

# The Writer's Share

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## I. INTRODUCTION

The Writers Guild of America (Guild)—the union that represents Hollywood film and television writers—wages a major fight over payment for reuse of its writers' work every time technology changes the way screen entertainment is distributed. The stakes in this longstanding struggle have grown as Hollywood steadily moves away from the 1930s movie studio model of salaried staff writers, and towards the freelance model of intermittent work punctuated by periods of unemployment. As technology increasingly enables the reuse of work, writers' long-term career prospects become more tenuous because their economic security depends on being paid for later use. Disputes over revenue sharing, generated by the reuse of films and television episodes, were the source of labor unrest in Hollywood from the 1940s through the long writers' strike of 2007 and 2008.<sup>1</sup> This issue arose again during negotiations between the Guild and the Alliance of Motion Picture and Television Producers (AMPTP) over a replacement for their agreement that expired on May 1, 2017.<sup>2</sup>

In the early 1950s, the Guild negotiated for residual payments from movie and television production companies to the credited writer whenever the production companies reissued or rebroadcasted a film or television episode.<sup>3</sup>

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1. See Carl DiOrio, *Script Goes as Planned: WGA Signs off on New Deal*, *HOLLYWOOD REP.* (Feb. 27, 2008), <http://www.hollywoodreporter.com/news/script-goes-as-planned-wga-105696> [https://perma.cc/9ELA-2KVV] (examining settlement of 2007-2008 writers' strike).

2. See generally WRITERS GUILD OF AM., 2014 THEATRICAL AND TELEVISION BASIC AGREEMENT (2014), [http://www.wga.org/uploadedfiles/writers\\_resources/contracts/MBA14.pdf](http://www.wga.org/uploadedfiles/writers_resources/contracts/MBA14.pdf) [https://perma.cc/LT5M-SFVG] [hereinafter 2014 MBA] (detailing agreement between Guild and AMPTP expiring in May 2017). The Guild's theatrical and television agreement covering film and television writing, known as the Minimum Basic Agreement (MBA), is available on the Guild's website. See *id.* The 2017 revisions to the MBA are, as of this writing, recorded in a memorandum of agreement, and have not yet been incorporated into the 2014 MBA. See Memorandum of Agreement for the 2017 WGA Theatrical and Television Basic Agreement 1 (May 4, 2017), [http://www.wga.org/uploadedfiles/writers\\_resources/contracts/2017moa.pdf](http://www.wga.org/uploadedfiles/writers_resources/contracts/2017moa.pdf) [https://perma.cc/8QRF-M72N] [hereinafter 2017 Memorandum of Agreement] (identifying 2017 amendments to 2014 MBA).

3. See WRITERS GUILD OF AM., *RESIDUALS SURVIVAL GUIDE* 3 (2016),

A residual is a form of compensation that resembles a copyright royalty insofar as it is a payment for certain reuses of copyrighted material.<sup>4</sup> Residuals, however, differ from copyright royalties in three ways. First, the writer does not own the copyright in the script, the copyright in the film, or the episode made from the script.<sup>5</sup> Second, the writer's right to residuals is contingent upon being awarded screen credit.<sup>6</sup> Finally, the right to receive residuals applies only to reuse of the material, such as when a theatrical movie is shown on television or streamed over the internet.<sup>7</sup> The right does not apply to the initial use, for example, when the movie runs in the United States or abroad, nor does the right apply to every type of use, like movie previews.<sup>8</sup>

The Guild initially considered residuals to be a betrayal of their ideal that writers should own their scripts and lease them to studios.<sup>9</sup> If writers owned and leased their scripts, studios would have to pay for all uses, including the initial use. Writers would share in the profits when a film became a huge success in its theatrical run. Yet, winning the rights to residuals was a major accomplishment for writers. One might think of residuals as a kind of intellectual property—the right to be paid for some uses of intellectual property which the writer participated in creating. In that sense, residuals are the only form of intellectual property invented and perpetuated by organized workers acting through their labor union.<sup>10</sup>

When the Guild first negotiated for residuals, lawyers and scholars considered them novel payments for services rendered in making a product—calculated based on the sales of that product—instead of royalties paid to copyright owners for use of their work.<sup>11</sup> Over time, however, residuals became an established feature of the industry and are now perennially important in collective negotiations. Between 1950 and 1960, writers' strikes

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[http://www.wga.org/uploadedFiles/writers\\_resources/residuals/residualssurvival2016.pdf](http://www.wga.org/uploadedFiles/writers_resources/residuals/residualssurvival2016.pdf) [http://perma.cc/3MZF-QFGJ] [hereinafter RESIDUALS SURVIVAL GUIDE] (providing historical overview of residuals in film and television).

4. See *id.* at 2 (introducing concept of residuals).

5. See Robert W. Gilbert, "Residual Rights" Established by Collective Bargaining in Television and Radio, 23 LAW & CONTEMP. PROBS. 102, 103 (1958) (describing residual recipients' property interests in underlying media).

6. See RESIDUALS SURVIVAL GUIDE, *supra* note 3, at 5 (outlining those entitled to residuals). In film, a writer who receives a "written by," "story by," "screen story by," "screenplay by," "adaptation by," or "narration written by" credit is entitled to residuals. *Id.* In television, 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. *Id.* Article 15 of the 2014 MBA, which contains the residuals provisions, is fifty pages long. See 2014 MBA, *supra* note 2, at art. 15; see also Gilbert, *supra* note 5, at 102-05 (describing how residuals worked in 1950s).

7. See RESIDUALS SURVIVAL GUIDE, *supra* note 3, at 2 (defining residuals).

8. See *id.* (recognizing residuals inapplicable to original use).

9. CATHERINE L. FISK, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE 161 (2016) (discussing Guild's ultimate acceptance of residuals).

10. *Id.* at 6 (arguing screen credit amounts to "contractually created intellectual property").

11. *Id.* at 142 (noting innovative nature of residuals).

persuaded producers to accept residuals.<sup>12</sup> In the sixty years since, writers continue to strike in order to protect residuals, as distribution through new technologies such as cable television, home video, and the Internet, threatens to undermine their rights.<sup>13</sup> Most recently, on May 2, 2017, writers narrowly averted a strike when the studios agreed at the last minute to a new contract that gave writers significant increases in pay, residuals, and other economic benefits.<sup>14</sup>

The Guild was crucial in overcoming the considerable collective action problems and administrative challenges that arose from this novel form of intellectual property and deferred compensation. Quite simply, had writers not unionized, they would likely be paid salaries, hourly wages, or flat fees for their services—the same as intellectual property creators in other sectors, such as video games, website design, computer programming, and advertising. Writers with market power, or those working on indie projects where the producer cannot pay a reasonable salary, would negotiate individually for a share in the ownership and profits of the project, as some writers do today. But residuals are collectively bargained benefits to which all credited writers are entitled regardless of their bargaining power, the amount of their salary, or the script fee paid for their work. In a sense, residuals confer a tiny share in the financial success of any reruns, syndication, downloads, or streaming on every credited movie or television writer. Today, the two most significant functions of the Guild involve administering two forms of contractually-negotiated, quasi-intellectual property rights that are unique to Hollywood: screen credit and residuals.

The residual system developed by writers (and later emulated by actors and directors) has been crucial. As entertainment lawyer and residuals expert Jonathan Handel writes, “the industry needs residuals because talent—especially actors, writers, and [television] directors—survive on them between gigs. . . . Without these payments, the industry’s professional talent base would evaporate.”<sup>15</sup> This Article details how the Guild developed the residual system, and briefly explains how the system operates in today’s world of streaming media. It also argues that the Guild’s early proposals for reuse compensation would have avoided some of the problems that exist in the current system,

12. See JONATHAN HANDEL, *HOLLYWOOD ON STRIKE!: AN INDUSTRY AT WAR IN THE DIGITAL AGE* 7-8 (2011) (chronicling past writers’ strikes).

13. See *id.* at 8-9 (detailing relationship between strikes and new technologies).

14. See Jonathan Handel, *WGA Deal Decoded: Big TV Gains But Movie Writers Have Less to Celebrate*, HOLLYWOOD REP. (May 2, 2017), <http://www.hollywoodreporter.com/news/wga-deal-addresses-problems-could-raise-cost-sag-aftra-deal-999819> [<https://perma.cc/823T-BXVL>] (summarizing Guild’s agreement with studios); see also Writers Guild of America, West, *Summary of the 2017 MBA*, WRITERS GUILD AM., WEST, <http://www.wga.org/contracts/contracts/mba/2017-mba-summary> (last visited June 6, 2017) [<http://perma.cc/N52P-V42B>] [hereinafter *2017 MBA Summary*] (explaining 2017 changes to residual provisions of the MBA).

15. See HANDEL, *supra* note 12, at 473.

particularly its mind-bogglingly complex nature and enormous cost.<sup>16</sup> One such proposal, which the studios resisted, paid writers a percentage of *all* of the project's gross revenue from all platforms, instead of paying different percentages for different types of reuse. Some experts believe this arrangement is the most desirable reform.<sup>17</sup> Finally, this Article suggests that the residuals system could be emulated if writers in other industries, such as video game creation, unionize.

## II. RESIDUALS TODAY

The current MBA allows writers to individually negotiate for script ownership, as well as ownership of the television show or film, in which case the writer shares profits with the production company.<sup>18</sup> But writer ownership of shows or films is not the norm. Film writers often negotiate individually for a bonus payment if they receive screen credit (which is also referred to as a credit bonus), and a writer-director may have an ownership stake in a film, especially if the work is an indie film. These forms of compensation are in addition to the writer being paid for the labor involved in initially writing the script, either by selling a completed script written outside of an employment relationship with the buyer, or by script fees and salaries paid to writers employed by the producing studio. The MBA, however, also provides credited writers with residuals, regardless of individual negotiations over salary, ownership, or credit bonuses.<sup>19</sup> The formulae for calculating residuals are extremely complex, but the underlying concept is simple.

Residuals were originally designed as payments made each time a theatrical film made after 1948 was shown on television or a television program was rebroadcast after its initial airing. The rise of streaming media, however, dramatically changed the way that films and, in particular, television shows are distributed. Today, television show residuals are less significant because they are only payable after an initial period in which the material is streamed or available for download. Even for wildly successful shows, television writers earn less in residuals than they once did because more repeat views are possible during the initial residual-free period in comparison to the age of broadcast television, where an episode aired only once.

One of the most important issues in the 2017 MBA negotiations was residual payments for shows exhibited on streaming services, known in Hollywood as streaming video on demand (SVOD). When the Guild first negotiated payment

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16. See *id.* at 473-76 (listing residual system's current problems).

17. See *id.* (arguing for change in residual calculation similar to Guild's proposal in 1940s).

18. See *e.g.*, 2014 MBA, *supra* note 2, at art. 13 (describing rules for writer compensation); *id.* at art. 15 (outlining rules for subsequent compensation to credited writers for reuse); *id.* at art. 16 (providing rules for writers' separation of rights).

19. See *id.* at art. 15 (providing subsequent compensation to credited writers for reuse).

of residuals for streaming media, the studios insisted that shows streaming for a one-year period after their initial availability should be treated like the first airing of a broadcast and, therefore, should not require residual payments.<sup>20</sup> The 2017 MBA provides for residuals to be paid after ninety days, rather than one year for domestic use of programs made for high budget, subscription SVOD (think of *House of Cards* on Netflix).<sup>21</sup> Shortening the initial period from one year to ninety days increases the residuals paid to writers on such shows. In addition, the 2017 MBA establishes a new residual for foreign subscription SVOD so that writers will be paid residuals for Netflix shows streamed outside the United States, a phenomenon which is common for American-produced shows.<sup>22</sup> These were highly contentious issues during contract negotiations, and writers threatened to strike if the studios did not agree to adjust the residual formulae.<sup>23</sup>

Residuals are foundational to the Hollywood labor market, and the system depends on the Guild for several reasons. First, because only writers who receive screen credit are entitled to residuals, the Guild's control over the screen credit system is crucial to credit being perceived as a fair basis for determining residual eligibility.<sup>24</sup> Second, by negotiating uniform terms of eligibility, the Guild simplifies individual hiring negotiations.<sup>25</sup> Such a practice is particularly important when multiple writers have worked on a project, as dividing residual rights would be difficult for writers to coordinate during their individual negotiations with production companies. Of course, it is possible for a studio to pay residuals to multiple writers on the same film, but it is beneficial for both writers and the studio to limit the number of people who share in the residuals.

If the Guild's most important role is protecting residuals, tracking and enforcing the right to receive them is certainly its most expensive. Writers benefit from the Guild's calculation and collection of residuals. The Guild investigates claims of nonpayment and underpayment, even prosecuting and paying for arbitration when producers refuse payment, saving writers the expense of hiring an attorney to enforce their residual rights through

20. See *2017 MBA Summary*, *supra* note 14 (noting residuals must be paid after ninety days of availability of SVOD rather than one year).

21. See *id.* (summarizing residual increases for SVOD services).

22. See *id.* (noting foreign-use residuals start at 35% of U.S. residuals before dropping to 10%).

23. See Cynthia Littleton, *WGA Contract Talks Complicated by Dramatic Changes in Television Landscape*, VARIETY (Apr. 4, 2017), <http://variety.com/2017/tv/news/writers-guild-strike-vote-changing-business-shorter-seasons-fewer-episodes-1202021923/> [<https://perma.cc/9JAB-KQ36>] (discussing SVOD services' effect on negotiations between studios and Guild).

24. Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 BERKELEY J. EMP. & LAB. L. 215, 247-248 (2011) (discussing reliability and appeal process of credit determinations).

25. FISK, *supra* note 9, at 143 (highlighting benefit of Guild in negotiations).

litigation.<sup>26</sup> Individual writers would be unable to administer the system on their own because they lack the technical ability to track reuse of their work. The Guild solves the problem by handling residuals on a collective basis, reducing transaction costs for the writer and the production company. By collectively monitoring uses of work and administering the payments for these uses, the Guild essentially does for film and television writers what the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) do for songwriters and composers. But, unlike ASCAP and BMI, which simply handle permission for public performance of copyrighted works on behalf of the copyright owners (like songwriters, publishers, or others), the Guild represents writers—who do not own the copyrights to film and television programs—to ensure they are compensated for use of their work through means other than copyright licenses.

In an industry where earnings are likely received over long time periods, as is the case with the reuse of television programs and movies, it makes sense to design a compensation scheme that allows the buyer or employer to pay the writer-creator over time. This is particularly true for low-budget projects or other similar projects where it would be difficult to predict future profits. When the buyer or employer cannot gauge a work's future popularity and revenue, or when they do not have enough cash to pay a generous salary at the time the work is done, future payments tethered to sales present a sensible compensation scheme for all parties involved. A sales-dependent approach makes it unnecessary to predict a film's success in attempting to set a price for the script based on the film's eventual profits. Equally as important, residuals smooth out income irregularity for writers—very few of whom are continuously employed.<sup>27</sup> While this obviously benefits writers, it also benefits employers because residuals allow writers to stay in the labor pool rather than leave the industry and take their considerable industry-specific human capital with them.

In sum, writers have good reasons to insist on protecting the residuals system which they have enjoyed for more than half a century, and the labor disputes that periodically occur in Hollywood are typically sparked by their efforts to do so.

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26. See 2014 MBA, *supra* note 2, at art. 11 (listing grievance and arbitration rules and procedures). The auditing of residuals is handled by the Tri-Guild Audit Fund, which is jointly funded by the studios, networks, the Guild, the actors' guild, and the directors' guild. See *id.* at art. 11, app. 557 (Sideletter to Article 11.H); 2017 MBA Summary, *supra* note 14 (describing renewed funding for Tri-Guild Audit Fund).

27. See Anthony A.P. Dawson, *Hollywood's Labor Troubles*, 1 INDUS. & LAB. REL. REV. 638, 640-41 (1948) (lamenting inconsistent and temporary nature of employment in film industry). For instance, in 1947, roughly 1,300 writers competed for slightly more than 200 open positions. *Id.* at 641.

## III. THE HISTORY OF RESIDUALS ..

From the beginning, writers recognized the costs associated with studios insisting on outright ownership of all scripts. Writers occasionally negotiated as individuals to reserve radio, stage, or novel rights when they sold scripts to studios. When working for small independent production companies, some writers individually negotiated for compensation based on the profits of the film, which usually turned on whether the writer's contribution was a significant portion of the final shooting script.<sup>28</sup> Writers on small budget shows or "webisodes," which are programs made to be viewed on the Internet, occasionally negotiate such individual profit-sharing deals today.<sup>29</sup> As of now, however, most writers typically sell their scripts outright in exchange for either a flat fee or weekly salary.

The studios' and networks' longstanding insistence on treating writers as seasonal or weekly employees—rather than joint venturers—created additional challenges as television formats changed with the decline of network dominance and the rise of cable and SVOD. In the past, writers negotiated compensation in the form of script fees on the assumption that a show would air twenty-two episodes per season, which was the network norm. Assuming it takes an average of two weeks to write and produce a television episode, a twenty-two episode compensation scheme constitutes payment for forty-four weeks of work each year. Premium cable and SVOD services, especially those featuring high budget productions, shortened seasons to thirteen or even eight episodes, which greatly reduced writer compensation. On high budget, high-production-value shows (like *Game of Thrones* or *House of Cards*), it takes much longer than two weeks to write and produce an episode. Together, reducing the number of episodes in a season, and increasing the amount of time spent writing and producing each episode, results in writers working longer on these shows to earn the same amount. Moreover, many studios once prohibited writers who could complete their work on an eight episode season quicker than they could on a twenty-two episode season from working on other shows.<sup>30</sup> These studios insisted on holding writers under exclusive option contracts that prevented writers from taking employment on other shows while their show

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28. Cf. Mary C. McCall, Jr., *Facts, Figures on Your % Deal*, SCREEN WRITER, June 1945, at 33-34 (detailing Ms. McCall's independently negotiated contract to write for independent producer). In 1943, Ms. McCall signed a contract that gave her a base payment of \$15,000 for a script. *Id.* at 33. If the final script was less than 75% of the work, she would be paid the \$15,000 alone. *Id.* But, if she contributed more than 75%, then she would receive 5% of the producers' share of the profits, and the \$15,000 would be considered an advance against her percentage of the profits. *Id.* at 33-34.

29. See Interview with Jonathan Stern, President & Exec. Producer, Abominable Pictures, and Becca Kinskey, Producer, Abominable Pictures, in L.A., Cal. (April 3, 2014) (on file with author) (discussing profit-sharing deals in modern context).

30. Cf. 2017 *MBA Summary*, *supra* note 14 (discussing 2017 improvements to writer compensation on short series).

was on hiatus, even though the writers were only paid for a small fraction of the year. In the 2014 MBA, the Guild negotiated for a provision that allows a studio to hold a writer idle and uncompensated for only ninety days before either releasing the writer or paying a holding fee; in 2017, the Guild extended that provision to writers earning less than \$275,000 annually.<sup>31</sup>

The necessity of negotiating payments for the reuse of work appeared early on in Hollywood's history. Even before television exploded in the 1930s, when movies were released in theaters and ran for several weeks or months before disappearing from the screen, film scripts were licensed to advertising agencies to use as radio dramas. The agencies would use staff writers to adapt the movie script for radio and hire actors to read the dialogue, with voice-overs when necessary to set the scene.<sup>32</sup> Beginning in this era, Hollywood writers recognized that they could only profit from multiple uses of their scripts if they negotiated for a share in the profits from each use. Homer Croy, a Hollywood writer who adapted his novels into screenplays in the 1930s and 1940s, observed that “[d]ribbles of radio money are beginning to flow into the pockets of screen writers” because “radio companies . . . are perfectly willing to buy a screen story a year after it has been released, when presumably it has slipped from the screen.”<sup>33</sup> That is why, he warned, in italics to emphasize his point, “*All screen writers should reserve radio rights to originals.*”<sup>34</sup>

Despite these concerns, the need to negotiate for reuse payments was not particularly pressing in the 1930s. Writers could earn only limited amounts of money when adapting a script for radio, and negotiating with the powerful advertising agencies that controlled prime-time radio had its challenges. In the postwar period, however, the practice of reissuing movies and the growth of television brought special urgency to writers' demands for greater ownership or profit sharing in their scripts.

#### *A. The Postwar Debate over Licensing and the Writer's Share*

When World War II ended, as the Guild planned its negotiating strategy for a new collective bargaining agreement, the Guild's leadership decided to make profit sharing, reuse and reissue payments its top priorities.<sup>35</sup> The Writers Guild of America Executive Board appointed Lester Cole, a very successful writer who had also been a founder of the Screen Writers Guild (SWG) in

31. See Handel, *supra* note 14 (discussing 2014 MBA provision); 2017 MBA Summary, *supra* note 14 (highlighting 2017 expansion of 2014 provision).

32. FISK, *supra* note 9, at 92-94 (recounting history of radio program production in 1930s and 1940s).

33. Homer Croy, *A Chapter on Radio*, SCREEN GUILDS' MAG., May 1936, at 13, 26 (recognizing growth in radio industry purchasing screen plays).

34. See *id.* at 26 (noting importance of retaining rights for reuse of original work).

35. See Writers Guild of America, Exec. Bd., Meeting Minutes (Nov. 18, 1946) [hereinafter WGA Meeting Minutes I] (on file with the Writers Guild of America, West) (recounting discussion over what position Guild should take in upcoming negotiations).



1933, to chair the Guild's Economic Committee (Economic Committee).<sup>36</sup> The Economic Committee's purpose was to develop the Guild's goals and strategy; specifically, a strategy to negotiate profit sharing on a collective basis for all writers.<sup>37</sup> Additionally, the Executive Board appointed Ring Lardner, Jr., another accomplished writer, as chair of the Committee on the Sale of Original Material.<sup>38</sup> Lardner's committee sought the same goal as the Economic Committee, but specifically for writers who sold finished scripts to studios instead of serving as studio employees.<sup>39</sup>

The Guild focused on the issue of profit sharing in 1946 and 1947, a logical time given the widespread writer unemployment caused by the rapid growth of television, drastic reduction in the number of movies made, and the increased reissue of old films.<sup>40</sup> Writers foresaw that television would drastically increase the phenomenon that existed in radio—movie scripts being reused as broadcast dramas, or being serialized into weekly programs. Moreover, writers anticipated that studios would soon license their huge film libraries for television broadcast.<sup>41</sup>

Cole's Economic Committee and Lardner's Committee on the Sale of Original Material proposed that the Guild pay writers a percentage of profits in addition to salaries, and also make payments to those with screen credit for all reissues and remakes.<sup>42</sup> Additionally, Cole and Lardner offered examples of writers who wrote, but never profited from, successful stories because they sold the ideas and characters outright in audition scripts (as they were known in radio) or speculative scripts (as they were known in film and later television).<sup>43</sup> These examples included *Fibber McGee & Molly*, an incredibly popular radio

36. FISK, *supra* note 9, at 146 (recounting Lester Cole's appointment).

37. See Writers Guild of America, Gen. Membership, Meeting Minutes (Sept. 8, 1947) [hereinafter General Membership Meeting I] (on file with the Writers Guild of America, West) (describing goals and adoption of Economic Committee's proposals); see also FISK, *supra* note 9, at 146 (noting goals included obtaining profit percentages and payments for screen credit); Lester Cole, *A Fundamental Right?*, SCREEN WRITER, Aug. 1947, at 21-23 (arguing salaries for writers, without profit sharing or royalties, amount to insufficient compensation).

38. FISK, *supra* note 9, at 146 (recounting Guild's 1946 committee appointments).

39. See Writers Guild of America, Exec. Bd., Meeting Minutes (Mar. 4, 1946) [hereinafter WGA Meeting Minutes II] (on file with the Writers Guild of America, West) (suggesting need for limited licensing agreements); see also FISK, *supra* note 9, at 146-47 (discussing similarities in committees' goals). The Guild also considered whether and how to urge other guilds to take action on the reissuing problem at a meeting on November 18, 1946, but referred the matter to the Economic Committee for further study. See WGA Meeting Minutes I, *supra* note 35.

40. See Writers Guild of America, Exec. Bd., Meeting Minutes (July 21, 1947) (on file with the Writers Guild of America, West). The Executive Board received a report showing that only 466 writers were employed in July 1947, down by eighty writers from the year before and 100 writers over a two-year span. See *id.*

41. See ERIC HOYT, HOLLYWOOD VAULT: FILM LIBRARIES BEFORE HOME VIDEO 139-40 (2014) (analyzing spike in prevalence of studios repurposing library films for television).

42. FISK, *supra* note 9, at 147, 151-53 (discussing committees' proposals and explaining demand for percentage of gross profits).

43. *Id.* at 146-47 (discussing why Guild sought profit percentages and screen credit payments).

show based on an audition script Don Quinn sold to an advertising agency.<sup>44</sup> Companies made millions of dollars from the show, but Quinn, the writer, did not.<sup>45</sup> Cole, Lardner, and their respective committees agreed that the Guild should negotiate not only for minimum wages as before, but also that writers should “substitute a limited licensing agreement for the current system of outright sale.”<sup>46</sup> The goal was that writers should be paid a percentage of profits above the minimum salary.<sup>47</sup> Cole and Lardner recognized that the demand for profit sharing constituted a major departure from traditional Hollywood writer compensation, but they insisted it was much like the system that existed for novelists and dramaturgs.<sup>48</sup> As Lardner explained, “picture studios remain alone in the extremes of ownership and control which they demand in their purchases. The introduction of television . . . gives increased urgency to this reform.”<sup>49</sup>

The SWG joined every other guild representing writers—the Radio Writers Guild, the Dramatists Guild, the Authors League, and various committees of television writers—in seeking collective bargaining agreements providing for profit sharing and licensing, as opposed to the sale of scripts. The idea, described as a bedrock principle from which the guilds would never deviate, received a great deal of attention in the trade and mainstream press. Studios, advertising agencies, and radio networks—which were rapidly expanding into television networks—also took notice.

### B. *The American Authors Authority*

It was not easy for the various guilds to design a system to administer the licensing of scripts on behalf of writers. Thousands of authors individually negotiating script usage with hundreds of radio, film, and television employers, as well as exhibitors, can be complicated. Moreover, as novelist and screenwriter James Cain realized during a conversation with Lardner and Morris Cohn, the Guild’s longtime lawyer, profit sharing would require establishing a strict rule preventing writers from selling their copyrights altogether.<sup>50</sup> Cain agreed with Cohn that such a rule would be unpopular, but was nevertheless essential because a fundamental difference exists “between what a man is forbidden to do, but may do, if enough money is shaken in his

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44. *Id.* at 147.

45. *Id.*

46. See WGA Meeting Minutes II, *supra* note 39 (discussing letter Lardner wrote to Author’s League).

47. FISK, *supra* note 9, at 147 (considering profit sharing Guild’s top priority). See generally RICHARD FINE, JAMES M. CAIN AND THE AMERICAN AUTHORS’ AUTHORITY (1992) (recognizing writers’ goals in negotiations).

48. See WGA Meeting Minutes II, *supra* note 39 (proposing new compensation agreements).

49. *Id.*

50. See FINE, *supra* note 47, at 95-97 (examining evolution of Guild’s stance on licensing written works to Hollywood).

face, and what does not lie within his power to do."<sup>51</sup>

Cain proposed a solution to the problem of writers being tempted by generous payments to sell their copyrights in a 1946 issue of the Guild's magazine, *The Screen Writer*, while Lardner and Cohn advanced the same idea in other publications.<sup>52</sup> Cain suggested the creation of the American Authors Authority (AAA), which would own the copyright in every form of literary work produced by all types of media writers.<sup>53</sup> The AAA would be to writers somewhat like what ASCAP is to composers: It would obtain the copyright in all written material, license it, collect royalties for each use, and transmit the royalties to authors.<sup>54</sup> Critics of the scheme wondered how the AAA would decide which companies received licenses, and the exclusivity of such licenses. Yet, the AAA's defenders insisted that the organization would not have the power to act as a censor in granting licenses. The AAA would simply function as a holding party that would license the work to anyone who paid the required fee, subject to a period of exclusivity, so that multiple studios could not buy the same script and simultaneously make the same film.<sup>55</sup>

In proposing the AAA, Cain drew on his experiences as a novelist, a short-story author, and a screenwriter, who struggled to make a career as a writer until eventually finding success at age forty with the publication of *The Postman Always Rings Twice*.<sup>56</sup> His short story, *Double Indemnity*, was later adapted into a successful movie in 1944.<sup>57</sup> Cain knew from his own experience that many writers were undercompensated for the subsidiary rights in their work (i.e., serialization in magazines and newspapers, paperback editions, stage, film, and radio adaptations, translations, and foreign editions) because publishers, radio producers, networks, and film studios required authors to sign over all the rights to their works.<sup>58</sup> Even writers who managed to keep the rights to their work often found it difficult to track profits resulting from the exploitation of subsidiary rights. For example, book publishers acquired the rights to control sales of trade and paperback editions, and negotiated extremely

51. See *id.* at 96 (considering possibility of writers assigning copyrights to Guild).

52. See James M. Cain, *An American Authors' Authority*, SCREEN WRITER, July 1946, at 10-11 (advocating for copyright reform of written works); see also Morris E. Cohn, *What is a License of Literary Property?*, SCREEN WRITER, Sept. 1947, at 27-28 (proposing licensing system); Ring Lardner, Jr., *First Steps in Arithmetic*, SCREEN WRITER, Aug. 1947, at 20 (advocating for licensing system). See generally *American Authors Authority Looms, a la ASCAP, to Embrace All Scribes*, VARIETY, July 1946 [hereinafter *American Authors*] (discussing possible solution).

53. See Cain, *supra* note 52, at 10-11, 14 (explaining AAA's purpose).

54. See *id.* at 11 (comparing AAA to ASCAP).

55. See *id.* at 14-15 (detailing function and procedures of AAA). ASCAP (and now BMI) are slightly different than the proposed AAA. They do not get the copyright in the song, but rather a nonexclusive license. The ASCAP and BMI licenses are only for nondramatic public performance rights, and these organizations must grant a license to anyone who requests one, so long as they can pay for it.

56. FINE, *supra* note 47, at 49-50 (discussing Cain's early career).

57. See *id.* at 43 (noting Cain's success between 1943 and 1945).

58. See *id.* at 46-56 (detailing various problems with subsidiary rights compensation).

unfavorable deals for authors. Cain himself claimed to have received only half of one cent for each twenty-five-cent pocket paperback copy of *The Postman Always Rings Twice*. By contrast, his publisher, Knopf, received a quarter of all stage royalties, while Metro-Goldwyn-Mayer, which bought the movie rights, received a third, leaving Cain with less than half of an author's typical royalty for the stage adaptation of his own novel.<sup>59</sup> In sum, Cain argued that the AAA would help writers protect their interests in the complex literary marketplace, and would allow them to receive a fair share of the wealth generated by their creativity, whether in print, radio, stage, or screen media.<sup>60</sup>

The business community vociferously opposed the AAA, asserting that the organization would censor good work, and would reduce the industry to crass commercialism.<sup>61</sup> The newspapers surely recognized that their own business model was based on corporate ownership of copyrighted works produced by staff and freelance writers. Accordingly, the creation of the AAA meant that newspapers would have to purchase the right to print or reprint reporters' stories, and that they could not rely on the work-for-hire doctrine to secure authors' rights at a low cost. The industry trade paper, *Variety*, characterized the AAA as "the most radical action ever taken by a talent organization" and asserted that "the outfit [would enjoy] a virtual monopoly in American literature."<sup>62</sup> A column in the *New York Sun* insisted the AAA would "compel every writer to submit his work to the control of one entity which would exercise monopolistic control."<sup>63</sup> The *New York Sun* columnist blamed the poor quality of American letters on writers' "preoccupation with rights and deals" and insisted that a true writer, "a creative person with something in his mind and heart," should be "as willing to risk the garret as to accept the emoluments and plaudits that come to him for his work."<sup>64</sup> Ironically, the owners of *Variety* and the *New York Sun* did not see their ownership of copyrights in their employees' work as quite the threat to freedom of thought and speech that they prophesied from writer ownership. Movie studio executives and newspaper owners could celebrate risking the garret as essential to political and artistic freedom, since they never had to do it themselves.

The key for the Guild centered on designing a collective management system for the rights in scripts and other writings that did not arouse the ire of every newspaper, magazine, advertising agency, and other corporation dependent upon acquiring the copyrights in works produced by their staff. The

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59. See *id.* at 50-51 (recounting Cain's troubles with subsidiary rights).

60. See FINE, *supra* note 47, at 51 (explaining Cain's favorable disposition toward AAA).

61. See George E. Sokolsky, *Proposed: Thought Monopoly*, N.Y. SUN, Aug. 29, 1946 (arguing AAA would stifle creativity and reduce quality of writing).

62. See *American Authors*, *supra* note 52 (criticizing AAA); see also FISK, *supra* note 9, at 149 (discussing negative reactions to AAA).

63. See Fisk, *supra* note 9, at 149 (referring to *New York Sun* article); Sokolsky, *supra* note 61.

64. See Sokolsky, *supra* note 61.

writers who developed and advocated the AAA concept tried mightily to convince the business community that it would not be a content censor, but simply a device to centralize licensing transactions. On the other end of the spectrum, it could be argued that a compulsory license regime modeled on ASCAP would give writers too little control over uses of their work, but Cain and the AAA advocates were not troubled by that. The business community, however, succeeded in tarring the AAA with the censorship brush. The timing was unfortunate. AAA advocates proposed the idea not long before red-baiting and allegations of communist sympathies forced many writers out of the industry, and even out of the United States.<sup>65</sup> As a result, the AAA idea never got very far.

Nevertheless, film, television, and radio writers did not abandon their efforts to claim ownership of their scripts, and turned to other ways of expressing their conviction that all writers should own the copyright to their work. In doing so, they compared writers for film, television, and radio, to novelists and playwrights, who typically retained ownership of their copyrights and licensed them for particular uses. While they never achieved anything quite as ambitious or all-encompassing as the AAA, they developed an enduring system for tracking the use of film and television writing.

### C. One Percent of the Gross

The Guild's best strategy proved to be demanding a percentage of the gross profits. The residuals formulae, which are calculated in percentages, eventually encompassed this idea.<sup>66</sup> Writers agreed to a percentage of the receipts as an alternative to the more ambitious proposal that authors retain ownership rights.

The issue of compensation for reissues of movies and reuse of scripts united many groups that would otherwise have been in opposition, both in the talent guilds and craft unions. In a July 1947 meeting of talent guild and craft union representatives, Lester Cole explained that the 100 movies reissued in the prior year (about a quarter of all movies released) probably "displaced from employment at least [200] or 300 writers, a couple of hundred directors and producers, and thousands of actors and skilled studio workers."<sup>67</sup> Moreover, Cole explained, reissues deprived all Hollywood workers, not just writers, of

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65. See FINE, *supra* note 47, at 219-20 (discussing Cain's thoughts in July 16, 1947 letter to H.L. Mencken).

66. See FISK, *supra* note 9, at 151-52 (recognizing use of gross profits in calculating residuals). The devil is in the details, as "gross" is not a clear concept. The MBA uses various terms such as "Producer's Gross" and "Distributor's Foreign Gross," among others, and assigns specific definitions each of those terms. See 2014 MBA, *supra* note 2, at art. 15 (defining "Distributor's Foreign Gross"); *id.* at art. 51 (defining "Producer's Gross"). Depending on how the terms are defined and the success of a film, a percentage can be a considerable sum or a pittance.

67. See *Summary of Authors' League Licensing Committee Report: Conference on Reissues*, SCREEN WRITER, Aug. 1947, at 42 [hereinafter *Summary of Authors' League*].

fair compensation.<sup>68</sup> Pointing out that “[o]ur industry is one of the few in the world where talents and skills of its workers, preserved on strips of celluloid, can be used repeatedly without any remuneration to the possessors of those talents and skills,” Cole insisted that the movie business treated its writers worse than book authors.<sup>69</sup> He stated: “Writers of books are protected by copyright law, and when their books are re-issued, they are compensated for it. Probably the only workers who are not compensated in the reprinting of a book are the original type-setters. If new plates are made, even the type-setters are paid.”<sup>70</sup> Accordingly, Cole called for a change in the compensation scheme for reuse in the film industry.<sup>71</sup> Although Cole was careful to include creative and technical workers in his plea for fair compensation, the talent guilds representing writers, actors, and directors were ultimately the only unions to secure the right to residuals. The craft and technical workers—lighting designers, makeup artists, costume designers, and so on—still have no right to residuals. Today, as then, their work may still “be used repeatedly without any remuneration,” even though they spend considerable talent and skill in creating films.<sup>72</sup>

It helped that film and television writers could draw on the examples set by the theater industry, where writers typically owned their scripts. As writers began to persuade people in the industry that writer ownership was important for television, changes to the terms on which movie scripts were written and sold became possible. In 1946, during the writers’ first television negotiations, screenwriter Emmet Lavery (creator of *Hitler’s Children* and *The Magnificent Yankee*) wrote that “licensing is to be preferred to sale,” and “there will never be a better time to achieve for the seller of material to the screen some of the privileges and protections which the dramatist enjoys in the theatre.”<sup>73</sup>

Leading up to the Guild’s September 1947 general membership meeting, *The Screen Writer* published a collection of essays under the headline *The Writers’ Share: Some Comments on the Contribution of Writers to the Screen Industry and Vice Versa*, and presented different points of view on the question of royalty payments.<sup>74</sup> Lardner made a clever rhetorical opening gambit in the

68. See *id.* (insisting new plan needed to ensure adequate compensation).

69. See *id.* (arguing book writers in better position due to copyright laws).

70. *Id.*

71. See *Summary of Authors’ League*, *supra* note 67, at 42 (advancing new compensation system in film industry for “repeated use of . . . creative and technical work”).

72. See *id.* (noting those who use skills and talents to create films often go uncompensated for reissues).

73. See Emmet Lavery, *A Time for Action*, *SCREEN WRITER*, May 1946, at 1, 1-2 (observing unprotected nature of writers selling works for screen production).

74. See Samuel Goldwyn et al., *The Writers’ Share: Some Comments on the Contribution of Writers to the Screen Industry and Vice Versa*, *SCREEN WRITER*, Sept. 1947, at 29, 33 (containing various responses to question of how much writers contribute to economic success of films). The Executive Board created *The Screen Writer* in January 1945 as a free magazine to be distributed to all Guild members and chose Dalton Trumbo as its first editor-in-chief. The editor-in-chief of the magazine and the chairs of the committees whom

discussion of the writer's percentage share by arguing that writers were currently paid about 1% of a film's gross profits and deserved 2%.<sup>75</sup> The percentages were so small—and so much smaller than literary or stage writers received—that it seemed impossible to disagree with the Guild's position. Noted writers of all political stripes generally favored the idea, but novelists who also wrote for the screen were particularly pointed in their criticism. Stephen Longstreet, a novelist and screenwriter who had just enjoyed success with the Oscar-winning biopic *The Jolson Story*, scoffed that “no author in his right mind would work for two percent no matter how hungry,” except of course in Hollywood.<sup>76</sup> James Hilton, who wrote the hugely popular novel *Lost Horizon* and won the 1942 Academy Award for his script in *Mrs. Miniver*, opined that “Hollywood would be a bigger and certainly a better success if writers had more share in *production* and *responsibility*—as in England. That would make more sense—and probably also more cents.”<sup>77</sup> Martin Field, a writer who never had many screen credits and felt quite acutely the vulnerability of writers in the industry, published two cleverly titled essays, *Twice Sold Tales* and *No Applause for These Encores*, charging that the studios' practice of reselling scripts reduced employment for writers and reduced the demand for original stories from freelance writers.<sup>78</sup>

Not surprisingly, producers saw it differently. Some of the biggest names in the studios insisted that the key to Hollywood's success was not writers, but the producers' ability to spot and nurture writing talent, revise scripts, and make them practicable. They objected strenuously to the idea that writers as a group were underpaid. Samuel Goldwyn argued that insisting all writers deserve a percentage of the profits did a “disservice to a great field of art,” because it lumped all Hollywood writers, even the “hacks,” with “the few capable ones.”<sup>79</sup> In Goldwyn's view, “it is a virtual impossibility in Hollywood to assign a writer to a script and to get from him a work that can be put on the screen.”<sup>80</sup> David Selznick, who claimed credit for the huge success of *Gone With the Wind*, agreed by stating, “the contributions of writers to motion pictures are not

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advocated writer ownership were quickly branded as communists, driven from their Guild leadership positions, imprisoned, and forced to flee Hollywood—certainly a detriment to the writers' efforts to secure profit sharing and script ownership. The position they advanced for writer ownership and compensation proved to be hugely important, and perhaps if they had not been hounded by the film business for ten or more years, the Guild could have negotiated an even bigger slice of the entertainment pie for writers than what they ultimately received.

75. See Lardner, *supra* note 52, at 20 (arguing for increased share in gross profits).

76. See Goldwyn et al., *supra* note 74, at 29-30 (focusing on Longstreet's thoughts concerning writers' percentage shares).

77. See *id.* at 29 (turning to Hilton's arguments).

78. See Martin Field, *No Applause for These Encores*, SCREEN WRITER, Aug. 1947, at 24-25 (arguing reissues injure script writers); Martin Field, *Twice-Sold Tales*, SCREEN WRITER, May 1947, at 1,1 (recognizing writers rarely profit from resale of scripts).

79. See Samuel Goldwyn et al., *supra* note 74, at 29 (opposing universal percentage share).

80. See *id.* (detailing producers' thoughts on paying writers).

sufficiently uniform, in relation to the pictures in their entirety, to warrant any arbitrary allocation of the share of the earnings as the proper share of the writers, either real or merely credited.”<sup>81</sup> Pointing out that “Hollywood still pays the highest monetary reward in the world for creative writing,” Goldwyn echoed the same complaint which had been made about the AAA—writers should pay more attention “to fine ideas and vibrant words than to percentage figures.”<sup>82</sup> Selznick explained the producers’ final objection to writer profit sharing in opining, “the best writing does not necessarily mean the highest earnings.”<sup>83</sup> Rather, he said, “the earnings on a picture are dependent, to an extraordinary extent, upon such factors as star values, showmanship, presentation, distribution, and the effectiveness of, and expenditures, for exploitation. To none of these does the writer contribute.”<sup>84</sup>

In September 1947, the Guild’s entire membership met in the ornate ballroom of the Hollywood Masonic Temple to discuss the question of what the Guild should demand with respect to profit sharing.<sup>85</sup> This was an important meeting at which the members had the chance to forever change the way they were paid, and to create a plan to assert the rights of television writers to have claims to credit, creative control, and compensation similar to film writers. Unfortunately, this meeting happened when the House of Representatives Un-American Activities Committee (HUAC) was threatening to find and banish every communist from Hollywood. Moreover, a Republican majority in Congress had recently enacted the Taft-Hartley Act, which sharply limited the rights and protections of unionized workers. Therefore, an entirely sensible and quite capitalist notion—that writers should be paid like entrepreneurs—got caught up in the hysteria over communism and the fight that hysteria provoked between the left and right wings of the Guild.

Nevertheless, Ring Lardner, Jr. and Lester Cole delivered their committees’ reports, each urging the membership to demand that writers be paid a percentage of the gross revenue of a film.<sup>86</sup> Emmet Lavery, the SWG President who led the effort to get members to sign affidavits of noncommunist affiliation as required by the Taft-Hartley Act, opposed their position.<sup>87</sup> Lavery had no reason to oppose paying writers a percentage of the gross. As a lawyer and successful movie writer, he personally would have had every reason to support a proposal that gave writers a share of the profits. But he, like other writers,

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81. *See id.* at 31 (recounting Selznick’s view as producer).

82. *See id.* at 29 (recognizing need in Hollywood for “new and fresh material”).

83. *See* Samuel Goldwyn et al., *supra* note 74, at 32 (opposing profit sharing).

84. *See id.* (postulating writers have limited impact on film’s success).

85. FISK, *supra* note 9, at 155 (detailing process of obtaining profit sharing).

86. *Id.*

87. *See* Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 9, 61 Stat. 136, 146 (1947) (requiring affidavits of noncommunist affiliation); *see also* Writers Guild of America, Exec. Bd., Meeting Minutes (Sept. 15, 1947) (on file with the Writers Guild of America, West) (discussing Lavery’s collection of affidavits).



was anxious about endorsing anything recommended by writers whose politics he feared would destroy the SWG. Accordingly, he said that the SWG should study the matter more fully before determining whether a percentage of the gross revenues should be paid to the individual writers or to the SWG, and then distributed amongst the members on some basis.<sup>88</sup> While the membership adopted the committees' reports in a 195 to 136 vote, the political controversy hung over the whole matter.<sup>89</sup>

In the autumn of 1947, while the Guild was trying to unite its fractious membership around receiving payment based on a percentage of a movie's gross revenue, the House of Representatives subpoenaed nineteen prominent Hollywood writers and directors to testify about communist influence in motion pictures. Some of those subpoenaed proved to be friendly to HUAC's efforts to eliminate the alleged communist influence from the movie industry, but eleven were not. Cole and Lardner were two of the unfriendly witnesses, and among the ten cited for contempt of Congress when they refused to answer questions about their politics. Immediately thereafter, Cole and Lardner were voted off the Guild's Executive Board and lost their roles in formulating Guild strategy.<sup>90</sup>

The hearings and resulting blacklist forced the Guild's attention away from how writers were paid, along with most other issues having to do with the MBA. It dramatically weakened the writers' bargaining position leading up to negotiations for the second MBA in 1949.<sup>91</sup> Twice in the spring of 1949, the Guild proposed to producers that writers be paid a percentage of the gross income and retain print, stage, radio, and some television rights in scripts, and twice the producers refused.<sup>92</sup>

Some producers tried to exploit the writers' insistence on profit sharing as a strategy to introduce wage cuts. Warner Bros. announced in the spring of 1950 that henceforward it would pay its writers the contract minimum as a weekly salary.<sup>93</sup> If any writer's contract provided for a weekly salary above the MBA minimum, his or her full salary would be paid when the film went into

88. See General Membership Meeting I, *supra* note 37 (noting proposal for writers to receive percentage of gross while Lavery opposed majority reports).

89. See *id.* (recording final vote).

90. FISK, *supra* note 9, at 174-75 (recounting HUAC hearings and resulting leadership change).

91. See Writers Guild of America, Exec. Bd., Meeting Minutes (Oct. 25, 1948) (on file with the Writers Guild of America, West) (cautioning against demanding royalties due to previous blacklisting); Writers Guild of America, Exec. Bd., Meeting Minutes (Dec. 20, 1948) (on file with the Writers Guild of America, West) (making recommendations for upcoming negotiations). Richard Fine's book contains a detailed account of the role of the HUAC hearings and the blacklist in killing the AAA. See FINE, *supra* note 47, at 214-43 (detailing HUAC's role in AAA's demise).

92. See Writers Guild of America, Exec. Bd., Meeting Minutes (June 20, 1949) (on file with the Writers Guild of America, West) (memorializing proposal for 10% share in gross revenue); Writers Guild of America, Exec. Bd., Meeting Minutes (Mar. 21, 1949) (on file with the Writers Guild of America, West) (noting recommendation of 5% of producer's gross profits).

93. See Writers Guild of America, Exec. Bd., Meeting Minutes (Apr. 24, 1950) (on file with the Writers Guild of America, West) (describing deferred Warner Bros. payment system).

production, and only if the writer received screen credit. Writers promptly complained to the California Labor Commission—the state agency charged with enforcing worker wage protection laws. The Commissioner ruled that no part of a weekly salary may be deferred because writers were employees, and state law required employers to pay employees within a reasonable time—never more than one month—after work was performed.<sup>94</sup> Thus, Warner Bros. took a different tack: They employed writers at the Guild's collectively bargained minimum rate, then later paid the writer the difference between that amount and the writer's usual weekly salary, plus a bonus if the writer earned screen credit.<sup>95</sup> Although this form of partially deferred compensation did not violate state law or the MBA, the Executive Board adopted a resolution urging its members not to accept employment under these conditions.<sup>96</sup> This kind of deal put writers at risk of underpayment (working for less than their usual rate), posed the risk that many writers would expect payments that would not be paid due to limits on the number of credited writers, and required even credited writers to wait a significant amount of time to be paid.

#### *D. Reuse Payments and Television*

Once the SWG (representing film writers) secured profit sharing for film writers working for major studios, the SWG and its allied television writers' guilds turned to securing ownership and profit sharing in television.<sup>97</sup> The television negotiations were even more complex, not only because television production was more geographically dispersed across the United States, but also because the industry was in its infancy and rapidly changing. One complication was that while the Guild negotiated hard for television royalties in the West, writers in the East did not negotiate for a royalty contract because television production in the East was not profitable at that time. In Hollywood, independent television and film producers occasionally agreed to pay a percentage of the profits. Profit sharing in this segment of the industry achieved "the long-cherished dream of screen writers . . . to have a royalty in the earnings of the pictures they write."<sup>98</sup> Several rounds of negotiations were

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94. *See id.* (discussing commissioner's ruling).

95. *See id.* (recognizing payment contingency of receiving credit).

96. *See id.* (deciding not to work under new Warner Bros. system).

97. FISK, *supra* note 9, at 158-63 (describing process of obtaining reuse and royalty payments in television).

98. *See* John Klorer, *Writing for Percentage*, SCREEN WRITER, Feb. 1946, at 7, 7 (noting independent productions allowed realization of this dream). Mary McCall, Jr., President of the Guild, reported to the Executive Board in 1952 that one small independent producer, Snader Telescriptions, was prepared to pay a flat fee of \$500 plus 3% of the gross profit after the company recouped \$20,000. *See* Writers Guild of America, Exec. Bd., Meeting Minutes (Mar. 3, 1952) (on file with the Writers Guild of America, West). In negotiating with Snader, the size of the percentage was controversial, but the Guild thought it could get "what would be the greatest gain for writers [they] could possibly hope for—copyright in the name of the author as well as the proprietor." *See* Writers Guild of America, Exec. Bd., Meeting Minutes (Mar. 24, 1952) (on file with the

necessary, however, for writers to secure an acceptable mix of guaranteed compensation and profit sharing from all studios and production companies.

Television producers were more amenable than film studios to paying writers on a percentage basis, largely because television was not yet reliably profitable, even in the West. Writers, the Executive Board recognized, were “gambling on the percentage part of the deal” but thought the gamble was worth taking because “[i]f and when there are profits, [they] should have a piece of it.”<sup>99</sup>

Guild negotiations with the television producer’s trade association stalemated in the summer of 1952 over the issue of royalties.<sup>100</sup> As the demand for material to put on television exceeded the supply of writers able to provide it, the Guild thought they were in a good position to insist on royalties, even to the point of calling a strike. Guild negotiators said they would consider a formula that would guarantee the producer a return on “negative cost” before any funds must be paid to the writer, essentially meaning that writers absorbed much of the risk. The Guild hoped that by doing so it could establish profit participation as a principle in most cases, without financial risk to the producer. Still, the television producers resisted, and proposed payment to the writer for reuse, but not for each reuse, and only after a certain number of reuses or a specific period of time.<sup>101</sup> The difference between the Guild’s proposal—a lease system with deferred payments—and the producers’ plan, which entailed studio ownership with some bonuses paid to writers, boiled down to a matter of principle for both sides. The Guild informed its members that a strike might be necessary because the “Guild’s position must prevail—not only for the sake of TV writers, but also to safeguard the economic future of screen writers when and if the major motion picture studios release their vast backlog of product to television.”<sup>102</sup> But a strike would be risky. As the Guild’s lawyer explained, the success of a strike would depend on whether television producers were determined just to fill air time, or if they wanted to improve the demand for television by improving its quality. “If they are in the market for first class

Writers Guild of America, West) (recounting Snader negotiations).

99. See Writers Guild of America, Exec. Bd., Meeting Minutes (Sept. 17, 1951) (on file with the Writers Guild of America, West) (noting stall in negotiations).

100. Writers Guild of America, Exec. Bd., Meeting Minutes (July 14, 1952) [hereinafter WGA Meeting Minutes III] (on file with the Writers Guild of America, West) (discussing breakdown in negotiations).

101. See *id.* (recounting negotiation talks).

102. See *Crisis Looms in TV Contract Fight*, SWG BULLETIN, July 1952, at 1 (discussing Guild’s firm negotiation stance). In 1955, the Executive Board considered the approval of a waiver for a unique deal—a producer asked a writer for a script in exchange for one third of the producer’s profits, with the stipulation that all rights would revert to the writer if the production did not sell, and the writers compensation would be above the minimum when paid. See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Apr. 11, 1955) (on file with the Writers Guild of America, West) (discussing offer for percentages instead of guaranteed minimums). The Executive Board approved the waiver, but insisted that its decision not be considered precedent. *Id.*

material which only our members can give,” then, the lawyer predicted, the Guild could successfully strike.<sup>103</sup> But if producers were willing to put anything on the air, a strike might fail, as non-Guild writers would probably not honor the strike.<sup>104</sup> Moreover, the Guild’s lawyer warned that the schism in the Guild over the issue of communism could be fatal to a strike; some Guild members might work during a strike, especially those who were desperate for work because of the blacklist of suspected communists, or those associated with “the right wing of the Guild,” who thought that the Guild was too soft on communism.<sup>105</sup>

While the Guild had its divisions, producers had theirs as well. Even if some television producers were prepared to withstand a strike by going off the air or using scripts written by “scabs,” some could not withstand intense pressure from advertising agencies and advertisers (including Proctor & Gamble, the huge maker of cleaning and personal care products) to avoid a strike, even if that meant accepting the Guild’s terms.<sup>106</sup>

The negotiations were further complicated by geography, confusion over which union represented television writers, and by virtue of the Guild negotiating a renewed MBA with major film studios to replace the one that it signed in 1949.<sup>107</sup> The multiple, simultaneous negotiations with producers spanning different forms of media meant that the gains secured by the Guild or producers in one negotiation, could serve as a model for others. This made all parties leery of reaching a deal, because the consequences of the contract were difficult to predict.<sup>108</sup>

The diversity of companies making television programs in the early 1950s

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103. See Writers Guild of America, Exec. Bd., Meeting Minutes (July 14, 1952) (on file with the Writers Guild of America, West).

104. See *id.*

105. See *id.*; see also Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. (forthcoming 2017) (noting difficulty maintaining solidarity among writers with different degrees of success, talent, and commitment).

106. FISK, *supra* note 9, at 160 (noting producers depending on work from advertisement agencies would concede).

107. *Id.* By late July, it was clear that the SWG considered, but rejected, trading ownership and royalty payments for sale of the script with payment for reuse (the residual system it ultimately adopted). See WGA Meeting Minutes III, *supra* note 100. In early August, the SWG called a strike against independent television production companies making filmed television programs in the West. See Writers Guild of America, Exec. Bd., Meeting Minutes (Aug. 4, 1952) (on file with the Writers Guild of America, West). The National Television Committee (NTC), the SWG, and the Radio Writers Guild asserted overlapping claims to represent writers working in various forms of television on both coasts, and the logistics of having multiple different guilds responsible for servicing the various contracts complicated negotiations.

108. FISK, *supra* note 9, at 160. In September of 1952, the SWG carefully studied the NTC’s contract with the networks and noted that if the writer is paid above the minimum, the overage could be applied to residuals. See Writers Guild of America, Exec. Bd., Meeting Minutes (Sept. 29, 1952) (on file with the Writers Guild of America, West). While, as a practical matter, the SWG had jurisdiction over live television west of the Rocky Mountains, it recommend that the network contract be administered by the NTC, and that dues be put in escrow or used to pay off the expenses of negotiating the network contract. Writers Guild of America, Exec. Bd., Meeting Minutes (Oct. 13, 1952) (on file with the Writers Guild of America, West).

was also an obstacle to establishing a uniform scale for compensating writers. However hard it had been to negotiate minimum compensation in 1938-1941, with only eight film studios, the problem intensified ten years later when more companies with very different financial situations entered the television production business. This was true both in deciding what minimum compensation should be, and in figuring out how to calculate profit sharing. The Guild proposed different minimum profit-sharing scales depending on the producer, but the proposals were complicated by separate negotiations with the different entities.<sup>109</sup> Ultimately, the Guild addressed the differences among producers by negotiating different pay scales and residuals formulae for different kinds of programs. This approach continues to this day, as the 2017 MBA, like those before it, provides for different compensation and residuals for streaming video on demand (Netflix, Amazon, or Hulu), high budget streaming video on demand, advertising supported video on demand (the ad-supported version of Hulu), for-pay comedy variety shows (including HBO), and other types of programs and distribution platforms.<sup>110</sup>

In the end, the Guild and producers agreed to residuals for some reuses, but did not agree to payment for television broadcasts of pre-1948 movies.<sup>111</sup> Instead, the Guild agreed that some of the money the studios made would be used to create a pension plan. In 1955, Radio Keith Orpheum Pictures became the first studio to sell its film library for television showing, followed by Warner Bros. and Twentieth Century Fox in 1956.<sup>112</sup> This was a huge source

109. FISK, *supra* note 9, at 161 (referring to difficulty in negotiations). In discussing the possibility of a strike focused just against the independent production companies (which were much smaller than the studios), a skeptical National Labor Relations Board (NLRB) official suggested to the SWG's lawyer, Gordon Stulberg, that the so-called "principle" for which the Guild was bargaining (writer ownership and payment on a royalty basis) was not one the Guild demanded of the major studios and that, "[i]n other words, this is a strike to compel the little guys to give in so that someday you can knock over the big guys." See Writers Guild of America, Exec. Bd., Meeting Minutes (Sept. 3, 1952) (on file with the Writers Guild of America, West). Stulberg replied that "they don't pay the minimums in television that are paid in the majors, and we have to make up the gap by some sort of royalty principle." *Id.* Everett Freeman, an Executive Board member, elaborated on a deal he was offered in 1952, noting that the producer "was very receptive to residuals and [payment for] reuse, but could not figure out—in terms of a sponsored show—what is considered a percentage of the gross in such case." Writers Guild of America, Exec. Bd., Meeting Minutes (Aug. 27, 1952) (on file with the Writers Guild of America, West).

110. See 2017 MBA Summary, *supra* note 14 (recognizing differing residuals for various types of streaming services).

111. See Writers Guild of America, Special Membership, Meeting Minutes (Apr. 22, 1953) (on file with the Writers Guild of America, West) (recognizing "minimum aggregate compensation agreement"); Writers Guild of America, Exec. Bd., Meeting Minutes (Mar. 2, 1953) (on file with the Writers Guild of America, West) (referencing percentage agreement for reruns); Writers Guild of America, Exec. Bd., Meeting Minutes (Feb. 23, 1953) (on file with the Writers Guild of America, West) (noting 1948 date same as deal given to actors and directors). The question of whether writers could accept a percentage in lieu of minimum compensation recurred frequently in the early days of television. Michael Wilson agreed to such a deal for *Salt of the Earth*, but his deal guaranteed him the MBA minimum in the event that it was more than 15% of the producer's share, which was the sum for which Wilson leased the script.

112. See ERIC BARNOUW, TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION 197-98 (2d rev.

of revenue for the studios, but the writers got none of it in residuals.<sup>113</sup>

Having secured the right to be paid residuals, the Guild assumed a major role in monitoring uses of material, tracking how much writers were owed, and whether they were paid. Thus, it was important to secure the cooperation of actors' and directors' unions to set up a national monitoring system, as they all shared an interest in residuals. Enforcing residuals relied on auditing the producers' records, as well as a variation of the ASCAP system of monitoring broadcasts.<sup>114</sup> Broadcast monitoring was not only necessary to calculate residuals, but also to monitor that credits were not clipped at the end of the program to ensure that writers received the credit for which they bargained.<sup>115</sup> Of course, if the industry adopted a percentage of the gross formula instead of residuals for reuse, it would have been unnecessary to monitor broadcasts. On the other hand, it was not all bad that the Guild was responsible for tracking residuals. It empowered the Guild to demand information from studios, which is always a significant issue for labor organizations, especially in an industry like film and television entertainment where the writers' agents negotiate individual contracts to supplement the MBA.

With the principle of payment for reuse established, every round of contract negotiations for film and television with the majors, independents, networks, and (in the beginning) live and filmed television, invited a new opportunity to revise the formula.<sup>116</sup> This idea remains true today.

### III. HOW RESIDUALS CHANGED THE DEBATE OVER CREDITS

Once compensation hinged on screen credit, the Guild again had to debate a fair system for dividing up credit, which was especially difficult due to television's collaborative writing culture. Two different points of view were in tension. On the one hand, some writers wanted to limit the number of credits to

ed. 1990) (summarizing various library releases); HOYT, *supra* note 41, at 176-77 discussing increased availability of studio libraries).

113. See BARNOUW, *supra* note 112, at 197-98 (addressing lack of residual payments from library releases).

114. See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Sept. 19, 1955) [hereinafter Television Writers Meeting I] (on file with the Writers Guild of America, West) (evaluating difficulties in ensuring writers are fully paid); Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (May 16, 1955) (on file with the Writers Guild of America, West) (proposing widespread cooperation in policing of reruns); Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Apr. 18, 1955) (on file with the Writers Guild of America, West) (discussing monitoring of reruns).

115. Television Writers Meeting I, *supra* note 114 (discussing difficulties in policing reruns).

116. FISK, *supra* note 9, at 163-64 (recognizing impact of continued negotiations). When the Guild planned to negotiate for a renewal of the 1952-1955 MBA, a major point was whether the residuals demand were too high in comparison to what actors settled for after a two-week strike in the summer of 1955. See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Aug. 15, 1955) (on file with the Writers Guild of America, West). Additionally, there was contention over whether writers should insist on residuals for foreign television release (on which actors did not demand residuals). *Id.* The writers decided to hold strong on demanding payment for the first rerun, but scaled back the percentages demanded. *Id.*

make it more like film, and thereby enhance the writers' prestige by identifying them as the authors. On the other hand, some writers wanted additional dialogue credits on some shows, particularly situation comedies, because, as one writer said, "a script is often given to a writer who can put humor into it and make it playable," and "such a writer should get credit in order to share in residuals."<sup>117</sup> Nevertheless, in August 1955, the Guild settled for restricting the number of credits, using the same criteria as for screen plays: teleplay by, or teleplay and story by.<sup>118</sup> The Guild allowed for special material credit in variety shows, and also explained that in comedies, any writer who contributed a significant amount of the humor should be found to have contributed enough to receive shared teleplay or story credit.<sup>119</sup>

Debates over removing one's name from credit after having been rewritten were also complicated by residuals because writers who preferred not to have their names attached to a bad script might change their minds if the film showed frequently on television, or if the show did well in reruns. This problem was illustrated by a 1955 credit dispute involving a writer named Paul Franklin, who wrote a teleplay for producer Gross Krasne called *Dead to Rights*. Krasne hired someone else to rewrite Franklin's teleplay and, when Franklin saw the revised version, he asked that his name be removed from the credits. On the third rerun of the teleplay in 1954, however, Franklin's name was somehow added as a story credit, which entitled him to a \$50 residual under the MBA. Franklin decided he wanted the money, apparently as a form of damages for the harm to his reputation caused by associating him with a picture from which he tried to distance himself. When the Guild asked Krasne to pay Franklin, the producer's lawyers insisted that the addition of Franklin's name was a clerical error. Pointing out that the producer had already paid the other writer a residual, Krasne insisted that paying twice would be unfair.

This matter caused consternation among the Guild's Executive Board members. As for the equities in the case of Paul Franklin, members felt that the second writer had a right to rely on Franklin's withdrawal from credit as a sort of guarantee that the second writer would receive full residuals. The Guild therefore decided it would not deprive the second writer of half the residuals "in order to compensate Mr. Franklin for the damages he feels he suffered by the incorrect use of his name on this picture."<sup>120</sup>

Some members felt that the issue was not a Guild problem, and that Franklin should simply pursue a claim for damages against the producer. Some thought the solution was for writers in the future to use pseudonyms to ensure a poor

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117. See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Aug. 15, 1955) (on file with the Writers Guild of America, West) (discussing various arguments relating to credits).

118. See *id.* (resolving credit dispute).

119. See *id.* (allowing for special credit for variety shows).

120. See Writers Guild of America, Television Writers Branch Exec. Bd. Meeting Minutes (Apr. 18, 1955) (on file with the Writers Guild of America, West).

quality script would not ruin their reputation, but entitling the writer to a residual if the project made money (and pseudonymous writing is the system that the Guild ultimately adopted). But allowing pseudonymous writing was controversial in the mid-1950s because of the blacklist, and so the Guild decided that if it permitted pseudonyms, there would have to be a policy allowing their use only in the case of “mutilation” of material. Yet the Guild recognized it had no easy way to distinguish actual mutilation of material from improper uses of a pseudonym.<sup>121</sup>

In the years since, because a writer’s claim to residuals turns on screen credit, writers have had incentives (beyond the satisfaction of seeing one’s name in the credits and advertising) to contest credit allocations through the Guild’s credit arbitration process. Credit arbitrations are more common with respect to movies than in television because television has its own norms by which show writers determine who receives credit for each episode among themselves. Of course, because credit determinations are made before a film is released in theaters, writers who think that a movie may be successful—and appear often on television or streamed over the internet—have incentive to contest credit in the small hope they will win in arbitration and thus be entitled share in the residuals.

#### IV. A MODEL WORTH EMULATING?

As technology and business models change, the line between television, film, and video games becomes fuzzier. This “transmedia” expansion raises the question of whether unionization and residuals should spread beyond Hollywood writers, actors, and directors to allied industries, like video game production.<sup>122</sup> Already, the possibility is there. The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), the union that represents actors, declared a strike in late 2016 to demand residuals

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121. See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Apr. 18, 1955) (on file with the Writers Guild of America, West) (recounting discussion regarding pseudonymous writing). Negotiations went on simultaneously with the majors and the networks, and by the end of 1955, the Television Writers Branch Board was informed that progress had been made in both sets of negotiations in the crucial areas of “money, terms, and rights.” See Writers Guild of America, Television Writers Branch Exec. Bd., Meeting Minutes (Dec. 20, 1955) (on file with the Writers Guild of America, West). With the majors, the most contentious issue hinged on whether to give the writers nothing more than they gave the actors with respect to return payments. See *id.* On foreign rights, the majors absolutely refused to talk, and the writers feared they would have to strike; but the networks were more flexible. See *id.* On remakes, the majors and the networks both insisted they would give writers nothing because they sensed a danger to the theatrical motion picture contract. See *id.* But, the writers insisted that the right to remake could “wipe out entirely the effect of separation of rights and reversion of rights.” See *id.* In negotiations with the networks, the major issue was that the networks wanted a separate contract for staff writers. See *id.*

122. See ROBERT ALAN BROOKEY, HOLLYWOOD GAMERS: DIGITAL CONVERGENCE IN THE FILM AND VIDEO GAME INDUSTRIES 15 (2010) (discussing potential unionization in video game industry).



payments for actors who voice video game characters.<sup>123</sup> Many recognize that this demand is simply the tip of a possible iceberg in which many others involved in video game creation might demand union representation and the protections that it entails.<sup>124</sup>

Video game production is big business. The multibillion dollar U.S. video game industry looks, in some respects, like Hollywood. Companies specialize in game development and, like independent production companies in film and television, employ staffs of between two dozen and hundreds of people to establish the game concept, develop characters, and conceptualize the mechanics of play. Artists develop characters, virtual worlds, animation, special effects, and sound. Programmers or engineers design and write the code which enables the game to function. Producers administer the budget, coordinate the project, manage the development team, and aim to maintain a coherent vision of the game's design. Testers play the game to identify bugs and evaluate it for playability. The company that employs all these people in turn contracts with the huge video game publishing companies (equivalent to the movie studios) that finance and market the games. Consequently, "[p]ublishers' control over funding, advertising, licensing, and distribution gives them enormous power."<sup>125</sup>

The Guild tried to organize gamers, forming the Videogame Writers Caucus in 2006.<sup>126</sup> Video game workers also approached the Washington Alliance of Technology Workers (WashTech), a local affiliate of the Communication Workers of America, in order to organize.<sup>127</sup> An adverse ruling from a hostile NLRB thwarted the campaign. But in the longer term, one question of concern may be: Will game development workers recognize that their self-conception as independent entrepreneurs, doing a stint at corporate drudgery only until they find their own company, is inconsistent with unionization?<sup>128</sup> This, of

123. See Emanuel Maiberg, *The Video Game Industry Is Afraid of Unions*, MOTHERBOARD (Feb. 22, 2017), [https://motherboard.vice.com/en\\_us/article/walk-the-line?utm\\_source=mbtwitter](https://motherboard.vice.com/en_us/article/walk-the-line?utm_source=mbtwitter) [<https://perma.cc/SHF3-JZ3R>] (detailing SAG-AFTRA's demand for residuals).

124. See Paul Hyman, *Unionization Now?*, GAMASUTRA, [http://gamasutra.com/view/feature/130678/unionization\\_now.php?print=1](http://gamasutra.com/view/feature/130678/unionization_now.php?print=1) (last visited Aug. 8, 2017) [<https://perma.cc/7QEX-FMUF>] (comparing video game and movie industry unionization).

125. See Nick Dyer-Witheford & Greig de Peuter, "EA Spouse" and the Crisis of Video Game Labour: *Enjoyment, Exclusion, Exploitation, Exodus*, 31 CANADIAN J. COMM. 599, 602 (2006) (outlining interactions between publishers and game developers); see also Greig de Peuter & Nick Dyer-Witheford, *FCJ-024 A Playful Multitude? Mobilising and Counter-Mobilising Immaterial Game Labor*, FIBRECULTURE J. (Dec. 4, 2005), <http://five.fibreculturejournal.org/fcj-024-a-playful-multitude-mobilising-and-counter-mobilising-immaterial-game-labour/> [<https://perma.cc/XAH5-TYSA>] (declaring "[p]ublishers exert massive influence over what games are made and when").

126. See *Video Game Writers Caucus*, WRITERS GUILD AM., WEST, <http://www.wga.org/the-guild/going-guild/caucuses/videogame-writers-caucus> (last visited Aug. 5, 2017) [<https://perma.cc/9NMY-V47F>] (elucidating caucus's main goals).

127. See Dyer-Witheford & de Peuter, *supra* note 125, at 613 (recounting attempts to unionize).

128. See *id.* (declaring entrepreneurial nature of video game development "antithetical" to unionization).

course, is the same dilemma that film writers faced in the 1930s when they chose to form the Guild.<sup>129</sup> Today, Hollywood writers periodically profess embarrassment over having to do such working class things as going on strike and picketing. Yet writers are devoted unionists precisely because they recognize that, but for the union, their working conditions might look much more like the long hours, irregular employment, and lower pay of reality television and video game writers.

#### V. CONCLUSION: AUTHORS AND OWNERS OF FILM AND TV

It is tragic that during the period between 1945 and 1955, when the Guild organized television and pioneered residuals, the communist blacklist nearly destroyed the Guild. Many of the ideas concerning how the Guild should protect writers through licensing rather than outright sale, profit sharing, and separation of rights originated with writers John Howard Lawson, Lester Cole, Dalton Trumbo, and Ring Lardner, Jr.—whom the Executive Board seemed willing to allow to be driven out of Hollywood.

The history of residuals is inextricably linked with the quest of Hollywood writers to achieve greater recognition of their role as authors of motion pictures and television programs. Almost every discussion about what writers ought to demand, whether in Guild deliberations, publications, or by students of Hollywood, tends to intermingle the issues of compensation with attribution and creative control. What makes the history of the Guild's campaign for residuals so fascinating is its effort to reconceptualize the role of the writer as a proper author entitled to share in the proceeds of the work. The economic issues of residuals—from the earliest demands for profit sharing in the 1920s up through the 2017 round of negotiations for a new MBA—have always been a crucial part of the writers' efforts to obtain recognition as the authors of films and television programs.

Negotiation over residuals also raised issues as to writers' labor status. Writers understood themselves as allied with management and as managers of capital, as they aspired to share in the profits (through residuals), to have more control over uses of their work (through rights to subsidiary uses such as radio, stage, and television), and to be recognized as the authors of films and television programs (through screen credit). Yet writers saw themselves as labor when they negotiated for minimum payment by the job (as a script fee) or by the week, and they had to insist on their status as employees in order to assert their rights to unionize and bargain collectively. Writers thought that distancing themselves from employee status would enhance both their claims to profit sharing and to control over the subsidiary rights in their work. They also thought that maintaining their independence would reduce the power that

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129. FISK, *supra* note 9 at 55 (stressing writers' concerns with unionization).

producers had over working conditions. Ironically, writers had to insist on their status as labor—employees eligible to form a union—rather than independent creators in order to gain power as entrepreneurs entitled to profit sharing in their work.

