to achieve a unanimous decision. If the arbiters are unable to reach a unanimous decision, the majority decision prevails. Each arbiter must confirm his or her individual decision in writing with a summary of the reason(s) for it.¹²⁸

Any participating writer may seek review of the arbiters' decision within twenty-four hours by the Policy Review Board, which is composed of three members of the Guild's Screen Credits Committee. The function of the Policy Review Board is to determine whether the arbiters deviated from the Guild's policies or procedures; the Policy Review Board is prohibited from reading the literary material involved for the purpose of judging the writers' contributions and may not reverse the arbiters' decision in matters of judgment as to the participating writers' relative contributions.¹²⁹

The elaborate legal process surrounding credit determinations distinguish the WGA and Hollywood from any other area of cultural production, and are unique in the law. They bring the ideas of the rule of law—uniform rules, fairly applied, based on evidence and reasoned argument—to the question of what it means to be the author of a story. Unlike other places in both law and culture where authorship is taken as a (relatively) easily discernible *fact*, credit arbitrations treat authorship as

127. SCREEN CREDITS MANUAL, *supra* note 19, at 4.

128. *Id.* at 13.

129. *Id.* at 7.

contestable and as something that can be determined only through a process designed and administered by and for Guild writers. Everyone in Hollywood knows that credited authorship is, in some sense, a fiction when multiple writers have worked on a film, but it is important to writers that it be a *legal* fiction.

Although credit is occasionally given to creators in other industries, including video games and open source software, there is nowhere near the amount or the regularity of credit.¹³⁰ Instead, an assortment of other legal claims has emerged to protect attribution, but without the involvement of the Guild, most aspects of attribution have been treated as company assets. The dominance of democratically-adopted, and regularly-applied legal rules to determine screen credit is a signal achievement of the WGA. It was the unionization of writers that led to the development of the elaborate body of rules governing screen credit.

II.

CREDIT AND THE MARKET FOR LABOR

The Guild's management of credit enables it to play a unique and little understood role as a labor market intermediary. Guild credit determinations have two crucial effects on the labor market in Hollywood that may explain why the Guild survives conditions that in other industries have led to de-unionization. First, it facilitates the assessment of talent in a high-velocity labor market. Second, residuals (a form of profit-sharing for successful work) compensate writers during periods of slack employment, thus keeping their human capital in the industry. As explained below in section A, these two functions of credit may explain why the union survives, even though there is a huge surplus of labor that might be willing to work non-union and why disgruntled writers do not join forces with producers to break the union and drive down labor costs.

As explained below in Section B, fair and accurate determination of the two fundamental features of the credit rules—what kind of credit is given to writers and who gets it—is crucial to the operation of the credit system and to all the labor market functions that rely on credit. As is explained in section C, the many forms of compensation that turn on credit—separated rights, residuals, and bonuses—depend on the WGA's fairness and rigor in administering credits. But, as explained in section D, the WGA does other things to protect the status and creative rights of writers and not all of them involve screen credit.

130. See, e.g., Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 88-92 (2006).

A. *The Guild as a Labor Market Intermediary*

Despite the fact that agents, rather than the Guild, typically determine who is hired as a writer,¹³¹ Guild membership and Guild credit determinations facilitate the employment of writers at many career stages. The WGA has long been acutely aware that most of its members are not working in Hollywood at any given time. Only a sliver of the total number of entertainment industry workers manages to work full-time in entertainment, and the percentage who do has been declining over time.¹³² Some retired Guild members are living off of residuals for work done years or decades ago. Future members are waiting tables (or working in law firms) and hoping to sell their first screenplay. Current members are working as writers, with various degrees of financial and artistic success. Even among the current members, the kinds of jobs that writers do varies enormously among segments of the entertainment industry. For example, writing for theatrical movies and long-form TV is quite different from writing for episodic TV or other types of programs—and writers specialize by genre and by format. Some writers need to be more entrepreneurial (pitching and packaging ideas) and others, such as writer-producers (showrunners), more managerial.¹³³ The WGA survives because it provides something for all of its diverse members and for the diversity of companies that purchase their services or their finished works.

For the aspiring or struggling writer, the WGA is a clearinghouse of information on agents, script registration, training and networking.¹³⁴ It creates a community (or the hope of belonging to a community) in an otherwise solitary and anomic labor market. Guild membership, which is limited to those who have obtained employment in the industry, is a badge of success that allows access to nontrivial cultural capital of being a screenwriter; cultural capital that is particularly important in Hollywood's freelance labor market and in the context of the short-term, project-based nature of filmmaking.¹³⁵

131. See DONALD E. BIEDERMAN, ET AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* 7-10, 28-61 (5th ed., 2007) (discussing the role of talent agents and the law regulating them); Paul McDonald, *The Star System: The Production of Hollywood Stardom in the Post-Studio Era*, in *THE CONTEMPORARY HOLLYWOOD FILM INDUSTRY* 168 (Paul McDonald & Janet Wasko eds., 2008) (discussing the increasing significance of talent agencies in the 1970s).

132. See Susan Christopherson, *Labor: The Effects of Media Concentration on the Film and Television Workforce*, in *THE CONTEMPORARY HOLLYWOOD FILM INDUSTRY*, *supra* note 131, at 157.

133. See Christopherson & Storper, *supra* 8, at 344-45.

134. In negotiations for the 2004 MBA, for example, the WGA proposed the creation of an industry program, jointly funded and administered by producers and the Guild, to train episodic TV writers to work as showrunners (writer-producers of TV series). 2004 Negotiations (on file with WGA).

135. To join the WGA as an Associate Member, a writer must have had "writing employment and/or sales within the Guild's jurisdiction and with a signatory company" within the three years preceding the application. To join as a "Current Member" the writer must have achieved more sustained

For the working writer, the WGA negotiates and administers collective bargaining agreements that guarantee reasonable compensation, plus health and retirement benefits, as well as residuals. In 1948, the WGA became the first major Hollywood talent guild to offer its members, both employed and unemployed, complete group health and accident coverage.¹³⁶ Union-administered benefits and residuals are crucial in a labor market dominated by short-term and freelance employment and punctuated by periods of unemployment.

The WGA also prevents production companies from derailing a career by arbitrarily denying credit. In an industry in which writers move from project to project, a career is created as people move from credit to credit.¹³⁷ Although a writer may be valuable to a project in part because of his past credits create his “brand” as a successful writer, it is also important to both writers and to their prospective employers that screen credits accurately reflect the underlying attributes that matter in hiring decisions.¹³⁸ Moreover, because gender and other stereotypes may significantly harm careers when the writer contracts individually with a company, the Guild’s collective strength may inspire writers who feel vulnerable in individual negotiations to support the Guild even when they disagree with some of its policies or priorities.¹³⁹

Even the most successful writers may benefit from the WGA’s administration of screen credit and residuals, and from the WGA’s constant efforts to enhance the status of writers so that the continual efforts of directors and producers to gain more credit and creative control do not eliminate the status and involvement of writers in the development, production, and promotion of films.¹⁴⁰ Occasionally, a hugely successful figure has resigned his or her membership in the Guild in a fight over screen credit, as George Clooney did in 2008 when the WGA arbitration did

employment for the preceding three years, including employment to write or the sale of a feature-film screenplay or 12 weeks of employment as a writer under the Guild’s jurisdiction on a weekly contract. See *How to Become a Member*, WGAW, <http://www.wga.org/content/default.aspx?id=84> (last visited Oct. 12, 2011). On the significance of the cultural capital of the role of screenwriter, see Wayne E. Baker & Robert R. Faulkner, *Role as Resource in the Hollywood Film Industry*, 97 AM. J. SOCIO. 279, 284-86 (1991) (noting that roles are particularly important resources in the unstable labor market of single project enterprises that characterizes film production).

136. *Writers Guild Giving Insurance Coverage*, DAILY VARIETY, June 4, 1948, at 2.

137. Faulkner & Anderson, *supra* note 8, at 883.

138. See *id.* at 889; Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 ANN. REV. OF SOC. 541 (1999).

139. See Denise D. Bielby & William T. Bielby, *Women and Men in Film: Gender Inequality Among Writers in a Culture Industry*, 10 GENDER & SOC’Y 248 (1996) (documenting a model of cumulative disadvantage of women whereby gender gap in earnings grows as men and women move through their careers as writers).

140. See Nick Madigan, *New Script for WGA’s Leadership: Guild Inviting Members to Tackle Issues*, DAILY VARIETY, June 14, 1999.

not give him writing credit for *Leatherheads*,¹⁴¹ but for the most part successful writers remain in the union even when their market power would enable them to survive on their own.

B. Types of Credit and Who Gets It

The problem of how many people to credit and for what kinds of contributions has vexed the Guild since the beginning. There are at least three interrelated problems: (1) how many writers to credit and whether to give preference to a first writer as opposed to later writers on a project, (2) how to treat writers who also work as production executives, and (3) how to protect the status of writers as authors of films when other powerful figures, especially directors, can also claim to be authors. Most of the controversy over the credit system revolves around these three issues.

1. How to Identify a Writer

Since at least the 1930s, some films have had so many writers work on the script that individual authorship is difficult to accurately ascribe. *Gone With the Wind*, for example, was filmed from a script that “almost every screenwriter in Hollywood” is supposed to have worked on.¹⁴² Nevertheless, since the early days, motion picture studios generally credited only one or two people. As the Academy of Motion Picture Arts and Sciences said of the credits rules created in the 1932 Writer-Producer Code of Practice, the “central idea” was that “the screen author should be publicly recognized along with the director and the producer as a co-partner in the creation of the photoplay.”¹⁴³ In the screen credits this was to be done by concentrating the recognition of one or two writers for each picture, by exploiting the term ‘Screen Play’ as a summarizing phrase to make it the equivalent of authorship of a play or a novel, and by giving the Screen Play credit a better position on the title cards than the credits of the technicians.”¹⁴⁴

When the Guild took over credit determinations, it continued past practice, and since 1948 the Screen Credits Manual has taken the position that “fewer names and fewer types of credit enhance the value of all credits

141. Michael Fleming, *WGA, Clooney At Odds Over Credit*, DAILY VARIETY, Apr. 3, 2008.

142. NORMAN, *supra* note 23, at 200 (F. Scott Fitzgerald, freelancing, “worked on *Gone With the Wind* for Selznick, but then so did almost every screenwriter in Hollywood”); *id.* at 210 (*Gone with the Wind*’s screenplay by Sidney Howard “and half the town, uncredited”).

143. *Revised Administrative Procedure and Reprint of Text of Writer-Producer Code of Practice*, WRITERS BRANCH BULLETIN (Acad. of Motion Picture Arts & Scis.) (July 14, 1934) (on file with WGA). Blacklist AMPAS & Screen Writers Guild Correspondence (on file with with WGA) (includes the 1932 Code and the 1934 proposal for revision of the administrative procedure on credits).

144. *Id.*

and the dignity of all writers.”¹⁴⁵ The MBA for film has long provided that writers are entitled to main title credits (the credits that show before the film) of a size and type similar to that used for directors and producers. Except between 1948 and 1956, when there was an “additional dialogue by” credit in the end credits,¹⁴⁶ additional writers have not been listed in the end credits.¹⁴⁷ At various points a writer has proposed a resurrection of the end credit to acknowledge writers who worked on the script but who do not meet the criteria for credit. Usually the proposal does not involve further subdividing residuals or separated rights; the end credit is proposed just for the sake of attribution.¹⁴⁸ The deliberations by both individual arbitration committees and by the Credits Review Committee recognize that when authorship is collective there are trade-offs between the benefits of attribution to the many people who worked on a script and the benefits of focusing the financial and reputational rewards and punishments on a few people whose contributions are most significant.¹⁴⁹ The Guild has chosen to focus on the few rather than the many, although the choice has remained controversial for decades.¹⁵⁰ The debate about whether to acknowledge additional writers tends to revolve around whether it is better for writers as a group to concentrate attribution on the few—so as to enhance their status vis à vis directors and to portray scripts as being the creative product of defined people as opposed to a committee—or whether it is better to give credit to as many as credit is due. This is a debate that writers have had among themselves since the 1930s. The view that has prevailed is that writers will enjoy the status akin to directors as the author of a film only if and when one or two writers control, and are perceived as controlling, the

145. SCREEN CREDITS MANUAL, *supra* note 19, at 22.

146. *Id.*

147. Occasionally writers have received other credits based on unusual circumstances. Robert Towne, for example, was credited as a “special consultant” on *Bonnie and Clyde* (1967) because Warren Beatty, as the star and producer, wanted him involved as an on-location script doctor. THOMSON, *supra* note 4, at 6.

148. *See infra* note 149.

149. As one arbiter put it in deciding credit on what became an iconic motion picture of the 1970s, to credit the objecting writer “would put four names on the screenplay—which, in this business, wouldn’t help any of them; though of course there is the possible future residual if it ever gets on TV.” That arbiter also remarked: “Why anyone would want a credit on this picture, let alone why anybody would actually film it, I just don’t know.” WGA File of Screen Arbitration. As recently as May 2009, the minutes of the Screen Credits Review Committee reflect deliberation over whether there should be an “additional writing by” credit for writers who contributed significantly but less than the 33% or 50% required to get screenplay by credit. One member said that it is inequitable that people get no credit for significant contributions. Another said that too many credits diminish the significance of all writing credits. Meeting of WGA File Screen Credits Review Comm. (2009) (on file with WGA).

150. For example, in 2000, the Guild polled its members about a variety of issues ranging from their views on the status of writers to their experience with status-based discrimination to their views on whether there should be more or fewer types of credits or whether credit bonuses should be prohibited. 54% of respondents said that there should be more credit for all writers. Credits Poll, in WGA File (on file with WGA).

content of the script and the construction of the story. Yet a minority has long argued that so long as multiple writers are used on projects, it is unfair to credit some while giving others even less public attribution than is given to the caterers, accountants, and most junior technicians.

A logical outgrowth of the commitment to concentrate credit on the few rather than the many has been that the Guild prohibits its members from claiming credit contrary to the final determination, and advises that “it is in the best interest of all writers that certain facts relating to any particular credit determination should remain confidential.”¹⁵¹ As anyone who has been to a Hollywood party knows, the rule is observed in the breach, as writers often claim to have worked on scripts for which they received no credit, and there are no penalties for violating the rule.

As to the rights of first writers versus subsequent writers, the rules have changed over the years. The early credits manuals did not offer increased protections for first writers unless the subsequent writer was a production executive. As the credit system was first drafted, credits were divided into “top” credits, “joint” credits, and “additional” credits. The top credit would usually go to the first writer hired. To obtain a “joint” credit, a writer would have to show that he or she had written fifty percent of the final shooting script. An additional credit would be awarded to a writer who could prove having written thirty percent of the final shooting script.¹⁵²

In 1948, to recognize the contribution of writers hired to polish a script, particularly dialogue, the rules were changed to allow an “additional dialogue by” credit, limited to two writers and subject to automatic arbitration. In 1956, this credit was eliminated and has never been revived since, although proposals to re-introduce it, either in front titles or in end titles, have periodically been made.¹⁵³ A “screen story” or “adaptation by” credit was also introduced in 1948 to distinguish when a writer had written an original story from when she had adapted a story written by another. The screen story and adaptation by credits were originally said to be interchangeable but were given their current distinct meanings in 1956.¹⁵⁴

151. *Credits Survival Guide*, WGA, available at http://www.wga.org/subpage_writersresources.aspx?id=153#9 (last visited Oct. 12, 2011).

152. “Historical Highlights of the Credits Manuals” (on file with WGA).

153. All descriptions of the evolution of the rules from 1948 to 1996 are from two WGAW files: “Historical Highlights of the Credits Manuals,” from a file: Screen Credits: History of the Screen Credit Manual, and Memorandum from Mary Delin to Ann Widdifield & Cathy Reed (June 16, 1995) (on file with WGA) (concerning credit manuals history).

154. The “screen story” credit in 1948 was defined as appropriate when the screenplay was based upon both a story and source material and the story is substantially new or different from the source material. The difference between the screen story and the adaptation credits in 1948 turned on whether the producer was obligated to give story credit to the author of the source material in connection with the source’s contract with the studio, in which case the second writer would be given “adaptation by” credit. *See supra* note 153.

These credits referred to writer(s) who incorporated more than seventy-five percent of the work from a novel or play or writer(s) who remade a movie, respectively. The 1948 rules also allowed a “suggested by a story by” credit when the screenplay did not follow the original story but was unmistakably derived from it. The Guild specifically objected, however, to a “from an idea by” credit.¹⁵⁵

From the start, the number of writers who could get credit was limited by the types of credits allowed and the contribution a writer must make to the final shooting script in order to get credit. Thus, for example, “screenplay by” “is appropriate when there is source material of a story nature . . . or when the writer(s) entitled to ‘Story by’ credit is different than the writer(s) entitled to ‘Screenplay by’ credit.”¹⁵⁶ A screenplay by credit “will not be shared by more than two writers, except that in unusual cases, and solely as the result of arbitration, the names of three writers or the names of writers constituting two writing teams may be used.”¹⁵⁷ The number of eligible writers is limited by the requirement that a writer must contribute more than a specified percentage to the final script. For example, a writer “whose work represents a contribution of more than 33% of a screenplay shall be entitled to screenplay credit,” except “[i]n the case of an original screenplay, any subsequent writer or writing team must contribute 50% to the final screenplay.” The thirty-three percent provision has been in the Screen Credits Manual since 1948.¹⁵⁸ In 1980, first writers in film received protection through a rule providing that subsequent writers on an original screenplay must contribute more than fifty percent to the final screenplay to receive screenplay credit. In the same year, an irreducible story credit for the writer of an original screenplay was introduced. This provision, as it exists today, provides: “in the case of an original screenplay, the first writer shall be entitled to no less than a shared story credit.”¹⁵⁹ In addition, the credits manual distinguishes between writers

155. “Historical Highlights of the Credits Manuals” (on file with WGA).

156. *Id.* at III.A.6.

157. *Id.* at III.B.4.

158. See 2008 MBA, *supra* note 17, at art 13.A.9 § 4.

159. SCREEN CREDITS MANUAL, *supra* note 19, at 22. In television, the rules protecting first writers adopted in the first TV credits manual in 1956 were more elaborate than subsequent rules. In 1962, the television credits manual increased the standards for subsequent writers to receive credit. In 1967 a provision was added to address the division of credit between first writers and subsequent writers. It provided, in part, that a “writer who is the original writer . . . of a teleplay shall be entitled to teleplay credit unless a second writer is determined to be entitled to a sole credit As a general rule for a second writer to receive credit his contribution must consist of changes of a substantial and original nature that go to the root of the drama or comedy, characterization, and content of a teleplay and constitute substantially more than the contribution of the first writer.” The rule then identified the most important elements in a teleplay as being “Construction or structure, i.e. the ordering or internal structuring of scenes so as to affect dramatic values (the ordering or structuring of scenes affecting basic narrative line); “Point of view, style or attitude”; “Characterization or character relationships”; and dialogue. TELEVISION CREDITS MANUAL, *supra* note 126, at 21.

who worked independently (their names are joined by “and”) and those who wrote as a team (their names are joined by “&”). As with all other forms of credit, this is a signal about the degree of creative contribution. And, as with other forms of credit, when writers work as a team they share separated rights and residuals, when writers work independently they divide them. The order in which writers are credited is another signal of status. In 1948, the manual said that the order of names was subject to arbitration due to “the tendency on the part of certain studios to give term contract writers first credit even though another writer has been a major contributor to the script.”¹⁶⁰ In the early days of television, the credits manual acknowledged that writers might negotiate individual contracts to provide more credit than the Guild was able to negotiate collectively. Accordingly, the television credits manual in 1956 stated that the MBA were minimum conditions, and that writers might negotiate more favorable conditions such as “audio as well as visual credit,” “credit to be given next to the producer or director,” or “parity with the producer or director.”¹⁶¹

This entire regime for parceling out credits rests on subjective determinations about the significance of various writers’ contributions. The Screen and Television Credits Manuals specify the criteria arbiters are to use in assessing the degree of contribution. For example, a first writer must have contributed more than thirty-three percent and a subsequent writer must have contributed more than fifty percent of the four important elements of the screenplay, which are specified as dramatic construction, scenes, characterization, and dialogue.¹⁶² But the manuals recognize that the “percentage contribution made by writers to a screenplay obviously cannot be determined by counting lines or even the number of pages to which a writer has contributed. . . . It is up to the arbiters to determine which of the above-listed elements are most important to the overall values of the final screenplay in each particular case.”¹⁶³ Arbiters get to decide what measuring device to use to distinguish between a thirty-three percent and a fifty percent contribution to a screenplay.

2. *The Problem of Writers Working as Production Executives*

The history of the evolution of the writing credits rules for production executives reflects the challenge of treating fairly writers who also work as producers or directors (“hyphenates”) without opening the door to the kinds of abuses by production executives that led the Guild to insist on controlling credit in the first place. Since at least the 1930s, writers have

160. Credits Manual History (on file with WGA).

161. *Id.*

162. *Id.*

163. *Id.* at III.B.4.

sometimes been frustrated by their lack of creative control as scripts are rewritten by producers, and/or by directors. While some frustration is inherent in any collaborative creative process, the power relations between writers on the one hand, and producers and directors on the other, often exacerbate the tension. Writers who wish to have greater creative control have occasionally become entrepreneurial as writer-producers or writer-directors, thus leaving, in some sense, the ranks of labor and joining the ranks of management. (Of course, the question whether directors are labor or management is murky in Hollywood, in that they are hired by producers and have a Guild, just like labor, but many of them function as management.)

A production executive is one who receives credit as the director or as a producer.¹⁶⁴ The original agreement prohibited production executives from receiving writing credit unless the production executive was the only writer.¹⁶⁵ The reason for this is obvious, given the history of the writers' experience with studio moguls abusing credit for self-aggrandizement, and the easiest solution to producer overreaching was simply to ban production executives from receiving writing credit at all. This rule is unfair to writers who also worked as directors or producers on their own films, so beginning in 1948 and continuing over time, the barrier to production executives receiving credit was steadily lowered. However, production executives have been and still are held to a higher standard to prove they were significantly involved in the writing. In addition, the Guild has adopted procedural protections, including arbitration in any case in which a production executive is proposed for credit and a requirement that production executives notify writers of the intent to claim credit.¹⁶⁶ In television, there are no heightened contribution requirements for production executives to receive credit because directors do not claim to be the authors of TV series and nor do most producers, except for writer-producers (showrunners).

3. *The Possessory Credit*

While cinema scholars have debated the auteur theory of film since the 1960s,¹⁶⁷ in Hollywood the authorship claims of directors and producers are

164. A production executive, for purposes of the credit rules, is the director of a film or anyone who works in a producer capacity. SCREEN CREDITS MANUAL, *supra* note 19, at 23. In television, the current definition of a production executive is broader, and includes any employee of the production company customarily hired for or engaging in activities considered part of the managerial part of the company's business, which includes story editors, story supervisors, or any other person who represents management in dealing with writers. TELEVISION CREDITS MANUAL, *supra* note 126, at 24.

165. "Historical Highlights of the Credits Manuals" (on file with WGA).

166. SCREEN CREDITS MANUAL, *supra* note 19, at 23.

167. Auteur is French for author. It refers to the notion that films, like books, have an author whose artistic vision is reflected in the work, and directors usually claim this position and the credit for

far older. Today the auteur theory provides a framework to understand the status grievances of writers, and its predominance in film schools may spur young directors to claim credit that they might not previously have claimed. Whether and to what degree, the auteur theory worsened screenwriters' working conditions or status within the industry is unclear.

The conflict between writers and directors over authorship of films has focused on the practice in many motion pictures of having a credit at the beginning of a film and in promotional materials saying it is "A Film By" or a "A __ Film," usually referring to the director of the film.¹⁶⁸ This "possessory credit" is among the issues that most exasperates writers. In 1940, the Writers Guild tried to bar anyone but the writer from claiming authorship of a film, but failed to secure an express contractual provision limiting the possessory credit. In 1963, the WGA did get a contract term in the MBA with the Alliance of Motion Picture and Television Producers (AMPTP) prohibiting use of the possessory credit by anyone who had not written the script. In 1967, the Directors Guild of America (DGA) insisted to the AMPTP that the WGA's control over the possessory credit violated directors' rights, and even initiated inconclusive litigation against the AMPTP and the WGA over it. In 1970, the WGA agreed to permit some directors to use the possessory credit, believing that its use would be limited to a handful of extraordinarily accomplished and marketable directors, such as Alfred Hitchcock. Whatever the intent of the parties in 1970, the use of the possessory credit expanded dramatically in the years that followed. In 1981 the DGA got AMPTP to agree that directors would be given "a film by" credit in outdoor advertising if the ad contained more than six credits. As the years went by, the WGA came to believe that a possessory credit could be claimed by, as one irritated writer put it, "any film school grad who could bargain for it." Worse, from the writers' perspective, the possessory credit expanded beyond directors to producers. And once producers began to routinely claim the credit, even some directors began to complain about the possessory credit.

In the negotiations for the 2001 MBA, the WGA unsuccessfully attempted to limit the use of the possessory credit.¹⁶⁹ Although the DGA

the authorship of the film. See DAVID BORDWELL & KRISTIN THOMPSON, *FILM ART: AN INTRODUCTION* 33, 475 (9th ed. 2010) (discussing the meaning and origins of the auteur theory of film authorship and the reasons why directors rather than writers are typically deemed auteurs of film).

168. This history of disputes over the possessory credit discussed in this paragraph is drawn from Jesse Hiestand, *Whose Movie Is It Anyway?*, *HOLLYWOOD REP.*, Mar. 31, 2005; David Robb, *A Dispute by WGA and DGA Over Film Credit*, *DAILY VARIETY*, Aug. 2, 1999 at 1; Notice from WGA to WGA Members (June 4, 2001) (on file with WGA) (explaining negotiations for and provisions of 2001 MBA, including efforts to get AMPTP to limit use of possessory credit).

169. Notice from WGA to WGA Members (June 4, 2001) (on file with WGA) (explaining negotiations for and provisions of 2001 MBA, including efforts to get AMPTP to limit use of possessory

expressed concerns about the proliferation of possessory credits by producers, ultimately the WGA, the DGA, and the companies were unable to reach an agreement that respected the DGA's desire to institutionalize the use of the possessory credit for directors, to limit and regulate the use of it by producers, and to sharply limit it, as sought by writers.¹⁷⁰ In 2004, the DGA unilaterally overhauled its own credit guidelines to limit when a first-time director can receive a possessory credit and eliminating the outdoor advertising rules. Many in the WGA believe, however, that the possessory credit is still unfair to writers, is claimed too often by directors, and that the 2004 changes did not fix the problem, but the WGA cannot prevent the DGA and the AMPTP from using it. In an effort to convince the DGA to rein in the use of the credit, the WGA continues to study the use of the possessory credit, showing that between three-fifths and three-quarters of all films under WGA jurisdiction released over the last twenty years have possessory credits.¹⁷¹

C. Credit and Compensation

Apart from the very great reputational significance of being seen as a credited writer, and its impact on the job prospects of the writer, screen credit determines the writer's share of the copyright's value in the form of separated rights and residual payments. The WGA fought very hard to establish both of these potentially valuable rights for its members so that they would share in some of the value of the copyright that the employer gains through the work for hire doctrine. In addition, increasingly writers are hired pursuant to individual contracts that provide a substantial financial bonus if the writer is ultimately determined to be entitled to sole or shared screen credit. Because these three very valuable forms of economic benefits turn on screen credit, a system that was originally designed solely for the purpose of attribution has become a system that affects writers' compensation in very direct ways.

1. Separated Rights

Separated rights are now part of the bundle of rights encompassed in a film or TV copyright. They are established in the MBA and, under the terms of that agreement, may not be negotiated in a writer's individual contract. The separated rights provision allows the writer of an original story or screenplay to retain some rights to exploit the story elements other

credit; this document was sent to all WGA members, along with the MBA negotiated in 2001, seeking WGA membership ratification of the contract).

170. *Id.*

171. 1998, 2005, 2007 Possessory Credits (on file with author and with WGA). Vanity Credits 1994-1997, 1999 (on file with WGA).

than through the film or TV show. To be eligible for separated rights, the writer must receive “story by,” “written by” or “screen story by” credit on a motion picture,¹⁷² or “story by,” “written by” or, in certain circumstances, “television story by” credit on a television movie, or “created by” credit on an episodic television series.¹⁷³

The process that led to the WGA’s negotiation for separated rights, and the Guild’s crucial role in coordinating and facilitating contracting over them, began in the 1930s when some writers opposed the practice of writers selling the copyright to a script to employers. They thought writers ought to lease their scripts to the studios so that the writer would have the right to develop a script which the studio decided not to put into production.¹⁷⁴ One legal problem with this strategy was that studios believed that copyrights were not divisible. Studios feared that purchasing only a license to use the copyright might void the copyright entirely.¹⁷⁵ In the 1951 MBA, the Guild negotiated the predecessor of the separated rights provisions,¹⁷⁶ which allowed writers to seek to retain book publishing rights in individual negotiations and agreed that separate consideration would be payable to writers when companies acquired publication, stage and radio rights.¹⁷⁷ One of the chief architects of the regime was Melville Nimmer, who was then the general counsel of the WGA and later became known for his encyclopedic work on copyright law. In 1960, the WGA sought and obtained rights in media other than book, stage and radio.¹⁷⁸ The separated rights provision has remained without substantial change since.¹⁷⁹

In the 1930s and 1940s, dividing up the rights in ideas and characters in a script was less threatening to studios than it later became. Although the studios owned the copyrights to the work, the business model of motion picture production at the time did not demand total control over the ideas. Motion picture production did not then entail possible sequels or tied-in marketing campaigns of novelizations and merchandising, so the main

172. 2008 MBA, *supra* note 17, at art. 16.A.3. The rules governing separated rights are explained in the Separated Rights section of the Writer Resources page of the WGA website.

173. *Television Separated Rights*, WGAW, http://www.wga.org/content/subpage_writersresources.aspx?id=124 (last visited Oct. 15, 2011) (citing 2008 MBA, *supra* note 17, at art. 16.B.1.).

174. Grace Reiner, *Separation of Rights for Screen and Television Writers*, L.A. LAWYER 28, 28 n. 6 (Apr. 2001).

175. *See* Commissioner v. Wodehouse, 337 U.S. 369 (1949). The history of the separated rights provision, and the legal arguments about them in the 1950s until the 1976 Copyright Act made copyrights divisible, is explained in Reiner, *supra* note 174. *See also* NIMMER ON COPYRIGHT, *supra* note 20, at ch. 5.

176. LOVELL & CARTER, *supra* note 39, at 42-43.

177. Reiner, *supra* note 174, at 30.

178. *Id.* at 30-31.

179. The current separated rights provision appears in article sixteen of the 2008 Theatrical and Television Basic Agreement. 2008 MBA, *supra* note 17, at art. 16.

aspect of controlling a screenplay was complete at the time the picture was filmed. Similarly, early television production envisioned a one-time use of the script rather than the series and related series. Some of the major writers in both film and television had successful careers writing plays, short stories and novels,¹⁸⁰ and could negotiate to protect their own reputations and the literary rights to the material they wrote for the movies or TV. However, a case occasionally arose as to whether a later work infringed a copyright to a film, such as the litigation over whether a radio show that Dashiell Hammett created based on the Sam Spade character from his novel *The Maltese Falcon* infringed the copyright to the movie based on the novel.¹⁸¹ In general, however, sequel rights and character rights were not considered crucial.

That changed with the rise of the blockbuster in the 1970s and 1980s, which could be promoted by tied-in marketing and which could generate the desired return on the massive investment of production costs through an emphasis on sequels, franchises, novelization, and merchandising. In the same era, technological change multiplied the number of formats or media through which a motion picture or television show could be disseminated. These major economic changes increased the possibilities for mining the ideas in a single script for use in spin-offs. The number of sticks in the bundle of rights represented by the copyright in a screenplay for a motion picture or a television show grew, as did the entrepreneurial opportunities for the owner of the copyright. Whereas in the 1950s, a television production company might be willing to allow the writer to keep all rights except the use of the script on a single TV show anticipated to be shown only once, by the 1980s possibilities grew for conflict over the use of the script or its ideas in multiple formats.

Today, separated rights for writers of film scripts include the right to publish the script or book(s) based on the script subject to a waiting

180. Among the most well-known of Hollywood lore are the great novelists, short story writers and playwrights who worked in Hollywood in the 1930s, including F. Scott Fitzgerald, Bertholt Brecht, and William Faulkner. Less well known examples include P.G. Wodehouse, who wrote dialogue for *Those Three French Girls* (1930), *Additional Credits*, HOLLYWOOD REP., Sept. 19, 1930, at 4, and George Bernard Shaw, who negotiated an arrangement allowing him to supervise the film production of his play, *How He Lied to Her Husband*, *Bernard Shaw as Supervisor*, HOLLYWOOD REP., Sept. 4, 1930, at 1.

181. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954) (contract between Warner Brothers and Dashiell Hammett, author of *The Maltese Falcon*, and Knopf, publisher and owner of copyright in the book, authorizing use of the *Maltese Falcon* in movies, radio and television did not prohibit Hammett from granting CBS the right to use characters from the book in radio show; suggesting in dictum that the sale of the copyright to a story containing a character does not foreclose author's later use of the character unless "the character really constitutes the story being told"); *but see Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995) (advertisement featuring a handsome, debonair man and an attractive female companion in a speeding sports car escaping from a grotesque villain through use of intelligence, dry wit, and clever gadgets infringing the copyright in James Bond stories).

(“holdback”) period.¹⁸² The company may publish a novelization in conjunction with the release of the film but must give the writer the option to write the novelization and must, in any event, pay no less than the WGA minimum for the right to publish it. The writer is entitled to produce a stage version of the material, to payment for any sequels or series made based on the film, to do the first rewrite of a script, and to meet with a production executive before being replaced as a writer. Finally, a film writer with separated rights is entitled to buy back unproduced material from the company within five years at the price the writer was paid for the script or the writing services.¹⁸³

In television, the separated rights provisions are slightly different and, as in film, are quite complex. The company has the exclusive right to produce the material for a period of years, and then the right to produce the material becomes a non-exclusive shared right between the company and writer.¹⁸⁴ The writer has the right to buy back unproduced material after a period of years. The writer credited as the series creator has the right to sequel payments for each episode of a series that is produced (in addition to residuals), and if the company does not produce a series within the exclusivity period then the series right reverts entirely to the writer. As in film, a television writer with separated rights enjoys the right to a compensated rewrite, and the right to produce the material for the stage, for a motion picture, or for radio, to publish a book, and to create interactive programs.¹⁸⁵ In both film and television, when writers share the qualifying credit (“written by,” “story by,” or “screen/television story by”), they share the separated rights.¹⁸⁶ Separated rights have been extended to material created for or used in new media, including the internet.¹⁸⁷

From the standpoint of companies, one function the Guild plays in simplifying separated rights is coordinating which writers are eligible to claim them. If it were not for the fact that separated rights are tied to screen credit, and screen credit is determined only when a project is finished and is limited to two writers, production companies would have a very complicated set of individual negotiations with writers at the time of hiring. Each writer would presumably negotiate for separated rights. A project that hired multiple writers might find itself very limited in its ability to attract talent late in the writing process if the separated rights had already been allocated to an earlier writer. Even if the producer could persuade a sixth or

182. 2008 MBA, *supra* note 17, at art. 16.

183. *Id.*

184. 2008 MBA, *supra* note 17, art. 16.B.

185. *Id.*

186. 2008 MBA, *supra* note 17, at art. 16.A.7.

187. *Id.* at art. 16.

tenth writer to sign on with the understanding that he or she would be sharing the separated rights with many previous writers, the various writers (and the production companies that might later contract with them to exercise the separated rights) would find themselves in a complicated negotiation over whether or how each one could exercise the right. It is possible that separated rights could be treated like joint ownership of other copyrights, which allows each joint owner to independently exploit the copyright so that all the writers could write and sell, say, a novelization of a movie. But publishers and writers might find the value of the novelization limited both by the possibility of multiple similar novelizations being published, and also by the possibility that the least talented or industrious of the joint owners might be the first to market, thus damaging the value of the “brand” in the eyes of later publishers and consumers.

2. *Residuals*

Residual payments for re-use of material are more economically significant for most writers than are separated rights. As with separated rights, the WGA has been indispensable in designing and administering them. In 1953, the WGA first negotiated an agreement requiring the payment of for re-use of material written for television, and in 1960 the residuals requirement was extended to the re-use of film material shown on television.¹⁸⁸ At the time, residual payments were considered quite novel by lawyers and legal scholars because they are not royalties for use of a copyrighted work paid to the copyright owner, but are instead payments for services rendered in making a product that are calculated based on the sales of the product.¹⁸⁹ Over time, residuals became an established feature of the industry and are perennially important in collective negotiations. Residuals for TV was the Guild’s top demand in the 1959-60 negotiations,¹⁹⁰ and residuals for new media was the principal issue leading to the 2008 writers

188. Cf. Robert W. Gilbert, “Residual Rights” Established by Collective Bargaining in Television and Radio, 23 LAW & CONTEMP. PROBS. 102, 103 (1958) (describing the residual rights established under collective bargaining agreements and arguing that residuals are a novel form of payment for services rendered).

189. See *id.*

190. Blacklist Credits Comm. Memos and Letters 1950s (Mar. 11, 1959) (on file with WGA).

strike.¹⁹¹ As with separated rights, the right to residuals depends on being awarded screen credit.¹⁹²

Residuals are foundational to the Hollywood labor market and the system depends on the WGA to function. By negotiating uniform terms of eligibility, the WGA simplifies individual hiring negotiations. This is particularly important when multiple writers have worked on a project because the division of rights among the writers would be a difficult task for individual writers to arrange in their separate negotiations with the production company. Writers benefit from the WGA's calculation and collection of residuals. The Guild investigates claims of non-payment or under-payment and it arbitrates claims to collect them. Individual writers could not administer the system on their own because they lack the technical ability to track re-use of their work. The WGA solves the problem by handling residuals on a collective basis, reducing transactions costs for the writer and the production company.

In a market in which the earnings on work are likely to be paid out over a long period of time (as is the case with the re-use of TV programs and movies), it makes good sense to design a compensation scheme that allows the buyer of the creative work (or the employer) to pay the creator (the writer) over a long period of time. Moreover, particularly when the buyer/employer cannot predict whether a work will become popular and generate revenue over the long haul and/or the buyer/employer does not have enough cash to pay a generous salary at the time the work is done, future payments measured by product sales are thus a sensible compensation scheme.

Equally as important, residuals smooth out the irregularities in income associated with the fact that few writers are continuously employed.¹⁹³

191. Carl DiOrio, *MGM Lets UA Off on Cruise Control*, HOLLYWOOD REP., Jan. 8, 2008 (describing interim agreement between WGA and United Artists announced on the sixty-fourth day of the WGA strike and providing residuals for new media); see Carl DiOrio, *Script Goes as Planned: WGA Signs Off on New Deal*, HOLLYWOOD REP., Feb. 27, 2008 (noting that WGA members approved new contract with Association of Motion Picture and Television Producers, providing pay hikes and separated rights on entertainment projects exploited on ancillary platforms, including when Web-based content spawns film or TV spinoffs).

192. In film, a writer who receives as "written by," "story by," "screen story by," "screenplay by," "adaptation by" or "narration written by" credit is entitled to residuals. In TV, a writer who receives "written by," "story by," "television story by," "teleplay by," "adaptation by," "narration written by," or "created by" credit is entitled to residuals. WAG, INC., RESIDUALS SURVIVAL GUIDE 5 (2005), available at http://www.wga.org/uploadedFiles/writers_resources/residuals/residualssurvival05.pdf. See also 2008 MBA, *supra* note 17, at arts. 13-15.

193. See Anthony A.P. Dawson, *Hollywood's Labor Troubles*, 1 INDUS. & LAB. REL. REV. 638, 640 (1948) (lamenting the difficulties caused by the fact that "[t]he movie labor market is casual in the fullest sense of the word" and quoting screenwriter Ring Lardner, Jr. as saying that "while the situation is bad enough if you think of approximately 1500 writers competing for some 421 jobs (as of July 1, 1947), consider how it looks if you estimate that at least 200 of our members are almost constantly

While this obviously benefits writers, it also benefits employers because residuals allow writers to stay in the labor market pool rather than leaving the industry and taking their considerable industry-specific human capital with them.

3. *Credit Bonuses*

A third way in which writers receive additional compensation when they receive screen credit is the credit bonus. A credit bonus is a provision of an individual hiring contract stating that the writer will receive a bonus if the writer is determined to get screen credit. In essence, if the script is not substantially rewritten during the production process, the writer will be paid a bonus.¹⁹⁴ The purpose of the credit bonus is to reward the writer whose script is good enough that it does not need significant rewriting (or who is fortunate enough to work on a project in which the production executives decide not to drastically revise the script). Unlike residuals and separated rights, credit bonuses are controversial among writers.¹⁹⁵ But because they are popular with producers, they exist, and the Guild facilitates their use.

The increase in the size and prevalence of credit bonuses has placed stress on the credit system. The more money that is tied to credit, the greater the incentive for various writers on a project to challenge the tentative writing credits. As one writer said in 2002 at a roundtable held by the Guild to discuss credits issues, if writers knew that the money they received for writing was not to be affected by the final credit determination, they would have fewer incentives to arbitrate over credit and no incentive to rewrite unnecessarily or to try to convince the director to throw out an earlier version of the screenplay.¹⁹⁶ This is true of residuals too, but because credit bonuses are paid in a lump sum up front and do not depend on the success of the project, writers appreciate the significance of a bonus

employed. Then we have the far grimmer picture of about 1300 writers competing for little over 200 jobs.”)

194. The credit bonus term in a 2001 contract by which a studio hired a writer (by “leasing” the writer’s services from the corporation owned and managed by the writer) provides: “If the Picture is produced as a feature-length theatrical motion picture and Artist receives sole ‘screenplay by’ or sole ‘written by’ credit therefore ..., then Lender shall be entitled to receive a bonus in the amount of \$500,000 If Artist receives shared ‘screenplay by’ or ‘written by’ credit ..., then in lieu of the foregoing, Lender shall be entitled to receive a bonus in the amount of \$75,000.” The same agreement also provided that if the writer received sole “screenplay by” or “written by” credit, the writer’s company (“Lender”) would receive contingent compensation in the amount of 5 percent of 100 percent of the “Defined Contingent Proceeds.” The contract provided that the writer would be paid \$225,000 for writing in addition to the bonuses. WGA File of correspondence between a writer and the WGA concerning litigation filed by the writer challenging the credit determination on a major motion picture of the 2000s.

195. *WGA Credits*. WGA CREDITS FORUM (WGA), Aug. 2002, at 1 (on file with WGA) (reporting a Roundtable that occurred on April 30, 2002).

196. *Id.*

at the time of employment rather than as a possible payoff that may occur in small increments in the future.

The WGA's unilateral control over credit determinations shifts responsibility for maintaining an expensive and controversial system from the production companies to the writers whose careers are most directly affected by it. It also allows the production companies to shift the blame for inequities in compensation to the writers. As one writer complained:

The Guild becomes the bad guy that sits down, looks at all the final drafts and says: 'This guy won, he got the most stuff in the script. This guy didn't do enough; doesn't matter how hard or long he worked. . . . The studios use that to their advantage saying, 'You'd better do that free rewrite or maybe you won't get credit and residuals [and a bonus].' The Guild gets the blame if they turn around and fire you anyway and have you completely rewritten. They don't have to pay you because the Writers Guild says you don't deserve credit.¹⁹⁷

Writers have periodically proposed that bonuses not be tied to credit so that every writer gets the bonus if the film is made, thus removing the financial incentives for writers to re-write the work of other and providing a financial disincentive for studios to hire multiple writers.¹⁹⁸ The studios obviously oppose such changes and are reluctant to agree to them in individual negotiations and certainly not in collective negotiations.

The interaction of screen credit (a collectively-bargained right) with credit bonuses (an individually-bargained right) illustrates that a union can play a role in facilitating individually-differentiated transactions. Writers would not accept contracts from production companies promising credit bonuses if they did not trust the WGA credit determination process to fairly protect their interests. If studios determined credit unilaterally, as was the case for all movies prior to 1942, producers would have an incentive to opportunistically grant screen credit to the writer with the smallest contractual credit bonus. Writers would figure this out and demand a larger up-front payment. A producer negotiating with a writer for a script or for writing services who is uncertain as to the quality of the work or the writer's abilities would not have the option of negotiating deferred compensation to be calculated when the work is done. On average, depending on whether producers or writers were more risk averse or better at predicting the worth of writers' work, writers might be paid less or more. Credit bonuses allow both parties a way to tie compensation to the quality (or utility) of the work.

In sum, the rise of flexible production in Hollywood transformed enterprise organization and labor relations, but it did not destroy the union

197. *Id.*

198. *Id.*

because the union adapted effectively to the change.¹⁹⁹ As movies adopted a flexible production model relying on freelance labor, screen credit, separated rights and residuals grew in significance for writers. The Guild proved crucial in administering these forms of intellectual property rights, which enhanced hiring and script sale transactions for both producers and writers. In addition, the Guild continued to negotiate for improved compensation for writers, thus shoring up the loyalty of the work force.

D. Credit and the Status of Writers

Among non-economic issues, probably none has been more important to writers than being treated as authors at every stage of the process from initial conceptualization to promotion and publicity. The Guild negotiates over many issues of status and recognition, from the seemingly trivial (insisting that every author who has worked on a project be listed on the cover sheet for all literary material read by anyone in the pre-production process,²⁰⁰ or the right to attend premieres) to the major (such as the tendency of directors and producers to claim for themselves the mantle of the author of a motion picture).

Beginning in the 1930s, the Guild negotiated terms to protect the status and creative control of writers. The Guild sought through the 1934 Code and the Academy to oblige producers to give writers the names of all other writers working on the same material, to prohibit on writing “on spec” (meaning without payment, hoping to sell it to a producer), to pay first-class transportation and living expenses on location, and to give writers receiving screen credit an opportunity to see the rough cut and a sneak preview.²⁰¹ During the 2001 negotiations over a new Minimum Basic Agreement, the Guild made its most recent push to enhance the stature of authors in the culture of film and long-form television production.²⁰² The 2001 MBA required that for all motion pictures and long-form television, writers must be listed on the call sheet adjacent to the listing of directors or producers during the production process and be invited to attend cast/crew events.²⁰³ This was thought to make it more likely that the writer would be notified when the script went into production and be recognized by the cast, the crew, and others in the production process as an important creator of the

199. See Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 663, 664-74 (1994).

200. 2004 Negotiations – Creative (on file with WGA) (showing WGA proposed amendments to Article 37 of MBA).

201. LOVELL & CARTER, *supra* note 39, at 41.

202. Notice from WGA, *supra* note 168.

203. Negotiations (2001) (on file with WGA); Summary of Producers’ Creative Rights Proposals (2001) (on file with WGA); Memorandum from Cathy Reed to Ann Widdifield & Jane Neufeldt (Jan. 18, 2001) (on file with WGA).

film. Directors were obliged to talk to writers before filming and before hiring any other writer. In addition, the 2001 MBA required that all credited writers be invited to attend (at company expense) premieres, festivals, and junkets and that companies must provide information about credited writers in press kits so that the audience and critics might understand “just how crucial the writer is to the film they are viewing.”²⁰⁴ All of this was portrayed as essential to allowing the writer to be regarded by the director, the cast, and the public as an author of the motion picture.²⁰⁵

In television, the relationship between screen credit, compensation, and the status of writers is in some respects more complicated than in film. Lead writers receive authorship credit of TV series that directors do not (the “created by” credit). Yet, until recently, first year staff writers on episodic dramatic programs were not eligible for credit. Although the Guild ultimately relented, the Guild initially opposed producers’ proposals to allow staff writers to receive credit on the grounds that affording screen credit to staff writers would remove the incentive to promote the writers to positions of higher pay and greater responsibility after the first season of employment.²⁰⁶

Both in economic terms and in terms of the culture of film and television production, the Guild is an indispensable intermediary in a complex labor market. It has enabled the operation of an intricate but mutually beneficial system of profit-sharing between writers and employers. It has on many occasions waged prolonged strikes to grab a greater share of Hollywood’s profits than employers initially wanted to give. Throughout, the Guild’s management of credit is the foundation on which the whole elaborate architecture of profit-sharing rests allowing it to survive both the successful and the failed strikes without debilitating defections of its members or anti-union efforts from the studios.

III.

CREDIT AND THE MARKET FOR IDEAS AND PRODUCTS

Screen credit and the rights that turn on it affect the decisions of production companies as well as the careers and compensation of writers. Hollywood constantly must match investment capital with human capital in a volatile, unpredictable, and diverse industry.²⁰⁷ There is little sustained analysis of the relationship between Hollywood labor economics and

204. *Id.*

205. Notice from WGA, *supra* note 168.

206. Negotiations (2001) (on file with WGA). Summary of Producers’ Creative Rights Proposals (2001) (on file with WGA). Memorandum from Cathy Reed to Ann Widdifield & Jane Neufeldt (Jan. 18, 2001) (on file with WGA).

207. Faulkner & Anderson, *supra* note 8, at 883.

producer decisions,²⁰⁸ nor of the market for ideas and its relationship to hiring decisions in Hollywood.²⁰⁹ What is known, however, suggests that the regime of deferred compensation resting on screen credit aids production companies and investors in deciding which projects to pursue. A number of features of the WGA facilitate the matching of investment capital to human capital. The reliability and neutrality of the credits determination process facilitates sharing ideas, getting investment capital to finance productions, and marketing products within the industry and to consumers through branding. The WGA thus plays a significant, albeit indirect, role as an intermediary in the market for ideas that lead to projects and in creating a market for the completed projects.

A. Sharing

At the first stage of developing a project, when production companies and writers must share ideas, the WGA operates a private intellectual property system that facilitates trust. The WGA script registry establishes authorship for thousands of writers who write film and TV scripts on spec. As Professor Merges pointed out some years ago, parties sometimes contract in the absence of property rights in ways that create norms that operate as a form of property rights, thereby facilitating transactions.²¹⁰ Merges offered the WGA script registry as an example of this phenomenon and argued that policy makers should embrace private intellectual property systems like the script registry “when they work tolerably well and do not have devastating anticompetitive effects.”²¹¹ Since then, at least one scholar has questioned whether the script registry is really necessary, inasmuch as it largely duplicates the effect of copyright registration and offers less legal protection for writers than copyright.²¹² In my view, the script registry survives because it is widely accepted by the relatively close-knit community of Hollywood as the way to prove authorship of a work, even

208. One economic analysis of the relationship between contracts for creative labor and the output of Hollywood can be found in RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 88-90, 103-42 (2000).

209. *But see* William T. Bielby & Denise D. Bielby, “All Hits Are Flukes”: *Institutionalized Decision Making and the Rhetoric of Network Prime-Time Program Development*, 99 AM. J. SOC. 1287 (1994) (analyzing the evaluation of new television program ideas for the 1991-1992 season, and noting interdependence among suppliers, networks, and markets in this process); Hong Luo, *When to Sell Your Idea: Theory and Evidence from the Movie Industry* (unpublished manuscript) (on file with author) (providing economic analysis of a sample of 1,638 movie scripts sold between 1998 and 2003 concluding that writers’ screen credits for past work affects the market for sale of ideas and finished scripts).

210. Merges, *supra* note 11, at 1361-62.

211. *Id.* at 1391.

212. *See* John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1450 (2009) (arguing that “there is no good reason to opt for the WGAW’s registration system over that of the Copyright Office”).

though copyright registration provides more legal rights.²¹³ The registry is valuable to writers and to producers who fear litigation for misappropriation of ideas and it therefore facilitates the sharing of ideas that is a foundation of the Hollywood markets for labor and ideas.

The script registry was first established by writers in 1927 to prevent controversies over which writer had first developed a script, idea, character, story, setting, or dialogue. At the time, Hollywood was a small and insular community, in which ideas circulated quickly and disputes over the origin and ownership of scripts and ideas were common. The script registry emerged as a collaborative solution to a collective problem. Registration of scripts under the copyright system, which at the time was a slow and cumbersome process involving payment of a fee and mailing a script to the Library of Congress in Washington, DC, would not have solved the problem writers and studios faced in sharing ideas because the mail was slow and neither writers nor studios wanted to wait for completion of the registration process before discussing ideas and reading scripts. Moreover, when disputes inevitably arose over who wrote a script or developed an idea, the Copyright Office was of little help in resolving them, whereas the WGA will testify who registered an item and on what date.²¹⁴ And, then as now, ideas could not be copyrighted, but often it was the idea that had real value. Thus the script registry was a fast, flexible, and local alternative to copyright registration. It protected writers against other writers and against production executives. It also protected production companies against copyright infringement and idea submission litigation brought by disgruntled writers.

Since 1927, the script registry has worked as a form of copyright registration proving the date on which a particular version of a screenplay, treatment, or story idea was completed and registered. For a small fee, both Guild members and non-members may register a script or other work. Any file, including scripts, treatments, synopses, and ideas, whether intended for film, television, radio, commercials, or the internet, may be registered. The WGA also accepts stage plays, novels, short stories, poems, commercials, song lyrics, drawings, music, and any other work that can be digitally stored.²¹⁵ A registration is valid for only five years and the registrant must renew the registration every five years or the WGA will destroy the records and registration is useless.²¹⁶

213. See *Numbers*, L.A. TIMES, July 18, 19789 at G7 (“if you are in any way serious about writing professionally for the screen, registering your work with the WGA is a must.”).

214. See *infra* text accompanying note 217.

215. See *WAGW Registry: Frequently Asked Questions*, WGA, <http://www.wga.org/registration/regfaqs.html> (last visited Oct. 15, 2011).

216. *Id.*

Registration with the WGA establishes that an item existed in a particular form in the possession of the person who registered it on the date of registration, but it does not establish authorship or originality. Unlike the Copyright Office, the WGA does not check to see whether a registered script is original or whether the person who registers it is really the author. Anyone who comes across a script could register it. One co-author cannot prevent another from registering a script in solely her own name. Yet the script registry has advantages over copyright registration. For example, it is faster.²¹⁷ Also, the item registered need not be copyrightable, so one can register an idea, whereas copyright registration requires the person registering to claim that the work registered is eligible for copyright, which ideas are not. Whether or not these advantages really matter, what is most important is that the script registry is widely accepted in Hollywood as proof of authorship. Combined with this, there's an *in terrorem* effect on non-legally trained producing personnel—their assumption that registration has protective meaning deters them from infringing and thereby actually confers meaning on registration.

Unlike copyright registration, which shows priority of creation *and* is a precondition to recovering full remedies (in particular, statutory damages and attorney's fees) in copyright infringement suits, the script registry establishes only the date on which a particular work was registered and the exact form of the work on that date. Neither the WGA nor the script registry offers dispute resolution mechanisms or remedies for copying registered works. The registry's principal use in copyright infringement litigation is to show that an allegedly infringed work was complete in a particular form on a particular date. WGA staff will testify as to the date of registration to offer proof of the existence of a particular work in a particular form on the date of registration and the registry has been accepted by courts as evidence of such.²¹⁸ The plaintiff still must prove that the defendant had access to the work and that the allegedly infringing work is so similar as to show infringement. Many frustrated screenwriters who believe that a film copied their script fail to prove either access or substantial similarity or both.²¹⁹ So neither the WGA nor copyright registration is sufficient protection against the actual or perceived

217. It can take six weeks to six months for the Copyright Office to issue a registration, although one could use proof of receipt of the registration as some evidence, but without the ability to offer testimony as to the identity of the receipt with the item that is to be registered, the proof is of limited evidentiary value.

218. See, e.g., *Bauer v. Yellen*, 548 F. Supp. 2d 88, 94 (S.D.N.Y. 2008) (finding evidence that defendant had deposited five versions of a script in the script registry prior to the date on which defendant first had access to plaintiff's script sufficient to sustain summary judgment in a copyright infringement action on the issue of access).

219. See, e.g., *Cassese v. Fox Broad. Co.*, 2008 WL 4605687 (Cal. Ct. App. 2008) (idea theft case for TV show format concept).

infringement of a work. Moreover, because the California law on misappropriation of ideas is not very plaintiff-friendly, the script registry by itself does not protect writers from idea theft.²²⁰

As copyright registration has become easier and offers more legal rights in the event of copyright infringement, the persistence of the script registry has mystified some copyright scholars.²²¹ It is true that WGA registration could be partially supplanted by copyright registration, but not entirely because ideas are not copyrightable, and it is the idea rather than its particular expression that often has value in Hollywood.²²² Protection for ideas could in theory be established by the so-called “poor man’s copyright registration” (the author mails herself a copy of her work via certified mail and does not open the envelope upon receipt). Because the script registry is more secure (one can steam open an envelope sent to oneself but one cannot break into the WGA files), it is more reliable. Moreover, proof of the date of registration and the content of the registered item does not depend on the testimony of the person who claims idea theft—a WGA official will testify if necessary.

The real significance of the script registry is in shaping behavior, not in affecting litigation outcomes for copying ideas. The WGA West receives approximately 50,000 scripts per year and the WGA East receives another 11,000.²²³ It is industry custom and practice for the writer to put “Re. WGA” and the registration number on the cover page of a spec screenplay, whereas it is not customary to include a copyright notice. Many agents and production companies refuse to look at a script or treatment that has not been registered.²²⁴ Indicators of the norms governing WGA registration

220. One who submits a story idea or concept to production executives with the expectation of payment if the idea is used can technically recover under California law. *See, e.g.,* *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956). Yet, such claims are often difficult to prove because it is difficult to show that the defendants used the plaintiff’s idea rather than coming up with a similar story or concept on their own or from another source. *See generally*, Arthur R. Miller, *Common Law Protections for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703 (2006). On the development of the law of idea submissions in California generally and Hollywood specifically, see Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA ENT. L. REV. 9 (1994); Melville B. Nimmer, *The Law of Ideas*, 27 S. CAL. L. REV. 119 (1954).

221. *See* *Tehrani*, *supra* note 212, at 1450 (arguing that “there is no good reason to opt for the WGAW’s registration system over that of the Copyright Office” because only copyright registration allows for the recovery of remedies under the Copyright Act).

222. And, of course, as explained above, *supra* note 220, a company may face liability for misappropriation of an idea even if the idea is not copyrightable and the use of the idea would not constitute copyright infringement.

223. Dave McNary, *Inside Move: Unmade Screenplays Mounting*, DAILY VARIETY, May 18, 2003 (noting that, despite heaps of unproduced scripts languishing in Hollywood, the script registry is receiving record numbers of submissions, perhaps due to the new ability of writers to register online, which a WGA administrator said accounted for half of all registrations).

224. *See* Memorandum from Bezdek Law to the WGA & Copyright Office (on file with author) (indicating that “Many agents and studios will not look at a script that has not been registered with the

include the content of form contracts and the plethora of how-to guides for aspiring screenwriters. Form contracts for the optioning or sale of works require that the work have a WGA registration number.²²⁵ Agents tell writers to register their scripts. How-to guides and entertainment lawyers recommend that writers register the script with the WGA and with the Copyright Office, pointing out that copyright registration is necessary to recover full remedies in a copyright infringement suit and that a copyright lasts far longer than the five years covered by the WGA.²²⁶ Many nevertheless suggest reasons to use the WGA registry: it offers some protection in the credit determination process; it allows the author to signal her expectation of following the WGA rules for ownership and attribution of works.²²⁷ Moreover, as one how-to guide for screenwriters pointed out, the WGA registry may have one advantage over copyright registration: because the public can view works registered with the Copyright Office, there is “the risk that some snoopy person might go through the public files and come across your idea.” In contrast, “the WGA registration system is closed; persons other than the person who registered the material cannot gain access to it.”²²⁸ Finally, as the formerly insular community of Hollywood agents and writers has expanded, new technologies have enhanced rather than undermined the status of the script registry. Some software designed specifically for scriptwriting touts compatibility with the WGA script registry and some how-to books recommend the compatible software.²²⁹ Even at the most technical level of software designed to assist writers, the norm of using the WGA registry appears significant.

Although the script registry began as a cheap and fast local alternative to copyright registration in the 1920s when Hollywood seemed much more remote from the Copyright Office, it has persisted for reasons of path dependence and local custom because it appears to offer protection for ideas that copyright does not. Because it is the nearly universal practice in the

WGA.”). Cf. JAMES RUSSELL, *SCREEN & STAGE MARKETING SECRETS* 12 (1998) (nothing that “when you submit a script to a production company the release form will normally be asking for the WGA and the Copyright numbers, anyway.”)

225. See NIMMER ON COPYRIGHT, *supra* note 20 at ch. 5 (form contracts for hiring for writing services or sale of screenplay).

226. See Tehranian, *supra* note 212, at 1450-51.

227. Cf. JONATHAN KOCH, ROBERT KOSBERG & TANYA MEURER NORMAN, *PITCHING HOLLYWOOD: HOW TO SELL YOUR TV AND MOVIE IDEAS* 62 (2004) (recommending WGA registration); SUSAN KOUQUELL, *THE SAVVY SCREENWRITER: HOW TO SELL YOUR SCREENPLAY (AND YOURSELF) WITHOUT SELLING OUT!* 10-11 (2006) (recommending WGA registration to prevent theft of material).

228. KELLY C. CRABB, *THE MOVIE BUSINESS: THE DEFINITIVE GUIDE TO THE LEGAL AND FINANCIAL SECRETS OF GETTING YOUR MOVIE MADE* 19-20 (2005).

229. MARTIE COOK, *WRITE TO TV: OUT OF YOUR HEAD AND ONTO THE SCREEN* 66 (2007) (noting that most writers prefer the Final Draft scriptwriting software because of its compatibility with the WGA script registry).

industry to register a script and to treat registration as proof of authorship, participants in the market for ideas regard its protections as significant and will negotiate over the sale of ideas or writing services based on them only after registration. The industry depends on the willingness of writers to pitch ideas to multiple prospective buyers/employers and the willingness of buyers/employers to seek ideas from multiple prospective writers, but both writers and production companies fear idea theft and copyright infringement litigation. Because script registration is widely accepted, authors and buyers believe they have some protection against idea theft (or idea theft litigation), which encourages them to show their work to others or to read others' work. And, in that respect, it does exactly what it was created to do and what intellectual property regimes are supposed to do: it encourages transactions.

B. Investing

Film and television executives have long faced considerable risk in deciding which projects to pursue to the green-light stage, particularly with the rise of the blockbuster system in the 1970s and 1980s. While producers were initially reluctant to relinquish the power they had in the 1930s to unilaterally determine writing credit, they eventually concluded that the reliability and, especially, the neutrality of Guild determined writing credits help producers and investors manage risk.

Production executives use established stars or artists as a form of insurance in the highly unpredictable effort of producing blockbusters.²³⁰ An executive who doubts his own judgment about the quality of a script or an idea may be reassured that the writer's last project was successful. And, even if the next project fails to find an audience, the executive can use the writer's reputation as an argument to insulate his own judgment from criticism. Production executives can be fired or demoted or find it more difficult to attract future investors if their projects fail, so they must analyze not only the prospects of a particular project but also the effects of success or failure of the project on their own career.²³¹ In this context, it is important to production companies and to financiers who risk huge sums on expensive productions that attributions of films to writers be accurate, in the sense that the credited writer was a major contributor to the screenplay, and be perceived as being accurate in that sense. The Guild's scrupulous use of

230. Baker & Faulkner, *supra* note 135, at 289. Some scholars have pointed out that profit-sharing contracts between production companies and star actors may be motivated by the desire of studio executives to shift some of the financial risk of a film from the studio to the star, who may be wealthier than the executive and more able to bear the risk. Mark Weinstein, *Profit-Sharing Contracts in Hollywood: Evolution and Analysis*, 27 J. LEG. STUD. 67, 110 (1998).

231. *See id.* at 110-12.

legal processes and evidence to make credit determinations makes writing credits more reliable.

The WGA's control over credit determinations insulates production companies in other ways as well. Production companies and agents are repeat players, as are writers, to a lesser extent. When a film is complete and it is time to determine writing credit, a production executive might prefer not to alienate future contracting partners by being ultimately responsible for the decision to give credit to one writer rather than another. The producers can use the notice of tentative writing credits to signal whatever they wish to the various writers or others involved in the project, but the Guild's control over credit determinations in the event of a dispute absolves the producer from responsibility for the final allocation of credit and the impact it may have on the careers of the writers involved.

C. Branding

The third way in which reliable credit determinations facilitate transactions over ideas is that credit creates a brand for successful writers, which sends signals to prospective contracting partners on future projects, to critics, to advertisers, and to consumers. Although actors and directors tend to be bigger names to consumers, some writers receive enough celebrity that their involvement will help sell a film or, especially, a TV show to critics and to the public. In this respect, the author's name is a form of trademark.

Studios sometimes wish to associate a writer's name with a project even when the writer thinks that the project has evolved such that the writer would rather not have his or her name be the brand that sells the film. Although the writer may want to use a pseudonym, the use of a pseudonym challenges the trademark function of authorship, which is part of what studios value when hiring a big-name writer. The MBA and credits manual provisions on pseudonyms grant what is in essence a form of *droit moral* that does not exist in American copyright law: writers can use pseudonyms or withdraw from credit in order to protect their work in the event of mutilation by others. When a writer has been paid more than a specified large sum though, it is presumed that the writer has sold not only writing services but also the use of his or her valuable trademark name. In that case, the writer cannot withdraw from credit or use a pseudonym. The Guild has thus negotiated a compromise between the desire of writers to protect the value of their brand and the desire of studios to license the brand for use in marketing a project.

Since 1948, the Guild has allowed any writer to use a registered pseudonym so long as he or she is not obligated under an individual contract to use his/her regular name. Registration of pseudonyms is required to enable the Guild to direct residual payments to the proper

recipient and to prevent the use of offensive pseudonyms.²³² The Screen Credits Manual stipulates that a writer paid more than \$200,000 for his/her writing services may not use a pseudonym or disclaim credit entirely,²³³ and producers have periodically negotiated to prohibit writers from withdrawing from credit in other circumstances.²³⁴ In contrast, the Directors Guild has negotiated for an explicit contractual provision in its MBA authorizing directors to withdraw from credit; in such cases, the director is listed as “Alan Smithee,” a clear signal to the public that, in the director’s view, the film is terrible.²³⁵

In television writing, the use of pseudonyms to protect a writer’s reputation from the slings and arrows of the collaborative process was initially more explicitly acknowledged than in film. The first Television Credit Manual (1956) recognized the possibility that writers might wish to protect their reputation by withdrawing from credit. The Guild also recognized that TV producers might wish to prevent their withdrawal. The Guild worked out a compromise: a writer may use a pseudonym not previously registered or withdraw from credit only when later writers have either mutilated the material or misrepresented the author’s intent.²³⁶ The question of withdrawal from credit will be automatically arbitrated, and the violation of principles or mutilation must be satisfactorily proven. Today, in TV as in film, a writer paid less than a certain amount (in the case of TV, three times the contractual minimum) may use a pseudonym while writers paid more than that cannot.²³⁷

In its regulation of pseudonyms, the Guild balances the writers’ desire to protect their reputations from the unfortunate consequences of failed projects with the employers’ desire to use the trademark value of authors’ names. In a labor market and product market which places enormous weight on the signals sent by who is affiliated with which project, collective negotiation over the competing interests of writers and employers enables both sides to take risks. The well-compensated writer will take the risk that a project will turn out poorly and will harm his or her reputation; the studio that is unwilling to take the risk of paying a writer over \$200,000 cannot get the benefit of a writer’s marquee name if the project is re-written to the

232. Screen Credits Manual History (on file with WGA).

233. 2008 MBA, *supra* note 17, at 263. The WGA proposed in 2004 to allow higher-paid writers to use a pseudonym (increasing the threshold to \$500,000) but the studios resisted. 2004 Negotiations – Creative (on file with WGA).

234. *Id.* Summary of Producers’ Creative Rights Proposals (on file with WGA) (indicating that producers wanted to require Guild to consider for credit all writers listed as participating writer to prevent writers from withdrawing from credit).

235. Amy Wallace, *Name of Director Smithee Isn’t What It Used to Be*, L.A. TIMES, Jan. 15, 2000.

236. TELEVISION CREDITS MANUAL, *supra* note 126, at 31.

237. 2008 MBA, *supra* note 17, at 281.

point where its quality suffers. As with the script registry and with the process of attracting investment capital, the Guild's rules facilitate contracting between writers and employers in a speculative and high-stakes market.

CONCLUSION

The Guild is virtually unique in American letters in having a democratic and worker-controlled process for deciding the meaning of authorship and administering private intellectual property rights that turn on authorship. Hollywood writers sometimes perceive themselves as caught between the work for hire doctrine, on the one hand, and the director-auteur theory of film, on the other. That is, corporations are deemed the legal authors of motion pictures and directors are deemed the factual authors. Film theorists have written critically, especially lately, about the ways in which the auteur theory obscures important information about the labor of production, and also about how the auteur dynamic enhanced the power of directors at the expense of other talent, especially below-the-line talent.²³⁸ Movie and television production companies have established themselves as the only legal authors of movies and television programs. They have also sought to be perceived as the factual authors in the wider culture, except to the extent that acknowledging individual contributions is good for business in a celebrity-obsessed culture.²³⁹ Through control of screen credit and the compensation that turns on it, the Writers Guild has created a system of private intellectual property rights that is as important as copyright to the operation of both labor and product markets in Hollywood. It is a unique system of private ordering that underlies a multi-billion dollar industry. Moreover, it is a system that has operated for decades with virtually no judicial or legislative intervention.

The credit determination process grew increasingly more elaborate both procedurally and substantively as most writers in Hollywood lost their status as employees of large, vertically-integrated studios and became (along with most other talent and craft workers) short-term, project-based employees of one-off production companies. This increase in legal complexity was a result of the increasing financial significance of credit—the more that came to be at stake in credit determinations, the more the Guild added procedural protections and substantive nuance. Legalism offers the union the shelter of procedural fairness as it decides the zero-sum

238. Derek Nystrom, *Hard Hats & Movie Brats: Auteurism and the Class Politics of the New Hollywood*, 43 *CINEMA J.* 18, 30 (2004) (auteur theory enhanced the power of directors as against below-the-line talent unions in the 1960s).

239. See Jerome Christensen, *Studio Identity and Studio Art: MGM, "Mrs. Miniver," and Planning the Postwar Era*, 67 *ELH* 257 (2000); Jerome Christensen, *Neo-Corporate Star-Making: The Band Wagon and the Charismatic Margin*, 20 *L. & LITERATURE* 213 (2008).

question of which of its members will receive the considerable financial benefits that flow from credit. The very limited judicial review of the Guild's administration of the system reinforces the tendency toward legalism. Under the duty of fair representation, the Guild's determination will be final and the Guild will not be subject to damages so long as its determinations are not arbitrary, discriminatory, or in bad faith, which is a substantial financial incentive for the Guild to use a process with all the trappings of the rule of law.

Amidst the half-century decline of labor unions, this control over valuable private intellectual property rights has enabled the Writers Guild to remain vibrant and influential. The rise of flexible production in Hollywood and the transformation of Hollywood labor and product markets could have destroyed the WGA but did not. Whereas other United States industries such as manufacturing, telecommunications, and raw material extraction and processing, experienced de-unionization followed by drastic job-restructuring and labor market change, Hollywood experienced drastic job-restructuring and labor market change without the de-unionization.²⁴⁰ The Guild survived in part because its governance of the screen credit system helped it adapt to the changed employment relationship and helped it facilitate transactions between writers and studios and production companies. As motion pictures and television programs became ever more expensive to produce in the era of blockbuster films and television, the individual hiring contracts to provide writing services and contracts to acquire literary properties became more complicated and more high-stakes. Screen credit and the rights that flow from it reduced transactions costs and helped to organize a market that might otherwise have seemed hopelessly diffuse and confusing. The script registry facilitates the rapid and widespread sharing of ideas in a sector in which fears of idea theft and copyright litigation might otherwise deter sharing by writers or shopping by companies.

Although it seems clear that the WGA has done a great deal for writers and studios in its seventy-five years of existence, it is not at all clear whether it will be able to negotiate the difficult times ahead. As many have remarked, content creators are in for tough times as new media have made distribution ever cheaper and easier while content creation remains slow and expensive.²⁴¹ About half of major motion pictures and a substantial

240. On the pattern of de-unionization followed by job and labor market restructuring, with a suggestion that unions can play a role if they do not resist but instead adapt to restructuring, see STONE, *supra* note 3 at 196-98.

241. See, e.g. Jonathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597 (2009) (providing a very good account of the conflict between new media companies, which make the distribution of content ever easier and cheaper, and content creation companies, which historically made money on distribution in order to

amount of television programming produced in the U.S. are done by non-union companies and, thus, outside the WGA's jurisdiction. The WGA is trying to organize growth sectors such as video game production but has not yet succeeded. The downward pressure on production costs generated by the war between content providers and new media distributors can be expected to increase pressure on companies to produce non-union unless the WGA is able to adapt.

The story is obviously not over. What the experience of the past suggests, however, is that private intellectual property rights regimes have played a substantial and generally constructive role in the markets for labor and for ideas and that the Guild has been able to solve the coordination problems necessary to make private intellectual property rights systems function relatively efficiently. The Guild has both facilitated contracts and provided the institutional support to enable administration of private rights. It may be that neither workers nor employers in other similar labor and product markets, such as the development of video games, software or other new media products and platforms, would be interested in establishing a union like the Guild. Path dependence is certainly a big part of the story of Hollywood. Writers unionized in an era when many educated (and uneducated) workers thought that unions were good. The culture of unionism that they created is easier to hand down to new generations than to create from scratch among a group of people who cannot imagine how a union could facilitate individual or collective negotiations or administer intellectual property rights. But to the extent that people think that knowledge workers never want unions and cannot benefit from them, or that unions have no role to play in the knowledge economy, the history of the Writers Guild teaches otherwise.

finance the expensive process of creation; speculating that if content creators can no longer profit from distribution, there will be less creation); see also Adrian McDonald, *Through the Looking Glass: Runaway Productions and "Hollywood Economics,"* 9 U. PA. J. LAB. & EMP. L. 879 (2007) (examining the pressure on labor costs in Hollywood production caused by the rise of runaway production and the decline of profits associated with distribution). *But see* Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. ON TELECOMM. & HIGH TECH. L. 125 (2011) (summarizing past claims that new technology including recorded music, radio, broadcast and cable television, photocopying, and video recording would devastate content production industries and asserting that content creation industries have always previously adapted to new modes of distribution and likely will again).