



# *Intellectual Property, Employment, and Talent Relations: A Media Studies Perspective*

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**ABSTRACT (EN):** This chapter considers twentieth century contests over the terms of creative employment in the United States film and music industries. The sites of creative employment are pre-eminently sites of power relations; cultural industry employers' dependence on continuous streams of novel intellectual property correlate to contrasting forms of struggle in "talent relations" (a sectorial adaptation of "labour relations") at the star and rank-and-file levels. This chapter offers brief accounts of Olivia de Havilland's and Olivia Newton-John's court disputes over the duration of their contracts (as well as a related change of relevant employment law), and of the American Federation of Musicians' and the American Federation of Radio Artists' collective bargaining efforts to stem and compensate for the technological displacement of their members. It argues that, surveyed together, these very different forms of contest reveal distinct logics of corporate control in core copyright industries. The management of the entertainment industries' constitutive tension between innovation and control has produced regimes of highly constrictive star contracts but it has allowed openings for extraordinary gains by organized creative craftspeople. Stars' great economic rewards can come at the expense of radical constraint; the AFM, AF(T)RA, and other organizations have been able to significantly democratize their employment.

**RÉSUMÉ (FR):** Ce chapitre étudie les luttes du vingtième siècle concernant les conditions d'emploi créatif dans les industries américaines du film et de

la musique. Les domaines d'emploi créatif sont de façon prédominante des lieux de relations de pouvoir; les employeurs dans l'industrie de la culture dépendent de courants continus de propriété intellectuelle originale, ce qui est en corrélation avec les formes de conflits en « relations de talents » (une adaptation sectorielle des « relations de travail ») au niveau des vedettes et des créateurs ordinaires. Ce chapitre donne un compte rendu succinct des poursuites judiciaires d'Olivia De Havilland et d'Olivia Newton-John pendant la durée de leurs contrats respectifs (de même que des changements pertinents apportés au droit du travail), ainsi que des efforts de négociation collective de l'American Federation of Musicians et de l'American Federation of Radio Artists dans le but de freiner le remplacement technologique de leurs membres et leur obtenir compensation. Il soutient que ces très différentes formes de contestations révèlent des logiques distinctes de contrôle corporatif dans les industries centrales du droit d'auteur. La gestion des tensions entre l'innovation et le contrôle dans les industries du spectacle a produit des régimes restrictifs de contrats pour les vedettes, mais elle a aussi permis aux professionnels organisés de la création d'en retirer des bénéfices importants. Les récompenses astronomiques des vedettes peuvent être versées, mais seulement aux frais de contraintes importantes; le AFM (American Federation of Musicians of the United States and Canada), l'AF(T)RA (American Federation of (Television and) Radio Artists (AFTRA)) et d'autres organismes ont réussi à démocratiser de façon significative ce type d'emploi.

*"[T]he work site is where we often experience the most immediate, unambiguous, and tangible relations of power that most of us will encounter on a daily basis."<sup>1</sup>*

## A. INTRODUCTION

Intellectual property rules allocate proprietary rights to some people and groups and correspondingly dispossess or exclude others; in addition to allocating (intellectual) property rights,<sup>2</sup> employment also assigns rights to command to some people and finds in others a duty to obey.<sup>3</sup> The distinctive

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1 Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Durham: Duke University Press, 2011) at 2.

2 David P Ellerman, *Property and Contract in Economics: The Case for Economic Democracy* (Cambridge: Blackwell, 1992) at 20.

3 Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 146–51 [Pateman, *The Sexual Contract*].

logics of intellectual property and employment routinely intersect in the creative workplaces found in many of the “core copyright industries . . . wholly engaged in the creation, production, performance, exhibition, communication or distribution and sales of copyright protected subject matter.”<sup>4</sup> In a foundational social-scientific analysis, DiMaggio and Hirsch observe that “[c]ultural production systems are characterized by a constant and pervasive tension between innovation and control.”<sup>5</sup> Troublous intersections of intellectual property and employment in these systems express this tension. Consumers’ demand for new cultural material requires innovation at all levels: from idiosyncratic performances and works by star creators to expert contributions by rank and file creative workers. Forms of control are correspondingly distributed, for example, over production processes, workers’ time and effort, and rights to resulting intellectual properties.<sup>6</sup> This characteristic tension between innovation and control frequently boils over into conflict regarding the terms of creative employment, including lawsuits and (threatened) strikes. Employers’ intellectual property concerns often influence the conditions of employment; creative workers — as individual employees and as members of unions, able to mobilize varying kinds and amounts of bargaining power in distinctive social contexts and at different historical moments — repeatedly come up against and sometimes contest the workplace corollaries of this influence, in typically patterned ways. On the one hand, established stars struggle against their employers’ desire and power to bind them to long-term contracts that assign present and future performances and works of potential long-term value. On the other hand, skilled rank and file creative workers contesting casualization have been able to withhold their labour to exploit their employers’ dependence on streams of novel, marketable intellectual property. In both of these contexts, “relations of power become more apparent and make the contested terrain of struggle more visible.”<sup>7</sup> The efforts of star and rank and file

4 WIPO, “Copyright-Based Industries: Assessing Their Weight” (May 2005) 3 *Wipo Magazine*, online: WIPO Magazine [www.wipo.int/wipo\\_magazine/en/2005/03/article\\_0012.html](http://www.wipo.int/wipo_magazine/en/2005/03/article_0012.html).

5 Paul DiMaggio & Paul M Hirsch, “Production Organizations in the Arts” in Richard A Peterson, ed, *The Production of Culture* (Beverly Hills: Sage, 1976) at 79 [endnote omitted].

6 See, generally, Matt Stahl, “Privilege and Distinction in Production Worlds: Copyright, Collective Bargaining, and Working Conditions in Media Making” in Vicki Mayer, Miranda J Banks, & John T Caldwell, eds, *Production Studies: Cultural Studies of Media Industries* (New York: Routledge, 2009) [Stahl, “Production Worlds”].

7 Danae Clark, *Negotiating Hollywood: The Cultural Politics of Actors’ Labor* (Minneapolis: University of Minnesota Press, 1995) at 38.

creative workers to exercise control over their labour make more visible the socially problematic nature of employment and intellectual property, giving rise to questions about the affordances and politics of both institutions.

Today, scholars from numerous disciplines take increasing interest in the practices, institutions, and individuals involved in cultural production; differing scholarly approaches illuminate contrasting questions and priorities. Critical legal studies of media and cultural production have long approached intellectual property rights as a problem, identifying ways in which they intervene in the production and circulation of media texts;<sup>8</sup> media studies scholars have also contributed to this tradition.<sup>9</sup> Particularly under the banner of the “cultural industries” approach, media scholars have focused on creative labour, closely examining the unusual social relations of creative workplaces and the occupational identities of writers, singers, artists, journalists, musicians, television producers, and other such workers.<sup>10</sup> Here too, legal and legal-historical research is making significant contributions.<sup>11</sup>

However, with few exceptions,<sup>12</sup> studies of cultural production rarely give the institution of employment the kind of critical attention devoted to intellectual property. Exemplary cultural industries research into creative work has targeted exploitive “bad work,”<sup>13</sup> sometimes invoking the “liberal-democrat-

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8 See, for example, Jane M Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991); Peter Jazsi & Martha Woodmansee, eds, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994).

9 See, for example, Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001).

10 See, for example, Bernard Miege, *The Capitalization of Culture* (New York: International General, 1989); Bill Ryan, *Making Capital from Culture: The Corporate Form of Capitalist Cultural Production* (New York: Walter De Gruyter, 1992); Mark Banks, *The Politics of Cultural Work* (New York: Palgrave Macmillan, 2007); David Hesmondhalgh & Sarah Baker, *Creative Labour: Media Work in Three Cultural Industries* (New York: Routledge, 2011).

11 See, for example, Catherine L Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800–1930* (Chapel Hill: University of North Carolina Press, 2009) [Fisk, *Working Knowledge*]; Steve Greenfield & Guy Osborn, *Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven* (Brookfield: Ashgate, 1998) [Greenfield & Osborn, *Contract and Control*]; Giuseppina D’Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Northampton, MA: Edward Elgar, 2010), examines the contracting practices of freelance independent contracting writers.

12 See, for example, Fisk, *Working Knowledge*, above note 11; see also Greenfield & Osborn, *Contract and Control*, above note 11.

13 Hesmondhalgh & Baker, above note 10 at 36.

ic”<sup>14</sup> context of such work, understood to set limits on such work’s exploitive badness. While these analyses are rich and rigorous in sociological terms, they tend to eschew challenges posed by democratic theorists<sup>15</sup> or by critical political economists,<sup>16</sup> who suggest, for example, that “exploitation” does not analytically exhaust the politics of work.<sup>17</sup> However, recent work on writers in North America and Europe has begun to take up these challenges with respect to problems associated with independent contracting. D’Agostino argues, for example, that under current copyright conditions, the freelancer’s purported freedom is essentially illusory.<sup>18</sup> This salutary contribution does much to bridge these diverging perspectives. Along with the prospect D’Agostino’s observation illuminates, the democratic-theoretical challenge demands that scholarship touching on work confront not only exploitation but also *domination*; this chapter suggests that forms of creative work central to the production of profitable intellectual properties reveal distinctive patterns along these lines.

Approaching the social relations of creative workplaces by way of a media studies framework, extended through insights drawn from social scientific, democratic theoretical, and critical legal studies, this chapter offers a brief account of twentieth century contests over the terms of creative employment in the American film and popular music industries. Taking employment as pre-eminently a system of power relations, it argues that cultural industry employers’ economic dependence on intellectual property has political effects in “talent relations” (a sectorial adaptation of “labour relations”) at different strata. The nature and extent of rights of property and command, as well as the definitions governing what sorts of working people enjoy or endure and their respective benefits or obligations, differ in various sectors and at various moments: an activity once legally recognized as authorship may at some later time not be recognized as such;<sup>19</sup> an activity once classified as mere execution may at some later time come to be linked with intellectual property rights;<sup>20</sup> an activity recognized as authorial in one sector may not be

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14 Banks, above note 10 at 100.

15 See, for example, Weeks, above note 1.

16 Nicole S Cohen, “Cultural Work as a Site of Struggle: Freelancers and Exploitation” (2012) 10:2 TripleC: Cognition, Communication, Cooperation 141.

17 Pateman, *The Sexual Contract*, above note 3 at 149.

18 D’Agostino, above note 11 at 244–45; see also Cohen, above note 16.

19 Fisk, *Working Knowledge*, above note 11.

20 Robert A Gorman, “The Recording Musician and Union Power: A Case Study of the American Federation of Musicians” (1983) 37:4 Sw LJ 697 at 739–40.

treated as such in another.<sup>21</sup> The examples examined here bring into relief patterns in the ways that Hollywood-based film and popular music industry employers and their creative employees have vied over the terms on which the tension between innovation and control will be managed. The chapter does not consider freelance independent contractors, though many of the working people involved in the examples are freelance employees who work under union employment contracts, nor does the chapter explicitly engage theories of intellectual property or copyright. The argument is that these characteristic flashpoints reveal how corporate dependence on commercially exploitable intellectual property affects talent relations at the star and rank-and-file levels.

## **B. CONTRACTS**

Cultural industry firms demand control of copyrights so that their licences have maximum value and minimal competition.<sup>22</sup> Control over copyright, in turn, requires control over labour and workplace creation: star creators are often subject to long-term, restrictive, exclusive contracts,<sup>23</sup> other creators to regimes of work for hire or market-based pressures toward maximal rights assignment.<sup>24</sup> Employers achieve control of labour and property through the intersecting instruments of employment, independent contracting, and copyright's doctrine of work for hire, which are themselves continually adjusted by lobbying and regulatory capture, and mediated by the market or bargaining power of the different players.<sup>25</sup> These forces interact at the point of the employment contract for creative labour, with differing outcomes at the levels of individual and collective bargaining. Individuals' bargaining power, even that of stars, is rarely great enough to overcome norms of dispossession; recording artist attorney Jay Cooper testified

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21 Stahl, "Production Worlds," above note 6 at 54.

22 Martin Kretschmer & Friedemann Kawohl, "The History and Theory of Copyright," in Simon Frith & Lee Marshall, eds, *Music and Copyright*, 2d ed (New York: Routledge, 2004) at 43.

23 Gaines, above note 8 at 148.

24 See generally Johanna Fisher Stewart, "The Freelancer's Trap: Work for Hire under the Copyright Act of 1976" (1984) 86:3 *W Va L Rev* 1305; D'Agostino, above note 11.

25 See, generally, Fisk, *Working Knowledge*, above note 11; Stewart, above note 24; D'Agostino, above note 11; see also Marci A Hamilton, "Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice" (1987) 135:5 *U Pa L Rev* 1281.

before United States lawmakers that despite representing some of the most commercially successful artists in popular music, he has never been successful in striking a work for hire provision from a recording contract.<sup>26</sup> On the other hand, collective bargaining power supports surprisingly strong claims of non-star employed creators. As I recount below, agreements between Hollywood cultural industry employers and their unionized creative employees have long enshrined significant workers' rights, including what Fisk calls "private intellectual property rights."<sup>27</sup>

Gaines writes that "it is the transferability of rights that is the basis of the mass marketing of the human image and the human voice in the communications industries."<sup>28</sup> In the organizations and relations at issue here, it is the employment contract that enables these transfers of rights; yet in so doing the contract creates not equal parties exchanging goods but regimes of private rule. In Pateman's words, "a form of government that is seen in democratic countries as 'intolerable' in governing the state is seen as desirable in enterprises." She maintains that "[t]he enterprise, like the state, is a political system where power is exercised over the governed."<sup>29</sup> In the disciplines of labour studies, critical political economy, and democratic political theory, the idea that the employment contract transfers both property *and* command rights is less controversial than in sociology, media studies, and communication, the disciplinary homes of much empirical creative work research. The virtue of a democratic-theoretical perspective for the study of intellectual property and employment is that, in rendering workers' surrendering of rights of self-determination legible and controversial, it provides a framework to connect the concerns of critical scholars of intellectual property to broader themes of work, dispossession, and subordination in contemporary society.

The questions this line of research poses include: On what terms are those rights transferred? What kinds of (historical, social, cultural, legal, or economic) circumstances shape those terms and how? What accounts for

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26 Matt Stahl, *Unfree Masters: Recording Artists and the Politics of Work* (Durham: Duke University Press, 2013) at 197-98 [Stahl, *Unfree Masters*].

27 Catherine Fisk, "The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000" (2011) 32:2 Berkeley J Emp & Lab L 215 [Fisk, "Markets for Labor"].

28 Gaines, above note 8 at 155.

29 Carole Pateman, "Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts" (2002) 10:1 Journal of Political Philosophy 20 at 46 [footnote omitted] [Pateman, "Democratization"]; see also Weeks, above note 1.

change in or persistence of these terms? How do the terms differ within the cultural industries, and between the cultural industries and other sectors? Representing early findings in an ongoing research project, this chapter suggests that patterns and themes are discernable in these arrangements and that an approach that highlights the politics of work has something of value to contribute to an understanding of intellectual property's role in the social relations of cultural production.

## 1) Individual Star Contracts

The star contracts of Hollywood's 1930s and '40s "studio system" era offer an Ur-example of how a firm dependent on steady flows of potentially valuable new intellectual properties may seek to cement its power over the labour of its most valuable star workers.<sup>30</sup> Stars present a linking of cultural and economic value, a "market strategy"<sup>31</sup>: their personae, voices, and bodies provide anchor points for consumers' imaginative identification and desire as well as their demand and willingness to pay for cultural goods. "In economic terms," writes Balio, "stars created the market value of motion pictures . . . [A] distributor simply pointed to the past box-office performance of a star to justify the rental terms for his or her forthcoming pictures."<sup>32</sup> The long-term option contract characteristic of the studio system (and of the contemporary recording industry) provides a crucial foundation for profitability. It enables the employer to secure the services of a new or rising performer at a low initial rate and is constructed such that, at any of a series of predetermined points, the employer may either exercise the option or terminate the contract.<sup>33</sup> These contracts are typically written so that only the employer has an option; these are "take-it-or-leave-it" deals in which

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30 See, generally, Emily Susan Carman "Independent Stardom: Female Film Stars and the Studio System in the 1930s" (2008) 37:6 *Women's Studies* 583.

31 Cathy Klaprat, "The Star as Market Strategy: Bette Davis in Another Light" in Tino Balio, ed, *The American Film Industry* (Madison: University of Wisconsin Press, 1985) at 354.

32 Tino Balio, *Grand Design: Hollywood as a Modern Business Enterprise, 1930–1939* (New York: Macmillan Publishing, 1993) at 144 & 145 [footnote omitted].

33 See, for example, Donald S Passman, *All You Need to Know about the Music Business*, 6th ed (New York: Free Press, 2006) at 99. The logic of the "option" has been analyzed extensively by scholars of the recording industry in which it is also a central form.



the only option available to employees is to work as directed or be in violation of the contract.<sup>34</sup>

The laws of the state of California, home to the Hollywood studio system and to much entertainment industry activity, have come to play an important role in the establishment of norms of entertainment industry contracting; arguments over some of these laws bring some of the imperatives of entertainment industry employment relations into focus. The so-called “seven-year rule” — a section of the state’s labour code originating in the late nineteenth century — limits the enforcement of employment contracts to that eponymous statutory maximum.<sup>35</sup> This rule was at the centre of a court battle between the film star Olivia de Havilland and her employing studio, Warner Bros. Pictures.<sup>36</sup> Her contract, like many during this period, had a clause providing that time spent “under suspension” during the life of the contract could be tacked on to the end of the contract’s term. Over the course of her seven-year option contract, de Havilland had spent twenty-five weeks under suspension, some by her choice, some by the studio’s. When the studio attempted to enforce the contract beyond its seventh anniversary in order to claim the twenty-five weeks’ labour they considered they were owed, de Havilland and her lawyer sued under the seven-year rule.<sup>37</sup>

The published ruling of the Appellate Court decision is striking in its “absolute” reading of the statute<sup>38</sup> and its explicit conceptualization of employment as an object of public policy. However, the unpublished ruling of Los Angeles Superior Court Justice Charles S. Burnell in favour of de Havilland penetrates the politics of the standard option contract in a startling way. Justice Burnell dilates on the threat embedded in Warner Bros. Pictures’ claim on seven years of actual service (as opposed to a contract covering seven calendar years). He finds that the studio’s construction of the seven-year rule could “easily result” in a contract like de Havilland’s “being indefinitely extended, even to the point of constituting life bondage for the employee.”<sup>39</sup> Under the interpretation sought by the studio, wrote Burnell,

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34 See, generally, Steve Greenfield & Guy Osborn, “Understanding Commercial Music Contracts: The Place of Contractual Theory” (2007) 23:3 *Journal of Contract Law* 248.

35 *California Labor Code*, §2855 (1937).

36 *De Havilland v Warner Bros*, 487685 Los Angeles County Sup Ct (1944); *De Havilland v Warner Bros Pictures*, 67 Cal App (2d) 225 (1944).

37 Jonathan Blaufarb, “The Seven Year Itch: California Labor Code Section 2855” (1983–84) 6:3 *Comm/Ent LJ* 653 at 666.

38 *Ibid* at 668.

39 LA Sup Ct, above note 36 at 14.

“the life of the contract might at the option of the producer be extended . . . indefinitely, thus precluding [the actor] from ever working for any other employer. It was to prevent such a condition of peonage or serfdom that the statute was enacted.”<sup>40</sup> Justice Burnell’s perception of the profoundly unequal — feudal, even — relations established in the contract sensitizes him to the need for the exercise of the “police powers of the state”<sup>41</sup> in protecting the rights of employees against the private power of employers, and to the potentially perverse results of expansive freedom of contract between manifestly unequal parties.

The seven-year rule was codified in the 1870s, a period in the state’s history when employment took the form of relations of master and servant, when employees — particularly non-white employees — had few rights, and when conditions of labour shortage predominated in California.<sup>42</sup> It must have appeared as a reasonable protection for workers whose employers had incentives to hold them under contract for long periods. When economic growth outpaces population, contractually assured rights in people’s labour and to their obedience can be very valuable.<sup>43</sup> While the balance of economy and population in California had changed markedly by the 1930s, the Hollywood film studios shared something with the state’s early employers: they depended heavily on and were in competition for the labour of a scarce population, in this case bankable stars: a small number of actors whose names and likenesses constituted much of the value of the firms’ intellectual property.<sup>44</sup>

The argument here is not that Warner Bros. Pictures fought to keep de Havilland from challenging the studio’s intellectual property rights, or that de Havilland should be considered an author under law, rather, it is that de Havilland’s intellectual property-producing performance labour was so crucial to the company’s value and profitability that they would fight vigorously

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40 *Ibid.*

41 *Ibid* at 7.

42 Donna R Mooney, “The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848–1872” (2000) 21:2 *Berkeley J Emp & Lab L* 633.

43 Maurice Dobb, *Studies in the Development of Capitalism* (London: Routledge & K Paul, 1963) at 23.

44 See, generally, Tom Kemper, *Hidden Talent: The Emergence of Hollywood Agents* (Berkeley: University of California Press, 2010), on varying ways in which stars and their agents sought to turn individual monopolies to their advantage.

to keep her (and her other star colleagues) under contract for as long as possible. As Balio writes,

[a] star's popularity and drawing power created a ready-made market for his or her pictures, which reduced the risks of production financing. Because a star provided an insurance policy of sorts and a production value, as well as a prestigious trademark for a studio, the star system became the prime means of stabilizing the motion-picture business.<sup>45</sup>

The Hollywood studio system depended on stars; option contracts grounded their salaries in their low initial rates and, until de Havilland's court victory, secured their services for potentially interminable durations. The efforts of Warner Bros. Pictures to keep de Havilland (and other stars such as Bette Davis<sup>46</sup>) under potentially interminable contracts can be read as evidence of the stars' importance to the ongoing profitability of intellectual property-dependent cultural industries.

Today, few workers have to worry about being held to overlong contracts. Yet, some core copyright industries still rely on their capacity to capture the labour and output of creative workers through long-term contracts. The recording industry of the late twentieth and early twenty-first centuries poses a particularly striking example.

Four decades after the unambiguous resolution of the de Havilland suit, another group of Hollywood employers was surprised by a similar lawsuit, this time by Grammy-winning singer Olivia Newton-John, who sought release from her contract with MCA Records. The Appellate Court ruling here was as decisive, if not as lyrical, as those of the de Havilland courts: it reaffirmed the right of employees to freedom from contract at seven years.<sup>47</sup> This 1979 decision inspired numerous other artists to pursue their own freedom under the seven-year rule,<sup>48</sup> provoking panic on the part of record companies.<sup>49</sup> Seeking to stabilize at a moment of perilous profit slump, the industry soon reorganized around a new blockbuster model that would intensify companies' dependence on the new releases and back catalogue of

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45 Balio, above note 32 at 144.

46 *Ibid* at 150 and 159–61; Greenfield & Osborn, *Contract and Control*, above note 11 at 12–14.

47 *MCA Records Inc v Olivia Newton-John*, 90 Cal App (3d) 18 (1979).

48 Ben McLane & Venice Wong, "Practice Tips: How Recording Artists Have Broken Their Contracts" (1999) 22:2 Los Angeles Lawyer 27 at 27.

49 Stahl, *Unfree Masters*, above note 26 at 109 and 124.

shrinking numbers of more profitable stars.<sup>50</sup> In this context, the ability to hold such artists to effectively interminable contracts was of paramount importance, and the Recording Industry Association of America (RIAA) lobbied the California legislature to carve out recording artists from the seven-year rule's protection.<sup>51</sup> They were concerned that they would be unable to reap "full benefits" from stars' existing and potential intellectual property. The RIAA's 1985 position paper argued that the

current law in California has been used as a weapon by prominent, highly successful recording artists to force their record company employer/financiers into renegotiating contracts under circumstances in which the record company is not even sure it will get the benefit of the new bargain . . . . The record company . . . is deprived of the full benefits of its bargain just at a point where the investment seems about to pay off.<sup>52</sup>

In 1987, after two years of deliberation, and despite opposition from labour unions, prominent artist attorneys and artists, and many lawmakers, the bill proposed and sponsored by the trade association became law. The industry is heavily concentrated in California; ever since the carve out, North American recording artists have been subject to contracts that are only effectively terminable by the employer.<sup>53</sup>

In 2002, a committee of the California State Legislature held a hearing on a bill to repeal the 1987 carve out.<sup>54</sup> Speaking in opposition to the proposed legislation, Jeff Ayeroff (an executive of Warner Bros. Records with contract signing powers) made it clear that long-term control over actual and potential artist-created intellectual property is a primary impetus toward effectively interminable contracts. He testified that when he and his colleagues succeed in recruiting and marketing a profitable act "we're entitled to hav[e] a long-term relationship to be able to recoup those kinds of

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50 Reebee Garofalo, "From Music Publishing to MP3: Music and Industry in the Twentieth Century" (1999) 17:3 *American Music* 318 at 342–43.

51 From a distance, recording artists appear as independent contractors. Indeed, federal copyright law appears to treat them as such. Yet, their numerous struggles with record companies in courts and before legislators show that they are employees under state law.

52 Gang, Tyre, and Brown and JLA Advocates Inc, "Background Paper in Support of Senate Bill 469 (Dills)" (Industrial Relations Committee Bill File SB 469, California State Archive) at 4.

53 See, generally, Stahl, *Unfree Masters*, above note 26.

54 US, California State Senate Committee on the Judiciary, *Hearing on California Labor Code Section 2855: Informational Hearing SB 1246*, Cal (19 March 2002) (Kevin B Murray).

investments.”<sup>55</sup> Ayeroff averred that by virtue of his company’s contractual relationship with artists he shares “a certain portion of [the artists’] revenues”: “I have a relationship with the records that I’ve bought from them, that I own, because the only way the record industry survives is by ownership of catalogue, and by owning a certain portion of the relationship to an artist’s career.”<sup>56</sup> Ayeroff’s personal claim of ownership may be controversial, but his rationale is clear: long-term control of artists’ labour is positively correlated to the value to the firm of the intellectual property created by the artist.

With the advent and normalization of the encompassing “360” or “multi-rights” recording contract in the last several years, recording artists are subject to more company demands than they had been up through the early 2000s. These contracts typically grant companies access to significant portions of formerly off-limits artist incomes, including touring, licensing, and other non-recording activities. Many of these contracts even grant companies decision-making power in these areas. Recording artists’ ability to support themselves through these non-recording activities had given them a real degree of bargaining leverage: a credible ability to withhold their labour. Under the 360 deal, such options are effectively foreclosed.<sup>57</sup>

## 2) Collective Bargaining and Employees’ Quasi-Proprietary Rights

At times, star creators working in core copyright industries organized around the existing and anticipated market value of star talent have found themselves subject to binding, long-term contracts that reveal virtually feudal degrees of domination. For recording artists, this logic has only ratcheted up under digitalization.<sup>58</sup> But where the rank and file of creative workers is concerned, the prevailing employment dynamic has been an emphasis on casualization rather than stiffening. Over the course of the

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55 Stahl, *Unfree Masters*, above note 26 at 165.

56 *Ibid* at 164.

57 See, generally, Matt Stahl & Leslie M Meier, “The Firm Foundation of Organizational Flexibility: The 360 Contract in the Digitalizing Music Industry” (2012) 37:3 *Canadian Journal of Communication* 441; Lee Marshall, “The 360 Deal and the ‘New’ Music Industry” (2013) 16:1 *European Journal of Cultural Studies* 77; Ian Brereton “The Beginning of a New Age?: The Unconscionability of the ‘360-Degree’ Deal” (2009) 27:1 *Cardozo Arts & Ent LJ* 167.

58 Stahl & Meier, above note 57.

twentieth and early twenty-first centuries, technological and political-economic changes have enabled the Hollywood cultural industries to reduce their dependence on the reliably expert labour of relatively anonymous “creative crafts[persons],”<sup>59</sup> while at the same time extracting greater amounts of profit from the products of their work.<sup>60</sup> In particular, cultural industries’ application of the new technologies of sound film, network radio broadcasting, radio transcriptions, and television video-recording threatened to, and in some cases did, destroy employment for large groups of creative workers. Corporate policies enabled by these technologies resulted in large-scale processes of casualization: the conversion of the work of many professional musicians, actors, and other creative personnel from relatively stable and well-paid occupations to increasingly outsourced, highly competitive and stratified contingent systems. Similar processes of casualization have been at work in the wider society since at least the rise of Thatcherism and Reaganism. Yet these creative workers were able to turn their employers’ dependence on their skilled labour to their advantage and impede these processes, institutionalizing durable regimes of private, quasi-proprietary rights not only in their jobs (as have many other organized workers)<sup>61</sup> but in *the products of their labour*, a range of rights unparalleled (to my knowledge) in other fields.

From the 1930s through the 1950s and early 1960s, the American Federation of Musicians (AFM), the American Federation of Radio Artists (AFRA), and other Hollywood unions fought against their technological displacement and the casualization of their occupations. Conceptually linking the erosion of their opportunity structures and the undermining of their social mobility with the expansion of their employers’ ability to use and reuse their recorded performances and written work, these highly organized, skilled, and motivated workers exploited cultural industries’ dependence on continuous streams of new cultural material to secure rights to additional, extra-salary “residual” or “reuse” payments. Whereas stars’ individual monopolies could only rarely overcome the bargaining power of their film

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59 Jack Gould, “Video Brings Hollywood Closer to Dream of Never-Ending Pay” *New York Times* (4 July 1955) 1.

60 See also D’Agostino, above note 11, on the experience of independent contracting writers along these lines.

61 William Gomberg, “Featherbedding: An Assertion of Property Rights” (1961) 333 *Annals of the American Academy of Political and Social Science* 119. From the AFM’s contractual perspective, “what is featherbedding to an employer is protection of a property right to a worker and his union” at 120.

studio or record company employers, the collective monopolies of expert side musicians, supporting and commercial actors, script writers, and other creative workers, poised at industrial choke points, compelled these employers to bear some of the burden of casualization, to accept limits to their ability to reuse recorded performances, and to share profits in ways that reshaped the entertainment industries. Today, Fisk argues, “[r]esiduals are foundational to the Hollywood labor market . . . .”<sup>62</sup>

First pursued by radio voice talent and musicians as a means of stemming workers’ technological displacement and protecting occupations and employment, these private intellectual property rights regimes soon came to be understood rather in terms of what creative workers experienced as authorship. This section sketches the emergence of these regimes in the American broadcasting industry, prior to their (re)conceptualization as rooted in creative workers’ creative practices.

The AFM and its members had benefited mightily from the explosion of silent film in the United States. Unlike other industrial workers in the first decades of the twentieth century, as Kraft writes, musicians “faced no innovative job-threatening machinery, no strong employer associations and no efficiency experts speeding up the pace of work.”<sup>63</sup> In the world of motion picture exhibition, “[d]emand for musical workers was high and rising while the supply of skilled instrumentalists was relatively low.”<sup>64</sup> Yet, by the late 1920s, sound film “enabled theater owners to discharge pit musicians in wholesale fashion, a classic case of substituting capital for labor. By 1934 about twenty thousand theater musicians — perhaps a quarter of the nation’s professional instrumentalists and half of those who were fully employed — had lost their jobs.”<sup>65</sup>

At the same time — the late 1920s — radio was looming as a major threat: “Local employment opportunities were . . . seriously undermined in 1926 and 1927 when the NBC and CBS radio networks were formed, allowing transmittal of a single program through local stations to the entire nation.”<sup>66</sup> Having failed to arrest the hemorrhage of movie theater employment, the

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62 Fisk, “Markets for Labor,” above note 27 at 263; see also Alan Paul & Archie Kleingartner, “Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry” (1994) 47:4 *Indust & Lab Rel Rev* 663.

63 James P Kraft, *Stage to Studio: Musicians and the Sound Revolution, 1890–1950* (Baltimore: Johns Hopkins University Press, 1996) at 32.

64 *Ibid* at 33.

65 *Ibid*.

66 Gorman, above note 20 at 700.

musicians sought in the early 1930s to preserve radio employment through two approaches: by trying to control the use of records by radio stations and by trying to maintain minimum staffing levels in radio stations. These efforts met with some success in contracts with radio and record companies in the late 1930s, yet the staffing minima were struck down legally, as were the efforts of bandleaders to enforce restrictive labelling on records. As Gorman writes, the effect of that latter failure “was that radio broadcasters were legally entitled, upon payment of the price of a phonograph record, to exploit and re-exploit for their own commercial advantage the public’s desire to hear the major recording artists of the day.”<sup>67</sup>

In 1940, the famously aggressive Chicago local officer James C. Petrillo became the union’s president, and in August of 1942 he announced that AFM members would cease their recording work. This first national “recording ban” took over two years to resolve, and was immediately followed by pointed anti-AFM and anti-union legislation (the *Lea Act*<sup>68</sup> and the *Taft-Hartley Act*<sup>69</sup>), and then by a second ban.<sup>70</sup> The result of this activity was the establishment of several AFM “trust funds” over the course of the 1940s. These funds would collect fees in a number of circumstances where recorded performances of music were used and reused, and use those monies to pay un- and under-employed musicians around North America to present free concerts for the public. By 1952, there were four trust funds, jointly administered by the union and the companies, drawing contributions based on 1) percentages of sales of records and revenues of transcription use, 2) percentages of revenues from the use and reuse of films made for television, 3) fees for the use of jingles and advertisements, and 4) percentages of revenues from the exhibition of theatrical films on television. The 1952 version of this latter agreement “permitted producers to use an original soundtrack upon making a one-time payment to the original film musicians of one-half of the 1952 scale” while also making trust fund contributions of 5 percent

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67 *Ibid* at 704.

68 *Lea Act*, c 138, 60 Stat 89 (1946) (codified at 47 USC § 506 (1976), amending *Communications Act of 1934*, c 652, 48 Stat 1064), as repealed in 1980, Pub L No 96-507, 94 Stat 2747 [*Lea Act*].

69 *Labor Management Relations Act*, c 120, 61 Stat 136 (1947) (codified as amended at 29 USC §§ 141-67, 171-87 (1976 & Supp V 1981)) 29 [*Taft-Hartley Act*].

70 Kraft, above note 63 at 148; Gorman, above note 20; see also Tim Anderson, “Buried Under the Fecundity of His Own Creations’: Reconsidering the Recording Bans of the American Federation of Musicians, 1942–1944 and 1948” (2004) 22:2 *American Music* 231.



gross revenues.<sup>71</sup> Kraft points out that in accepting contracts that gave the union the right to impose extra costs on recordings, “recording companies had acquiesced in, even if they did not positively agree with, the principle that technological change imposed social costs that employers had a responsibility to share.”<sup>72</sup>

AFRA was formed in the midst of the commercial organization of radio under the nascent network system, around the same time that the AFM was beginning to contest the accelerating displacement of radio musicians. In 1937 AFRA became the “autonomous union of all radio talent except musicians.”<sup>73</sup> The union focused on wages and working conditions, but also was concerned with transcriptions, recorded radio programs distributed in disc form to radio stations. In the late 1920s, independent transcription producers had begun to supply recorded programming to radio stations in areas of the country not well served by the networks. Advertisers embraced transcriptions, which enabled them to target local and regional markets, supplementing their national network campaigns. So also did smaller radio stations, whose audiences often preferred pre-recorded to live programming, and, “[b]y the end of 1930 . . . [approximately] 75 percent of the nation’s radio stations used transcriptions,”<sup>74</sup> mainly produced and distributed by independent companies. A number of factors propelled the networks themselves to get into the transcription business in the ensuing years,<sup>75</sup> and by the late 1930s AFRA had become convinced that transcriptions posed a dire threat to the employment of radio talent.

In 1939, on the eve of negotiating their first nationwide contract for advertiser-supported programming, the union made it clear that, in addition to higher contract minimums and payment for rehearsal time (which stations had been requiring performers to undertake without pay), additional payment for the use of transcriptions was one of its central demands. The broadcasters’ trade journal reported that the “[t]hreat of a nationwide strike of radio talent that might conceivably throw every commercial network

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71 Gorman, above note 20 at 730.

72 Kraft, above note 63 at 160.

73 “Single Union to Embrace Radio Talent Is Organized; Actors’ Equity Withdraws” (1 August 1937) 13:3 *Broadcasting* at 12.

74 Alexander Russo, “Defensive Transcriptions: Radio Networks, Sound-on-Disc Recording, and the Meaning of Live Broadcasting” (2004) 54:1 *The Velvet Light Trap* 4 at 8 [footnote omitted].

75 *Ibid.*

program off the air,”<sup>76</sup> involving the “withdrawal of all [radio] talent save musicians,”<sup>77</sup> was a real possibility. As Cole and Holt argue, “[m]ore than many industries, broadcasting suffers a nearly irretrievable loss when work stoppage occurs.”<sup>78</sup> AFRA was in a powerful position: shutting down advertiser-supported program production would most likely result in increased production of network-supported programs, providing more work for striking commercial talent. Moreover, Actors Equity and the Screen Actors Guild promised not to work struck programs.<sup>79</sup> With this threat looming, the networks conceded, and within a month virtually all network programming was covered by another two-year contract.

However, it was not until May of 1941 that the union and employers arrived at an acceptable set of terms regarding the general use of transcriptions by larger and smaller radio stations, known from that moment on as the Transcription Code. According to the Code, “[i]n the event [a] sponsor repeats the use of [a transcription]” — on a station of greater than 1,000 watts in power, beyond the first use allowed under the contract — “the artist shall receive for each repeated use, a fee equal to the compensation paid for the original performance . . . .”<sup>80</sup> This clause grants compensating payments to those performers who had been accustomed to multiple performances for networks reaching multiple time zones. Smaller stations could reuse transcriptions without additional payments, but should such a transcription be used by a station of greater than 1,000 watts, it would be reclassified and accordingly generate reuse payments. AFRA’s 1941 Transcription Code appears to be the first entertainment industry collective bargaining agreement to require additional payments for the reuse of recorded performances.

As do many other collective bargaining agreements, the 1941 AFRA contract codified significant degrees of union control over the terms and condi-

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76 “AFRA Threatens Net Talent Strike” (15 January 1939) 16:1 *Broadcasting* at 14 [AFRA Threatens].

77 “AFRA Contract Covers Broad Scope” *Broadcasting* (1 November 1940) at 28.

78 Robert L. Cole & Darrell Holt, “The Effects of Unionism on Broadcasting: A Mathematical Analysis” in Allen E. Koenig, ed., *Broadcasting and Bargaining: Labor Relations in Radio and Television* (Madison: University of Wisconsin Press, 1970) at 38.

79 AFRA Threatens, above note 76.

80 AFRA, *Code of Fair Practice for Transcriptions and Recordings for Radio Broadcasting Purposes: Minimum Terms and Conditions for Radio Recording Artists* (New York: American Federation of Radio Artists, National Office, 1941); see also AFRA Official Bulletin, 2:8 (April 1941); see also Robert W. Gilbert, “‘Residual Rights’ Established by Collective Bargaining in Television and Radio” (1958) 23:1 *Law & Contemp Probs* 102.

tions of members' conveyance of labour to their employers. An increase in worker control represents an instance of democratization, an incremental contribution to the ongoing modern project of "reducing subordination and creating a more democratic society."<sup>81</sup> However, what appears as a turning point in American labour relations was the union's achievement of rights to additional compensation based on the subsequent use of their recorded performances which would impose limits on, and defray the social costs of, technological displacement of workers. Over the subsequent two decades, the Screen Actors Guild,<sup>82</sup> the Writers Guild of America,<sup>83</sup> the Directors Guild,<sup>84</sup> and the numerous guilds affiliated with the International Alliance of Theatrical Stage Employees (IATSE) would also gain residual rights (although the rights of the IATSE guilds would take a different form).<sup>85</sup> It is in large part these very systems of profit sharing (and the regimes of attribution that ground them<sup>86</sup>) that have enabled Hollywood's talent guilds to remain so effective and relevant in an era of widespread union decline.<sup>87</sup>

Both AFRA and the AFM had acted against the technological evisceration of their occupational power by their (former) employers' ability to mass produce, circulate, and profit from symbolic forms protected by intellectual property rules. Each achieved significant degrees of participation in the governance of their work, as well as forms of remuneration based on the reuse of recorded performances. Yet soon ideas of authorship and copyright — particularly conceptions of the nature of royalties, which their forms of extra-salary remuneration resembled — began to colonize and stratify what had begun as a solidaristic effort of resistance. While this is a topic of ongoing and future research, initial findings suggest that authorial discourse may flow into and (re)define areas of practice that could be and sometimes were otherwise conceived. Since the 1950s, understandings of residuals as primarily serving labour market functions or securing work-

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81 Pateman, "Democratization," above note 29 at 22.

82 David F Prindle, *The Politics of Glamour: Ideology and Democracy in the Screen Actors Guild* (Madison: University of Wisconsin Press, 1988).

83 Fisk, "Markets for Labor," above note 27 at 262.

84 "New Contract Boosts Film Directors Pay" (16 May 1960) 18 *Broadcasting* at 94.

85 Paul & Kleingartner, above note 62 at 670.

86 Fisk, "Markets for Labor," above note 27 at 244–48 (outlined with respect to writers).

87 *Ibid* at 277–78: a more complete account of the development of the residual right in Hollywood is an anticipated outcome of this research project; see, generally, Paul & Kleingartner, above note 62.

place rights appear to have been effectively banished from Hollywood creative labour discourse.

## C. CONCLUSION

The intersections of intellectual property and employment in the social relations of creative labour are not exceptional: intellectual property is a factor in many workplaces,<sup>88</sup> obedience a norm in most. In fact, the employment relationship, in which employers' property rights and employees' duty to obey appear virtually as facts of nature, "is accepted as part of the furniture of the social universe."<sup>89</sup> What is unusual is the immediacy of the connection between the social relations of work and the innovative generation of new intellectual property: contests at these hinge points highlight problems of workplace autonomy and property that characterize but are obscure in the run of North American workplaces.

This chapter has suggested that the fraught social logics of intellectual property and employment intersect acutely in certain of the core copyright industries, and that their intersections ramify in different but patterned ways in different sectors, times, and occupational clusters. Bringing a media studies perspective into dialogue with other disciplinary perspectives, it has suggested that the "constant and pervasive tension between innovation and control"<sup>90</sup> characteristic of the Hollywood film and music industries of the twentieth century has had paradoxical effects in the employment of star and rank-and-file creative workers: regimes of highly constrictive individual contracts for even the most eminent stars appear on the one hand, and extraordinary workplace powers achieved by organized creative craftspeople on the other.

The realities of long-term star contracts, and the arguments that emerge when those contracts come under scrutiny, impel our consideration of basic questions about the politics of employment: If long-term contracts can be seen to effect forms of serfdom and peonage, does that not also throw into question their short-term siblings? How, and at what point in its duration, might an employment contract become (experienced or understood as) an indenture? Organized musicians, actors, and other creative workers not only exploited their position at industry choke points but gained rights to

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88 See, generally, Fisk, *Working Knowledge*, above note 11.

89 Ellerman, above note 2 at 106.

90 DiMaggio & Hirsch, above note 5 at 79 [endnote omitted].

profit participation (that have come to appear very much like the intellectual property rights so zealously protected and enforced by their employers) in the name of stabilizing the market for creative labour and compensation for lost employment. Moreover, they have sustained and been sustained by these rights well into an era of spectacular union-busting. But how might the capacity of workers in other sectors as well as policy-makers to fight for similar rights be hampered by conceptions of cultural creation and intellectual property that obscure the ways in which not just creative cultural industry employment but employment in general resists democratization? Indeed, it appears that conceptions of residuals as royalty-like systems of reward based on intellectual property creation crowded out conceptions of them as instances of work's democratization or embodiments of employer obligation around technological displacement and compensation for lost employment.

Creative workers of the kinds discussed here bring to points of cultural production heightened (authorial) consciousness of the value of their work and of its place in the systems that employ them. These organizational contexts are characterized by employers' contradictory requirements of control of labour and ownership of intellectual property (on the one hand) and the accentuated employee creative autonomy on which continuous innovation depends (on the other). Creative workers in different positions find themselves differently able to participate in the governance of and revenues associated with their work; thus far, this research suggests that workers' capacity to claim participation and exercise control and ownership (or at least quasi-ownership) is not something easily achieved through individual bargaining, and that workers' claims of rights of authority and property are best supported by a credible strike threat.