Hollywood Deals: Soft Contracts for Hard Markets

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Hollywood film studios, talent and other deal participants regularly commit to big-budget film projects on the basis of unsigned “deal memos” or draft agreements whose legal enforceability is uncertain. These “soft contracts” constitute a hybrid instrument that addresses a challenging transactional environment where neither formal contract nor reputation effects adequately protect parties against the holdup risk and project risk inherent to a film project. Uncertainly enforceable contracts supply an implicit termination and renegotiation option that provides some protection against project risk while maintaining a threat of legal liability that provides some protection against holdup risk. Historical evidence suggests that soft contracts substitute for the vertically integrated structures that allocated these risks in the “studio system” era. The prevalence of soft contracting in Hollywood and other markets suggests an efficiency rationale for the historical relaxation of formation requirements in contract law.

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“Moviemakers do lunch, not contracts” – Ninth Circuit Judge Alex Kozinski (Effects Assoc., Inc. v. Cohen (908 F.2d 555 (9th Cir. 1990))

“Aren’t you people ever going to come in front of me with a signed contract?”

The Hollywood film industry regularly enters into significant commitments under various species of incomplete agreements: oral communications, deal memoranda, or draft agreements that are revised throughout a production and often remain unsigned. These “unsigned deals” are supported by an uncertain threat of legal enforcement coupled with some prospect of reputational liability. Hollywood’s loose transactional practices challenge conventional expectations that an enforceable contract is a precondition for any significant financial undertaking. Business lawyers usually make special efforts to protect clients (and themselves) by avoiding the predicament of being potentially, but not certainly, subject to legal liability. Hollywood contracting departs radically from this prudent approach.

Existing explanations tend to attribute Hollywood’s contracting practices to the proclivities of actors and other talent who have little appreciation of legal matters. But these explanations are incompatible with the competitive repeat-play environment populated by the sophisticated intermediaries who negotiate and execute transactions on behalf of talent and their business counterparts in Hollywood. Consistent with this environment, I account for Hollywood’s contracting practices as a tailored response to two types of risks that are particularly salient in the film industry (and, generally, any creative goods market). These are: (i) the project risk arising from uncertainty as to the project’s likelihood of success or failure (the latter being the typical result); and (ii) the holdup risk arising from the irrecoverable and sequential character of investments in a film project. Transacting parties negotiate the degree of contractual formality as an implicit term that proxies for the explicit allocation of those risks in an environment characterized by high specification and enforcement costs, which reduces the efficacy of formal contract, and unreliable reputation effects, which demands some recourse to

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1 Statement reportedly made by presiding judge to Warner Brothers’ counsel in litigation involving alleged breach of oral contract by Rodney Dangerfield (Schleimer 1998).
2 By “Hollywood”, I refer throughout to the film (and, where specified, the television) industry based in Southern California, including the major film studios and the network of smaller entities that transact with the studios.
formal contract. Each risk category “pulls on” contractual formality—which I assume correlates positively with contractual enforceability—in opposite directions. Increasing contractual formality reduces holdup risk by supplying legal sanctions to deter opportunistic termination and renegotiation. Reducing contractual formality reduces project risk by supplying an implicit termination and renegotiation option in response to adverse information concerning the expected outcome. The result is what I call the “soft contract”: a mix of legal and reputational governance situated between the standard alternatives of short-term contracting governed solely or primarily by law and repeat-play relationships governed solely or primarily by reputation.

I focus on a segment of the film industry where unsigned deals are especially prevalent: transactions between studios or other production entities and higher-value talent (mostly, actors and directors), commonly known as “stars”. It might be wondered why studios and stars do not use a simpler mechanism to protect against these risks. The studio could bind talent to a long-term employment contract and shift all transactions from the “market” to the “firm”. That would constrain the holdup behavior to which the studio is exposed in single-project transactions with high-value talent and would enable the studio, a risk-neutral and well-diversified entity, to efficiently insure talent, a risk-averse and non-diversified individual, against the risk of failure on any individual project. Hollywood mostly operated under this arrangement during the classical studio system that prevailed from the 1920s until its dissolution in the late 1940s and the music industry

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3 In a related contribution, Gil (2011) argues that distributors and exhibitors in the Spanish film industry endogenously select the level of contractual formalization, including a hybrid contract consisting of a formal agreement modified by an informal commitment to renegotiate, in order to elicit new information to make ex post efficient adjustments. My argument differs in two respects: (i) I derive formalization choices from a tradeoff between holdup risk and project risk; and (ii) I contemplate that parties may select from a full range of formalization possibilities (and an associated range of likelihoods of enforceability).

4 The concept of “soft contracts” draws on two foundational papers: (i) Goldberg (1976), who analyzed the use of flexible contractual terms to structure the process of adjusting terms in response to new information, and (ii) Klein (1996), who analyzed the interaction of reputational and legal enforcement in constraining holdup behavior. Bozovic and Hadfield (2011) and Gilson, Sabel, and Scott (2010) address these issues in the context of innovation markets.

5 As used herein, “studio” refers to either the small group of “major” studios that have a full range of financing, distribution and production capacities or the larger group of independent production companies that (i) only have production capacities and must seek distribution and financing elsewhere or (ii) have some but limited in-house distribution and financing capacities (a “mini major” studio). Where necessary, I distinguish between these specific types of entities.

6 Throughout I use the term “actor” to refer to both male and female performers.
continues to use a variant of this system. The dismantling of the studio system, and its replacement by a disaggregated network of studios, talent agencies and independent production companies, exposed the studio to increased holdup risk and talent to increased project risk and necessitated an alternative transactional arrangement by which to secure commitments in a fluid environment. The result is, in part, the transactional hybrid represented by the soft contract.

Elucidating the economic logic behind Hollywood’s contracting practices yields three contributions in increasing order of generality. First, this paper contributes to the economic analysis of contracts in the film industry. Existing scholarship has analyzed exhibition contracts (Gil 2011; De Vany and Walls 1996) and profit-sharing provisions in talent contracts (Weinstein 1998; Chisholm 1997; Goldberg 1997). But there is little scholarly treatment of other features of talent contracts or the interaction between talent contracts and organizational structure. Second, while scholars have derived contractual and organizational structures from either holdup or uncertainty alone, this paper derives those structures from a combined holdup and uncertainty problem. Third, and most generally, this paper identifies how parties negotiate over contractual formality as a “meta term” that allocates risk in environments where neither contract nor reputation nor vertical integration provides an adequate governance structure. This framework anticipates how parties negotiate levels of formalization as a mechanism by which to tailor risk-allocations with respect to different counterparties, assets, and deal terms at the lowest transaction cost.

Organization is as follows. In Part I, I describe the key economic costs and risks of a film project. In Part II, I present data on the characteristics, incidence and enforceability of soft contracts in Hollywood, based on formal law, field interviews, and data collected from judicial opinions and the trade press from the early 20th century through the present. In Part III, I provide an analytical framework that identifies the circumstances in which soft contracting represents an efficient transactional option and then apply that model to Hollywood contracting practices. In Part IV, I discuss how soft

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7 There is a small descriptive literature in specialized law reviews and practitioner journals on unsigned deals in the film industry. See Bogart (2004); McLaughlin (2001); Smith (2003); Bardach (1993); Kari (1993).

8 I am aware of one prior contribution that derives transactional structures from a combined uncertainty and holdup problem (Hanson 1995).
contracting may have displaced vertical integration as a risk-allocation mechanism in Hollywood film production. In Part V, I discuss normative implications.

PART I: HOLLYWOOD ECONOMICS

Four features of the Hollywood film industry are especially salient from an economic perspective: (i) the extreme risk of a film project; (ii) the longevity and dominance of a small group of major studios; (iii) the persistence of the star vehicle in the labor market for acting and directorial talent; and (iv) the complex set of multiple inputs required to assemble and deliver a film to market.

A. Why Only Fools Invest in Movies

1. Extreme Uncertainty; Skewed Returns.

Any movie is akin to a gamble with long odds: a few hits succeed spectacularly while the remainder consists of flops that generate meager or no profits. The disparity in outcomes is dramatic. From 1984 through 1996 (for the U.S. and Canadian markets), only 22% of releases were profitable; among the minority of profitable movies, 35% earned 80% of total profits; and, in the aggregate, 6.3% of all movies earned 80% of total profits (De Vany and Walls 2009).9 No known metric exists by which to predict the likelihood of success or failure of a given film (De Vany 2004). This is sometimes known as the “nobody knows” property.10

2. High Stakes.

A substantial investment is typically at stake. As of 2007, the Motion Picture Association of America reported that a major studio film had an average production and distribution cost11 of $106.7 million (Motion Picture Association of America 2008). The

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9 More recent evidence finds even more extreme outcomes: Standard & Poor’s (2007) reports that approximately one in ten releases cover production costs.
10 The phrase is derived from a statement by screenwriter William Goldwyn: “Nobody knows anything –Not one person in the entire motion picture industry knows for a certainty what’s going to work” (Goldman 1983, p. 39).
11 In industry terminology, this refers to both the “negative cost” (the cost of production) and “prints and ads” (aka “P&A”), which includes primarily the costs of advertising and making prints for theatrical exhibition.
largest blockbuster films have production and distribution budgets as high as $300 million (for example, *John Carter* and *Pirates of the Caribbean: At World’s End*, major feature films released in 2012).

3. *Irrecoverable Investments.*

A film project proceeds along an extended timeline starting with idea conception and running through release at the box office. At various points on the timeline, parties must make “specific” investments—that is, investments that have a lower value in any alternative use—prior to having any reliable information as to the likely commercial outcome. Absent reputational or legal constraints, these specific investments inherently trigger exposure to holdup behavior by counterparties.

4. *Multiple Inputs.*

A film project combines goods and services supplied by hundreds or even thousands of different entities and individuals. The core inputs include: (i) financing; (ii) production; (iii) talent; (iv) craft and other technical personnel; (v) distribution; (vi) theatrical exhibition; and (vii) post-release distribution (e.g., home video, internet, television). These inputs can be sourced either internally within a single firm or externally through the market. In Hollywood’s current industrial structure, external market-based sourcing predominates and is universally the case with respect to talent. This structure is depicted graphically below.

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12 Estimates vary: 12-to-18 months after a film is “greenlit” (that is, definitively approved) for production (Ferrari and Rudd 2006, p.15); or 12-to-24 months from development (Cones 1997, p.141). Note that development time can last far longer for projects that are “placed on hold”. I thank Jonathan Handel for bringing this to my attention.
**Figure I: Transactional Structure of a Film Project**

**B. Why Studios Exist: The Inevitability of Scale**

Since the start of Hollywood, a small group of major studios have held roughly consistent market shares. In 2011, the six major studios (Sony Pictures, 20th Century Fox, Walt Disney, Paramount, Warner Bros. and Universal) accounted for 81.2% of gross domestic box office revenues (Subers 2012); in 1939, five major studios and three smaller studios released 85% of the feature films released that year (Huetting 1944, p. 87). The scale and scope of the Hollywood studio facilitate funding the costs, and mitigating the risks, of film production. A Hollywood studio does not primarily “make movies”; rather, it is primarily a vehicle for coordinating the inputs required to assemble a film project and financing, promoting and distributing films produced by internal production divisions and independent production entities. By holding a diversified portfolio of projects and maintaining a library of past successes, the studio can generate a sufficient number of “hits” and revenue streams to make up for losses on the far greater number of “flops”. Today all the major studios are subsidiaries of media or industrial conglomerates (or, in the case of Disney, *is* a media and entertainment conglomerate)\(^{13}\), which can use an additional pool of products and services, including a rich library of television programs, music and other creative properties, to further diversify project-specific risk. For the same reason, even critically successful independent production

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\(^{13}\) Current ownership structures are as follows: Sony Pictures is controlled by Sony; Universal is controlled by Comcast and General Electric; Paramount is controlled by Viacom; Fox is controlled by News Corp.; Warner Bros. is controlled by Time Warner.
companies face chronic financial difficulties and often declare insolvency or are acquired by a major studio (Selz et al. 2009, §§1:8; 2:3; Boyle 2004, p. 176).

C. Star Power

The star vehicle has been a consistent feature of the movie industry over virtually its entire history (Kindem 1982, p. 79). This feature can be derived from two sources: (i) high-quality, low-cost reproduction technologies create “winner-take-all” effects that disproportionately drive market rents to the most highly-valued performers (Rosen 1981); and (ii) consumers mitigate consumption risk by using a star as an imperfect indicator of movie quality, which drives producers, distributors, and financiers to use that same variable as a proxy for a film’s likelihood of success. Both factors explain why major feature films typically cannot be financed without a “bankable” star cast or director and why industry participants closely follow rankings of star value. Actors and directors in the upper echelon of those rankings represent a scarce asset for which studios compete vigorously while all others are virtually a commodity good. For 2010, the Bureau of Labor Statistics estimates that, of the nearly 100,000 members of the Screen Actors Guild (the actors’ union), only about 50 earned extraordinarily high incomes, while most others earned meager salaries and were unemployed for long periods of time (U.S. Department of Labor 2009). Other evidence confirms this extreme skew in talent’s fortunes. For the period 1993-95, only 58 directors directed more than one feature film released by a major studio and only three persons directed at least three such films (Zuckerman 2004); for that same period, 79.5% of all actors who acted in any film only acted in one film (Zuckerman 2004); and, for the period 1995-2001, only 30 actors appeared in two or

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14 The extent to which the presence of a star improves the likelihood of a successful release remains unresolved. Using a sample of 2000 films released from 1984 to 1996, De Vany (2004, §§ 4.3.2, 4.5.1, 4.5.2) finds that, on average, a star significantly increases a movie’s higher least revenue (that is, a star constrains the lower tail portion of the revenue distribution) and slightly increases a movie’s chance of making a profit, in each case relative to a movie without a star. This is consistent with findings that actors positively impact opening performance (Elberse 2007, p.120), as well as popular observations in Hollywood that “stars help the movie to open”.

15 Recently released rankings include: the “Ulmer Scale”, a list of the industry’s top 1400 actors ranked by “bankability” (defined as the ability to raise “100% or majority financing” for a movie) (Ulmer 2010); the Internet Movie Database’s “StarMeter” list (based on the search behavior of users of the “IMDb.com” website, a leading online source of information in the film industry) (IMDb.com 2012a); Esquire’s “Box Office Power” list (based on box office revenues, as weighted by various criteria) (Shepatin 2008); and Forbes’ “Star Currency” list (based on industry survey) (Forbes 2012).
more hit films (defined as a film that grossed $100 million or more) (De Vany 2004, § 11.6).

**PART II: HOLLYWOOD CONTRACTING**

Scholars have observed (and business lawyers would not be surprised to learn) that parties use strategic ambiguity in drafting contracts (Choi & Triantis 2010, Geis 2007). Other scholars have identified settings in which parties appear to deliberately use legally unenforceable documentation (Charny 1990; Boot, Greenbaum, and Thakor 1993; Scott 2003; Mann 2000; Macaulay 1963) or in which parties enter into preliminary agreements that set forth some, but not all, of the terms of a proposed transaction (Schwartz & Scott 2007; Ben-Shahar 2004). But scholars have not observed that parties sometimes use strategic ambiguity with respect to the *existence* of a contract itself.\(^\text{16}\) Standard business law practice takes every measure to avoid this predicament.\(^\text{17}\) Certainly, operating in a gray area of potentially enforceable agreements would appear to be imprudent for both client and attorney. Yet Hollywood appears to feel otherwise.

**A. Conventional Contracting**

The timeline of a conventional transaction is depicted below. First, after some initial discussion, the parties enter into a preliminary agreement, often called a “memorandum of understanding” or “letter of intent”, which describes the basic terms of the proposed transaction and usually states that the document is non-binding.\(^\text{18}\) Negotiation of detailed terms and legal and financial diligence then proceed simultaneously. If those processes advance, the parties negotiate, draft and execute a package of final agreements and proceed to closing of the deal (in a discrete transaction) or other forms of performance (in a “relationship” transaction). In this case, there is a clear demarcation between the negotiation period, in which there is no risk of contractual liability, and the performance period, in which contractual liability clearly operates. Once the deal is executed, parties

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\(^{16}\) The possibility that parties may deliberately choose ambiguous levels of legal enforceability is mentioned in passing in Scott (2003 n.172).

\(^{17}\) Personal experience as a corporate attorney. Perillo (1994, p. 287) agrees: “[w]ithin the common law system, most legal professionals staunchly cling to the supreme value of certainty of result”).

\(^{18}\) Exceptions to the “no liability” disclaimers are sometimes made with respect to confidentiality provisions or, in an acquisition transaction, “no shop” provisions barring the target firm from seeking bids from other acquirors. For further discussion, see Lake and Draetta (1994, pp. 15-16).
commence performance under the assurance that all subsequent investments are governed by contractual terms that can be enforced in court.

\[\text{Diagram: \text{The Conventional Deal}}\]

**B. Hollywood Contracting**

1. *The Contracting Problem*

   The multiple inputs, severe uncertainty and extended timing of a film project give rise to a chicken-and-egg problem. The studio or outside investor is not willing to commit until the star is signed up, the star is not willing to commit until the investor is signed up, and the distributor is not willing to commit until both the star and investor are signed up, and so on...\(^{19}\) To address this problem, Hollywood has developed a rich menu of time-limited option contracts that finely condition performance obligations on the occurrence of specified triggering events (for a full review, see Moore 2011). In certain projects (or, more precisely, certain elements of a film project), Hollywood deviates from these conventional risk-shifting mechanisms. Rather than conditioning performance on execution of a contract, or staging performance on the basis of conditions precedent, it adopts a cruder device: studio and talent commence performance under imperfectly specified obligations set forth in an imprecise mix of oral communications, email exchanges, and unsigned written instruments. In these “unsigned deals”, the point at which legal liability commences (or ends) is never entirely clear.

\(^{19}\) Brouwer & Wright (1990, p.50) note that studios are wary of committing to a movie until the talent package has been fully assembled; Cleve (2000, p.108) notes that producers avoid entering into contracts that “lock them into fixed starting dates” for as long as possible.
2. The Unsigned Deal

The typical sequence of an “unsigned deal” transaction between a studio and a star actor is depicted below. A Daily Variety article nicely summarizes this sequence: (i) an oral agreement is made by an actor’s agent or attorney with the studio; (ii) a deal memo is exchanged; (iii) “reams of paperwork” (meaning, draft longform agreements) are exchanged outlining the major points; and, in a rare case, (iv) a “longform agreement is signed by both sides” (Daily Variety 1997). As shown, prior to the start of shooting (what entertainment lawyers call “principal photography”), studios generally insist that talent execute a “certificate of engagement” assigning to the studio all intellectual property rights in talent’s contribution to the project (Studio Counsel Interviews II, III; Entertainment Attorney Interviews I, III, IV; Studio Executive Interview). Thereafter, three possible outcomes may then result: (i) the contract is executed during shooting (Studio Counsel Interview III; Studio Executive Interview); (ii) the contract is executed after shooting has been completed (Moore 2011, pp. viii, 17; Litwak 1994, p.161; Dossick 1999; Cleve 2000, p.109; Entertainment Attorney Interview I; Studio Executive Interview); or (iii) the contract is continuously negotiated (a so-called “creeping contract” (Dossick 1999)) but is never executed and remains in draft form (Studio Counsel Interview I; Mini Major Studio Counsel Interview; Studio Executive Interview; Entertainment Attorney Interview IV).

![Diagram of the Unsigned Deal]

Figure III: The “Unsigned Deal”
3. Evidence

To understand more precisely the extent to which soft contracting practices are used in the film industry, I surveyed the practitioner and business literature, reviewed the digital archives of *Variety*, one of the industry’s two leading trade journals, conducted a comprehensive survey of “unsigned deal” litigation, and conducted interviews with different types of legal and business practitioners in the field.20 Much of the trade and practitioner commentary and most interviewees stated that unsigned deals are widespread throughout the industry, including deals between studios and individual producers (Bogart 2004, p.360; Rapportoni (1991); Entertainment Attorney Interview III)21; independent production companies and studio-distributors (Cones 1997, p. 35; Entertainment Attorney Interview II); independent production companies and foreign distributors (Coudert Brothers LLP 1998); talent and agents (Entertainment Attorney Interview I); and talent and managers (Cestero 2010). In a brief filed by Warner Bros. in a federal appeals court litigation, the studio asserted that “many business deals are never formalized” in the entertainment industry and it is “standard” for parties to commence performance without a formalized contract (Warner Bros. 2012, pp. 3, 28-29). Consistent with that assertion, a court once observed: “Motion picture development and production operates in a unique business universe . . . Multi-million dollar film projects are developed and completed (or cancelled) on the basis of loose, artistic understandings without written, signed contracts” (Stuart 1982).

The bulk of the evidence suggests that unsigned instruments are used most regularly with respect to the creative elements of a film project while conventional signed instruments are used with respect to the financing and other non-creative elements of a film project.22 On the “creative side”, trade commentary and interviewee reports confirm that unsigned deals are used most consistently in the case of studio/talent transactions

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20 Interviewees included: (i) three senior law firm partners and a senior law firm counsel with entertainment law practices; (ii) three current or former in-house counsel at two major Hollywood studios; and (iii) a “business affairs” executive at another major Hollywood studio and a business affairs executive at a major independent studio. For a full list of all interviews, see “References—Interviews”.

21 In my research of the *Variety* archives, this seems to be a frequent source of contract formation disputes.

22 Conversation with former chief executive officer of a major motion picture studio, Nov. 20, 2012, Los Angeles (stating that contracts in film are “never” signed, except for distribution, financing, and other “operational” agreements, and that entire transactions are executed on the basis of deal memos or sequence of letters exchanged among attorneys).
(Entertainment Attorney Interview II; Mini-Major Studio Counsel Interview; Studio Counsel Interview II) and, in particular, in deals involving higher-value talent—that is, stars (Studio Counsel Interviews I, III; Studio Executive Interview; Kravit, p197). For that reason, I focus on that particular transactional category in the remainder of my analysis.

Evidence produced in litigations indicates that leading actors and directors regularly commit to, and often complete, a movie without having entered into a signed contract. Consistent with that evidence, interviewees reported that studio/star transactions are often or sometimes not memorialized in fully-negotiated long-form documentation and, for part or all of the transactional timeline, proceed on the basis of some combination of oral commitments, short deal memos (Entertainment Attorney Interview II; Bogart 2004, p.363), draft long-form agreements (Studio Executive Interview), or email exchanges or other informal communication (Mini-Major Studio Counsel Interview; Studio Counsel Interviews II, III; Entertainment Attorney Interviews II, IV).

In-house counsel reported that the studio will typically “green light” (that is, finally approve) a project based on incompletely specified communications with talent attorneys and a mutual understanding to subsequently negotiate and draft a fully executed long-form agreement (Studio Counsel Interview III). An executive reported that the studio sometimes commences shooting without a signed agreement but is careful to identify in its comments to outstanding long-form drafts the points that it considers to be unresolved (Studio Executive Interview). In other cases, studio lawyers send a “reliance letter” indicating

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23 In Daily Variety (1997), the author notes that entertainment lawyers reported that “contracts with major stars are never signed”.

24 In an unsigned deal litigation between RKO Studios (then a major studio) and an actress, a witness for the studio, a studio executive, reported that “the industry deals largely in oral deals” and that contracts are usually signed after a film is completed or, in rarer cases, never signed at all (Daily Variety 1952b). In a litigation between Kim Basinger (then a star actress) and an independent production company, the court found that she had acted in all but two of her previous nine films without a signed contract (in Basinger v. Main Line Productions, 1994 WL 814244 [Cal.App. 2 Dist. 1994]). The court observed that “film industry contracts are frequently oral agreements based on unsigned ‘deal memos.’” See id. In a litigation between Francis Ford Coppola and Warner Bros., the court found that Coppola, a world-famous director, had not entered into a signed contract in directing two previous films for the studio (in Coppola v. Warner Bros., Appellate No. B126903 [Mar. 26, 2001][unpublished decision]).

25 For further discussion, see Litwak (1994), pp. 160-61; Biederman et al. §2.4. Another interviewee described the process in more detail. The talent attorney initially agrees on a deal with the studio’s “business affairs” department, which sends a “deal memo” to the agent (but does not ask for a signature) and to the studio’s legal affairs department, which is then instructed to “work out” a long-form agreement with the talent’s attorney (Entertainment Attorney Interview I).
that an agreement had been reached based on the last negotiation draft (and that the negotiator’s client is relying on that belief), which may in turn prompt a “counter-reliance letter” from the talent’s attorney (Dossick 1999; Major Studio Counsel Interview III; Entertainment Attorney Interview I). In the case of a successful release, these dueling drafts can even play a role in post-production accounting disputes over contingent compensation (known in the industry as “participation rights”) provisions—in fact, some Los Angeles auditing firms specialize in this practice.\footnote{Discussion with accountant specializing in the entertainment industry, Los Angeles, September 2011. The absence of a signed agreement sometimes leads to litigation concerning the calculation of “net profit” compensation. \textit{See} Hermits Glen Prods. v. 20th Century Fox, L.A. Sup. Ct. Case No. BC 147241 (Mar. 29, 1996) (writer/producer of film \textit{White Men Can’t Jump} sued studio over alleged breach of oral agreement that he would receive a percentage of the gross receipts).}

C. Are Soft Contracts Enforceable?

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

1. Indefiniteness Doctrine

Contractual enforceability requires satisfaction of two elements: (i) the exchange of consideration; and (ii) mutual agreement on sufficiently definite terms. The second element is at issue in the soft contracting context. Historically courts have required mutual agreement over all essential terms. On that basis, courts sometimes declined to enforce “agreements to agree” or other preliminary or incompletely specified agreements (Farnsworth 1987, pp. 220-21). Current law is more equivocal. Courts are sometimes willing to “fill in gaps” based on a reasonableness criterion, which restores contractual completeness and can then support the standard award of expectation damages. Far less frequently, courts may imply an agreement to negotiate in good faith\footnote{For the leading case, see \textit{Teachers Ins. & Annuity Ass’n of Am. v. Tribune Co.} (670 F. Supp. 491 [S.D.N.Y. 1987])} or, even if mutuality is not satisfied, may award reduced damages on equitable grounds such as promissory estoppel or unjust enrichment. Sophisticated parties can eliminate exposure...
to these volatile sources of precontractual and extracontractual liability by stating up-
front that any preliminary communications are non-binding. This simple prophylactic is
standard practice in other business settings (Lake and Draetta 1994, pp. 192-93; Johnston
1999, pp. 404, 478) and proves effective when tested in litigation. But this simple
precaution is not commonly undertaken in studio/talent transactions. Effectively,
entertainment lawyers choose not to opt out of a regime that can impose liability by the
unpredictable fiat of a judge or jury.

2. Writing Requirement

As a matter of common law, oral agreements are enforceable so long as the
consideration and mutuality requirements are satisfied. State and federal statutes of
frauds sometimes impose an additional writing requirement. In California and New
York, any contract that cannot be performed within one year of its “making” must be in
writing and executed by the party against whom enforcement is sought (Calif. Civ. Code,
§ 1624(a)(1); N.Y. Gen. Obligations Law, § 5-701). A writing is useful to a studio-
plaintiff under California law, which provides that negative injunctive relief is only
available in the case of personal services contracts that meet the writing requirement
(Calif. Civ. Code § 3423). Federal law also provides that any exclusive transfer of a
copyright interest must be in writing to be valid (17 U.S.C. § 204(a)).

3. Evidence: Enforcing Soft Contracts

It now remains to consider the extent to which soft contracts in the entertainment
industry are likely to give rise to legal liability as an effective matter. This is a critical
point. Without some reasonable anticipation of being held enforceable, soft contracts

28 For examples, see: Rennick HHC v. Care Inc. (9th Cir. [1996]) (declining to enforce a “handshake”
deal because other written communications included disclaimers of any legal liability prior to execution of
a final written agreement); R.D. Group, Inc. v. Horn & Hardart, Co. (751 F.2d 69, 74 [1984]) (refusing to
enforce an agreement that included all material terms, because it stated that the parties did not intend any
legal liability until the execution of a complete written agreement).
29 Given that requirement, it might be wondered why studios or other production companies would
ever agree to undertake a project on an unsigned basis, which would expose the studio to “legal holdup” by
talent that asserted a copyright interest in some portion of a film release. The answer is that they don’t. As
shown in Figure III above, typically the studio obtains a certificate of engagement from an actor or director
(known as a certificate of authorship in the case of a screenwriter) even if the longform agreement remains
unsigned.
would exert no deterrent force, would hold no settlement value for a potential plaintiff, and would largely overlap with certainly unenforceable reputational agreements. Without some reasonable anticipation of *not* being held enforceable, soft contracts would largely overlap with certainly enforceable formal agreements.

a. **Litigation Behavior**

It is difficult to assess precisely the extent to which studios and talent seek to enforce soft contracts, either formally or informally. To gain some limited insight into litigation behavior, I\(^{30}\) surveyed the archives of *Variety* and (as described in greater detail below) the Westlaw and Lexis case law databases for reports of contract formation disputes between a studio (including an independent production entity) and talent (meaning, an actor, director or writer).\(^{31}\) For the entire period starting with the inception of the Hollywood film industry through the present, a total of 67 reported “unsigned deal” disputes were identified. All but two arose after the end of the studio system (provisionally dated for this purpose as of 1947) and, for the period from 1947 through December 2012, there is on average slightly more than one reported talent/studio lawsuit per year of this type. While both the total number of informal disputes and the total number of actual and proposed film projects is unknown, it can be safely asserted that studio or talent bear some legal exposure as a result of terminating involvement in a project with respect to which the parties had expressed a sufficiently firm commitment.

b.1. **Case Law Survey -- Sample; Methodology.**

I used the Lexis-Nexis and Westlaw case law databases to identify all reported decisions for the entire period from the date of each database’s inception\(^{32}\) through December 2012 in all federal courts and all New York or California state courts that involve disputes concerning the enforceability of oral agreements, deal memoranda, or

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\(^{30}\) I and research assistants identified all relevant cases or press reports following my instruction. I then reviewed the identified cases and reports to confirm relevance.

\(^{31}\) For this purpose, I targeted disputes over the existence of a legally binding agreement between studio and talent, but excluding disputes over binding agreement with respect to a particular term of an agreement that the parties otherwise recognized as having been duly formed.

\(^{32}\) As a practical matter, the search could obviously only have located cases since the start of the commercial film industry in the United States. The first commercial motion picture exhibition in the United States took place in 1894.
other incompletely specified agreements relating to a film or television project.\(^{33}\) Additionally, I identified all reported decisions involving the same fact pattern for the 32-year period from January 1980 through December 2012 in state courts other than New York and California.\(^{34}\) Appendix A provides a complete list of all identified cases, a summary of relevant facts and holdings, and database scope.

\textit{b.2. Case Law Survey -- Results}

Not surprisingly, a fully-litigated case in this context is an infrequent occurrence: only 37 decisions were identified for the entire period through December 2012 (all but two cases having occurred since 1947, which coincides approximately with the end of the “studio system”). Of the 37 cases, the courts declined to enforce the claimed contract in 27 cases – that is, almost 73\% of the time. Assuming that (i) more fully specified or more completely executed agreements are enforceable at a substantially higher likelihood (that is, substantially greater than 27\% of the time), and (ii) less fully specified or less completely executed agreements are enforceable at a substantially lower likelihood (that is, substantially smaller than 27\% of the time), then a soft contract represents a meaningful transactional alternative between the options of a purely formal or purely

\(^{33}\) I included cases relating to the television industry in this survey on the assumption that judicial rulings concerning unsigned deals in television would influence expectations of parties transacting with respect to a film project. Note that I excluded cases involving “idea submission” disputes, usually involving claims by a writer or producer that a network, studio or other production company used an idea “pitched” to the network or studio.

\(^{34}\) It would be useful to learn whether any such disputes are resolved by arbitration (the typical dispute-resolution procedure in Hollywood). I am doubtful, however, whether this would shed significant additional information. First, my trade press review only identified a single reported contract formation dispute between studio and talent that was resolved by arbitration (App. A). Second, it is not clear that arbitration is typically available in contract formation disputes between studio/talent. The “Basic Agreement”, which governs relationships between talent and any production entity that is a signatory to the collective bargaining agreement with the Screen Actors’ Guild (“SAG”, now known as “SAG-AFTRA”), subjects all disputes between those parties to mandatory arbitration and, in the case of performers who earn below a certain amount, identifies criteria by which to determine when a performer is deemed to be “definitely engaged” with a production. These largely follow the mutual assent requirements of the common law of contract except that the Agreement does provide that a performer is engaged if a producer delivers an unsigned contract to the performer and the performer executes it and returns it by the next business day (Producer-Screen Actors Guild Agreement 2005, Minimum Freelance Contract, Sch. B., Section 6.A). In the case of a document that is signed by neither party, it is not clear that this Agreement would apply and, with respect to performers earning larger amounts, there is no provision that addresses contract formation.
informal contract. While the small sample size limits the ability to draw any definitive conclusions, it is supportive of the view that soft contracts offer a meaningful but insecure source of legal liability. The distribution of outcomes, and underlying grounds, are summarized below.

**Table I: Final Judicial Determinations Involving “Contract Formation” Issues in Film and Television Projects**

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Total</th>
<th>Oral Agmt Only</th>
<th>State statute of frauds</th>
<th>Federal statute of frauds</th>
<th>Indefiniteness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforce</td>
<td>10</td>
<td>8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Enforce</td>
<td>27</td>
<td>11</td>
<td>3</td>
<td>7</td>
<td>13</td>
</tr>
</tbody>
</table>

*b.3. Case Law Survey -- Evaluation*

Since at least the late 1940s, California courts have held that legal enforcement can—but will not certainly be—triggered by the typical Hollywood contracting sequence: “Handshake, Start Production and (Maybe) Work Out the Details Later”. In a 1948 decision involving an alleged oral agreement between a director and a studio, a California court observed that the fact that a “formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement” (in *Columbia Pictures Corp. v. De Toth* (87 Cal. App. 2d 620, 629 [1948])). This principle sometimes prevails. In a 1994 decision involving Kim Basinger (then considered star talent) and an independent studio, a jury found that Basinger had entered into a binding personal services contract based on oral conversations, an unsigned deal memo and five drafts of a long-form agreement (*Basinger v. Main Line Productions*, 1994 WL 814244 [Cal.App. 2 Dist. 1994]). However, entering into a fully executed and highly specified long-form agreement would support greater enforceability relative to any oral or written

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35 This assumes that plaintiffs’ success rates with respect to “contract formation” issues in breach-of-contract litigation involving fully-executed agreements are significantly greater than 27%. That seems a reasonable assumption in any well-functioning system of private law.
agreement that is unexecuted or exhibits a lower degree of specificity. That assertion is supported by the case law survey described above: in more than 70% of the sample of identified cases, courts declined to enforce insufficiently formalized agreements. A recent example is provided by a 1998 litigation between the director, Francis Ford Coppola, and Warner Bros., in which the court refused to recognize a purported agreement involving employment as a director in a proposed film project (Coppola et al. v. Warner Bros., Inc. (L.A. Sup. Ct., Case No. BC 135198 [1998])). Parties that elect to participate in transactions under incompletely specified agreements operate in a “no man’s land” that is neither fully within nor fully outside contract law. In a business where nobody knows if a film will succeed (and most ultimately do not), it is often the case that nobody knows if a particular transaction is being undertaken pursuant to a legally enforceable contract.

III. AN ECONOMIC ACCOUNT

In this Part, I provide an economic rationale why studio and talent sometimes prefer ambiguously enforceable over certainly unenforceable or certainly enforceable agreements when entering into a film project. Soft contracting practices are a prudent response to a challenging environment characterized by three major features: (i) high holdup risk and project risk, (ii) high specification and enforcement costs, which reduce the efficacy of formal contract; and (iii) positive but weak reputational constraints, which demand some recourse to formal contract. To construct this argument, I proceed in three stages: (i) I describe and critique existing explanations for Hollywood’s use of soft contracts; (ii) I develop an analytical framework that identifies the transactional parameters under which parties will rationally elect soft contracting over hard contracting; and (iii) I apply that model to Hollywood’s soft contracting practices.

A. Existing Explanations

Existing explanations for Hollywood’s soft contracting practices include: (i) ignorance or recklessness; (ii) timing pressures to commit rapidly to a transaction; and (iii) reputational pressures. Ignorance or recklessness is implausible: both studios and talent are represented by experienced agents, lawyers and other advisors who operate in a
competitive market. Timing explanations are unpersuasive for several reasons: (i) Sophisticated law firms routinely prepare complex agreements for high-stakes transactions in other fields in a matter of days; (ii) entertainment lawyers draft and negotiate highly specified contracts to govern financing and other transactions; (iii) entertainment lawyers have access to contract templates that often do not require considerable modification; and (iv) timing considerations would not bar converting unsigned deals into executed long-form documents during the course of production. Reputational factors, however, have considerable merit in a relationship-based industry such as Hollywood. This is the explanation provided for the use of legally unenforceable contracts observed in other settings and will play an important role in the ensuing analysis. But an entirely reputation-based explanation falsely anticipates that Hollywood would avoid the expense of contractual documentation altogether or, as is done in more conventional business settings, incur the small cost of crafting a disclaimer to avoid exposure to legal liability. A mixed explanation that integrates the deterrent force of both legal and reputational sanctions is therefore required.

B. Theory: The Rationality of Soft Contracts

1. Contract Risks

Any interparty transaction that does not occur simultaneously, has an uncertain outcome, and involves transaction-specific investments operates under two fundamental risks: project risk and holdup risk. Both risks are well-known. Project risk refers to the risk that a transaction will result in an outcome that is inferior as compared to other possible uses of a party’s resources during the relevant time period. Holdup risk refers to a party’s ability to expropriate the value of nonsalvageable investments—that is, investments having no or lesser value in another use—made by another party in a joint project. Once one party has made an irrecoverable sunk investment, the non-investing

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36 Based on author’s experience as a corporate lawyer.
37 Other equivalent terms are investment risk, natural risk, or environmental risk.
party can hold up the investing party by refusing to perform, subject to renegotiation that adjusts terms to the advantage of the non-investing party. The investing party will accede to any demand that leaves it better off relative to discontinuance of the project.

2. The Conventional Solution: Hard Contracts

Any formal contract provides some aggregate level of protection against project risk and holdup risk. Critically, those two risk categories demand drafting solutions that run in opposite directions: minimizing project risk usually demands more contractual flexibility; minimizing holdup risk usually demands less. Flexible excuse provisions (for example, the walkaway right in an acquisition transaction, cost escalator clauses in long-term supply contracts or force majeure provisions) protect against project risk by providing opportunities to adjust, terminate or renegotiate contractual obligations in response to information concerning the expected value of the existing project as compared to alternative opportunities. This can be illustrated by omission: in the well-known case of *Alaska Packers Ass’n v. Domenico* (117 F.99) (9th Cir. 1902), the contract failed to protect the plaintiffs-fishermen from an effective reduction in compensation due to an unexpected degradation in the quality of the fishing equipment. Conversely, rigid obligational provisions (for example, disclaimers of any impossibility defense or fixed-price formulas) protect against holdup risk by making it difficult to reopen agreed-upon terms in response to changed circumstances—in the best (but unobtainable) case, a provision that preemptively forbids modifications to the original contract. It is precisely for that reason that the *Alaska Packers* court, following the common law “preexisting duty” rule, declined to uphold the plaintiffs’ claim under a modified contract agreed-upon in the absence of additional consideration being paid to the employer, which had made a large specific investment in a vessel and processing facility for the season.

In an ideal world of zero forecasting and specification costs, transacting parties use formal contract to efficiently allocate project risk and holdup risk through some

\[38\] For a similar assumption, see Athias and Saussier (2010); Masten and Crocker (1991). Note that the use of formal contract as a device to address holdup risk has been empirically established. For example, Lyons (1994) finds that contractors are more likely to enter into formal contracts, rather than informal agreements, where there are significant relationship-specific investments.

\[39\] This is an unobtainable objective because even a provision banning modification can itself be waived by the contracting parties.
agreed-upon combination of excuse and obligational provisions. “Tighter” contracts in which obligational provisions predominate protect parties against holdup risk at the price of increased exposure to project risk; “looser” contracts in which excuse provisions predominate protect parties against project risk at the price of increased exposure to holdup risk. In a real world of positive forecasting and specification costs, any actual contract is prone to exhibit excessive or insufficient rigidity relative to the hypothetical efficient contract design. In particular, two design errors can be expected to occur. First, the parties may enter into an excessively rigid contract that overprotects against holdup risk, and underprotects against project risk, by failing to provide a sufficiently generous termination right or some other mechanism for adjusting terms in light of changed circumstances.40 Second, the parties may enter into an excessively flexible contract that underprotects against holdup risk, and overprotects against project risk, by providing an overly generous termination right that shifts the costs of unforeseen contingencies to one party in a manner inconsistent with initial expectations.

Even implausibly assuming that parties could avoid these design errors, enforcement obstacles inherently limit the practical force of any formal contract. There are three well-known reasons. First, litigation costs often compel parties to rationally decline to take action against a counterparty that breaches a legally binding contract. By anticipation, contracting parties that are immune to reputation effects regularly withhold performance in exchange for increased payment or other terms. Second, judicial error induces any breaching party to seek to avoid liability by using legal strategies that can induce misunderstanding or delay by the adjudicating party. These obfuscatory strategies are particularly effective in transactions involving performance actions (such as “best efforts”) or subjective metrics (“material adverse effects”) that are not susceptible to fact-

40 It might be objected that even the most rigid contracts cannot block mutually efficient adjustments in response to changed circumstances since parties will rationally ignore existing terms in order to extract mutual gains from renegotiating an existing agreement in favor of a more efficient arrangement—which will either reprice the project (if the project will then still result in a mutual net gain) or terminate it (if the project will always result in a mutual net loss). Nonetheless there remains a meaningful difference between informal contracts and non-renegotiation-proof formal contracts. The reason is that renegotiation of any certainly enforceable contract will inherently operate to the advantage of the party that is “accidentally” favored by circumstances with a stronger negotiating position (Gilson, Sabel and Scott 2010). Moreover, any such efficient ex post adjustment may be blocked by transaction costs (in particular, the costs of bargaining over the distribution of any savings generated by a proposed adjustment), informational asymmetries, strategic behavior, precedential considerations, agency costs, or other bargaining obstacles. For further discussion, see Scott (1987), pp. 2010, 2019-2021, 2044-45.
based verification. Third, even assuming zero litigation costs, the non-breaching party will still be unable to obtain full expectation damages if it cannot adequately demonstrate lost profits, in which case damages will be limited to verifiable out-of-pocket reliance costs or, even in the latter case, if the breaching party has no attachable assets. In all these cases, a legally binding contract fails to exert the deterrent force that would otherwise be expected in a world of frictionless dispute resolution.

3. The Unconventional Solution: Soft Contracts

Formal contract does not provide an entirely adequate solution to the holdup risk and project risk inherent to any non-simultaneous transaction involving specific investments and uncertain outcomes. Sophisticated repeat-players anticipate these deficiencies and assess the relative cost and utility of alternative transactional instruments. Soft contracting provides an intermediate solution that, under certain conditions, achieves a superior expected outcome relative to a highly-formalized and fully enforceable “hard” contract, which would rely entirely on contract law to govern parties’ behavior, or an entirely unformalized and fully unenforceable “social” contract, which would rely entirely on reputational forces to do so.

a. Contractual Formality as Risk Management

Legal and economic scholars, as well as contract law jurisprudence, divide promissory expressions into those that are enforceable in contract and those that are not. As a practical matter, however, contractual enforceability is more precisely viewed in continuous terms as a probabilistic outcome the likelihood of which is a positive function of contractual formality.\textsuperscript{41} Formally, this can be rendered as follows: $E = f(F)$, where $E$ denotes the likelihood of being held enforceable in court ($0 \leq E \leq 1$), and $F$ denotes the level of formalization ($0 \leq F \leq 1$). Transacting parties select the value of $F$ (and hence, $E$) by investing more or less effort in formalization. Retaining a Wall Street law firm to draft and negotiate a detailed acquisition agreement requires hundreds of expensive

\textsuperscript{41} Enforceability also requires the exchange of “consideration”. This is not much of an omission: nominal values, or even nominal recitals of consideration, are usually considered sufficient to satisfy this requirement. For a review of the state of the law, see 1464-Eight, Ltd. & Millis Mgmt. Corp. v. Gail Ann Joppich (S. Ct. Tex. 2004).
attorney-hours, easily translating into tens or hundreds of thousands of dollars in legal fees but securing for the client an instrument with a high level of enforceability; scribbling on a napkin in a Beverly Hills restaurant is virtually costless but results in a low to moderate level of enforceability.

![Figure IV: Formalization and Enforceability](image_url)

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

This calculus is well-known in the economic analysis of contract interpretation, which asserts that parties will rationally underinvest in specification efforts in order to economize on the sum of specification costs ex ante plus dispute-resolution costs ex post (Posner 2005). I take the marginalist approach to contractual specification to its logical extreme. *Parties may radically underinvest in specification efforts in order to endanger contract formation and thereby generate an implicit termination option that is exercisable at a certain cost.* Exercise of the termination option is achieved by withdrawing (or announcing withdrawal) from the project. Upon withdrawal, the exercising party expects to pay an exercise price as follows: $p = d + l$, where $d$ denotes the expected damages award (or settlement payment in lieu of damages) and $l$ denotes the expected litigation and other dispute-resolution costs.\(^4^2\) The level of formalization operates as a meta-term that calibrates the exercise price owing in the event of termination: everything else being equal, low-$F$ contracts (which have a low probability of being enforced) result in lower damages and higher litigation costs on an expected basis while high-$F$ contracts have the opposite effect.\(^4^3\) To illustrate, suppose an actor has made a “low-$F$” commitment to appear in a particular film: that is, he has entered into an uncertainly enforceable commitment that implies a positive but discounted penalty in case of termination.\(^4^4\) The absence of an entirely reliable legal instrument to secure that commitment provides the actor with an implicit termination right that will be exercised whenever the actor believes that $g_m > p$, where $g_m$ denotes the actor’s expected marginal net gains on an alternative project.\(^4^5\) At the same time, the presence of even an insecure

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\(^4^2\) I am intentionally ignoring the reputational cost of exercising the implicit termination right. Later I build reputation effects into the analysis.

\(^4^3\) At high levels of formalization, non-breaching parties are more likely to sue and can expect to incur lower costs in demonstrating contract formation, which means that breaching parties expect to pay higher amounts in order to avoid or halt litigation with a settlement payout. Conversely, at low levels of formalization, breaching parties expect to incur lower expected monetary penalties (which approach zero in the case of a purely informal commitment) and higher costs in demonstrating contract formation, which means that breaching parties expect to pay lower amounts in order to avoid or halt litigation with a settlement payout.

\(^4^4\) For convenience, the following discussion analyzes the performance/breach decision from the perspective of talent. The same framework could be applied from the perspective of the studio.

\(^4^5\) More formally, $g_m = g_2 - g_1$, where $g_1$= the expected net gains on the existing project, and $g_2$ = the expected net gains on an alternative project.
legal instrument generates positive values for \( d \) and \( l \), which together constitute the expected exercise price, \( p \), that induces talent to perform even within a certain range of circumstances in which he anticipates marginal net gains by moving to an alternative opportunity (that is, where \( g_m > 0 \) but \( g_m < p \)).

From the talent’s perspective, we can anticipate three outcomes under a soft contract, as shown graphically below:

(i) **Voluntary performance** \( (g_m < 0) \): Talent anticipates a net gain under the contract and performs irrespective of any expected legal penalty.

(ii) **Involuntary performance** \( (0 < g_m < g_m^*) \): Talent anticipates a net loss under the contract but performs due to the expected damages payment and legal costs.

(iii) **Termination** \( (0 < g_m > g_m^*) \): Talent anticipates a net loss and terminates to capture incremental gains on an outside opportunity, even after taking into account the expected damages payment and legal costs.

There is a fourth outcome, which will be common in practice. In lieu of terminating participation in the project, the talent may extract a continuation payoff from the studio equal to the difference between the contract price and the outside “market” price, less the exercise price that the talent would otherwise expect to pay to terminate (i.e., the talent is paid a settlement amount equal to \( g_m - p \)).\(^{46}\) Effectively, the talent commits to perform except in the case of sufficiently high-value outside opportunities, in which case the talent will either (i) withhold performance, incur dispute-resolution costs and pay a settlement amount to the studio, and then capture the gains on the outside opportunity\(^{47}\), or (ii) continue performance and receive a continuation payoff that covers its opportunity cost from foregoing the outside opportunity less the savings on dispute-resolution costs.

\(^{46}\) The studio will make that payment so long as it is less than (i) the expected cost the studio will incur in locating a substitute for the star or canceling the project plus (ii) the expected amount recoverable from the star in the event of litigation (net of legal fees). Given that the costs of locating substitutes for higher-value talent are likely to be high, and the collectible net damages in the event of litigation against an individual star are likely to be low, it can be expected that the star’s termination option will routinely operate as a renegotiation option. This appears to be the case.

\(^{47}\) Note that, in practice, the talent’s new employer will often pay the “settlement” amount by “buying out” the talent’s contract.
and damages payments. In both cases the talent is put in the same position and enjoys a net gain equal to $g_m - p$.

![Diagram of Outcomes under a Soft Contract]

**Figure V: Outcomes under a Soft Contract**

The mix of performance and termination (or renegotiated performance) outcomes implied by a soft contract determines transacting parties’ exposure to the holdup risk and project risk attendant to the relevant project. Each party’s exposure to those risks is a function of the value of $g_m^*$, which is in turn a function of the value of $p^*$, which is in part a function of the value of $F$. Everything else being equal, higher $F$ values increase the exercise price, which “pushes out” the point at which a party can elect to terminate, which inflates project risk but reduces holdup risk; lower $F$ values “pull in” that point, which has the opposite effect.48 The critical observation is that minimizing each type of risk demands different levels of contractual enforceability and therefore different levels of contractual formality—precisely the same relationship observed initially between those same risk categories and the level of rigidity in a formal contract. A hard contract allocates risk explicitly through a mix of excuse and obligational provisions, which demands a large investment in specification costs subject to a high likelihood of

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48 The same change in risk allocation could be achieved by holding constant the level of formalization but adjusting the damages award appropriately (subject in practice to any limitations imposed by the common law doctrine of “penalty damages”). But I am simply attempting to show that a soft contract can achieve different risk allocations solely by adjusting the level of legal enforceability. As I later observe, that argument places in question why parties ever incur the additional costs required to produce a highly formalized contract. On that point, see *supra* note __.
forecasting error. A soft contract allocates risk implicitly by selecting a reduced level of formalization, which demands a small investment in specification costs without a necessarily proportionate increase in transactional uncertainty. Holdup risk declines as $F$ increases, since non-breaching parties can more credibly threaten suit (and hence, can more credibly demand damages) against an opportunistic counterparty. But increasing $F$ increases project risk: each party expects to incur a greater cost if it withdraws in response to adverse information concerning the expected project outcome. Project risk declines as $F$ declines, since a party can exit from a losing transaction—or demand a continuation payoff to reflect a valuable outside option—with reduced risk that the counterparty will bring suit, will do so successfully, or will be able to credibly demand damages as a result of any claimed breach.\textsuperscript{49} But there is a price for increased flexibility: as $F$ decreases, holdup risk increases. Just as parties allocate holdup risk and project risk explicitly through negotiations over price and non-price terms, parties allocate those same risk categories implicitly through negotiations over the level of contractual formality.

b. \textit{Reputation Effects}

A complete analysis of soft contracting must incorporate the role of reputational penalties. Those penalties comprise part of the exercise price expected to be incurred by any repeat-play party that elects to exercise the termination option. Whereas legal penalties impose immediate out-of-pocket costs in the form of a damages or settlement payment plus legal fees, reputational penalties result in prospective costs in the form of reduced future revenues given the credibility discount to be suffered in future transactions. For repeat-play parties, the prospect of future revenue losses protect against downward and upward shifts in the exercise price due upon termination, which would otherwise result in underenforcement and overenforcement, respectively, relative to the implicitly agreed-upon risk allocation.

\textsuperscript{49} For a similar view, see Klein (1996, pp. 448-49), who notes that parties can more cheaply opt out of a non-formalized contractual understanding “if market conditions deviate substantially from expectations.”
(1) Underenforcement

As compared to a more fully formalized hard contract, a soft contract imposes an important risk: without a clear documentary point of reference, opportunistic or uninformed parties can misuse the termination option embedded in a soft contract by withdrawing in a manner inconsistent with the implicitly agreed-upon risk allocation. This would be equivalent to a party withdrawing from the project in cases not involving sufficiently high-value outside opportunities—that is, a case where $g_m < g_m^*$. In a world with zero dispute-resolution costs and no judicial error, that underenforcement contingency would never materialize. Legal penalties would be applied costlessly and, by anticipation, no party would exercise the termination option in a manner inconsistent with the agreed-upon risk allocation. In the real world, however, parties may “irrationally” breach, either due to lack of information, mistake or opportunism, requiring the counterparty to incur litigation or other dispute-resolution costs to preserve the agreed-upon risk allocation. In cases where provable and collectible damages are not sufficient to warrant incurring litigation costs, or in cases where incurring those costs confers positive externalities on other similarly situated parties, non-breaching parties will tend to underenforce. Over time, rational underenforcement would reduce the effective exercise price expected to be paid upon termination, resulting in an excessively flexible contract that overexposes a party to holdup risk. By anticipation, this would compel parties to incur additional specification costs to secure the agreed-upon risk allocation or to secure compensation for bearing any additional hold-up risk. Reputational liability mitigates this risk by increasing the exercise price due upon termination and protecting against downward shifts in the threshold termination point at which a party rationally withdraws from the project.

(2) Overenforcement

As compared to a zero-\(F\) “social” contract, a soft contract imposes another important risk: opportunistic or uninformed non-terminating parties can take legal action to contest exercise of the termination option or resist settlements to preempt or resolve any such legal action, even if the option is being exercised in a manner that is consistent
with the agreed-upon risk allocation. This would be equivalent to a party being forced to incur dispute-resolution costs and damages payments that, by anticipation, discourage it from withdrawing from the project in cases involving sufficiently high-value outside opportunities—that is, a case where \( g_m \geq g_m^* \). The result is an excessively rigid contract that overexposes a terminating party to project risk ex post (or more precisely, exposes that party to project risk that was not reflected in the original deal terms). By anticipation, that would compel parties to incur greater specification costs ex ante to secure the agreed-upon risk allocation or to secure compensation for bearing any additional project risk. Reputational penalties against non-terminating parties inflate the cost of using legal action to “aggressively” contest exercise of the termination option or to demand “exorbitant” settlement payoffs in cases where that option is being exercised in a manner consistent with the agreed-upon risk allocation. Reputational liability protects against upward shifts in the threshold termination point at which a party may terminate involvement in a joint project.

c. Anticipating Formalization Levels

The foregoing line of argument explains why parties would rationally enter into underformalized soft contracts: (i) compared to a hard contract, the enforcement result is functionally equivalent on an expected basis at a significant transaction-cost savings, and (ii) compared to a purely social contract, the enforcement result is functionally superior on an expected basis in the absence of sufficiently powerful reputational constraints. But that argument is vulnerable because it proves too much. Namely: it has now placed in doubt why parties would ever “wastefully” enter into highly formalized agreements, as is typical practice in conventional business environments. Viewing contract formality as a deal term that proxies for legal enforceability, which in turn proxies for substantive risk-allocation, provides the basis for a framework that can explain why, and anticipate when, parties select higher and lower levels of contractual formalization. Parties’ selected level of contractual “hardness” or “softness” in any particular case can be derived from a combination of (i) specification costs and enforcement costs, on the one hand, and (ii)

\[^{50}\text{Klein (1996) discusses how contractual specification exposes transacting parties to strategic behavior by counterparties, who may seek to enforce the literal terms of a contract in a manner that deviates substantively from the parties’ agreed-upon risk allocation.}\]
reputational capital and transactional knowledge (by which I mean familiarity with industry norms), on the other. Explicit termination options are most likely to be used when (i) specification costs and enforcement costs are sufficiently low; or (ii) counterparties do not have sufficient reputational capital and transactional knowledge to pledge against nonperformance. Implicit termination options are most likely to be used when those values are inverted: enforcement and specification costs are high and parties hold rich observable stocks of reputational capital and transactional knowledge.

As shown below, we can use these factors to sketch a rough prediction of parties’ preferred levels of contractual formalization: (i) parties will tend to select “harder” (high-$F$) contracts in environments characterized by one-shot players and transactions that can be specified and enforced at low cost; (ii) parties will tend to select “softer” (low-$F$) contracts in environments characterized by repeat play and transactions that can only be specified and enforced at high cost; and (iii) parties will dispense with formal contract and rely solely on “social” (zero-$F$) contracts in environments where reputational forces are especially strong and specification costs are especially high. All other transactional environments yield ambiguous formalization preferences because these two factors “pull on” contractual formality in different directions.

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51 The second circumstance partially collapses into the first: in transactions involving parties with a rich stock of observable reputational capital and transactional knowledge, parties can economize on specification costs by substituting reputational bonding for legal constraints; the opposite effect holds true in transactions involving one-shot, uninformed or otherwise non-credible parties.
D. Application: Soft Contracts in Hollywood

We are now in a position to account for the differentiated landscape of “harder” and “softer” contractual instruments, and the interaction of formal and reputation-based contracting, across the universe of Hollywood transactions.

1. Contract Risks

Any film project operates under project risk and holdup risk. But those risks are not allocated equally among studio and talent. Project risk tends to burden talent most heavily while holdup risk tends to burden the studio most heavily.

   a. Project Risk

   Project risk in a film production takes two forms: (i) reputational loss and out-of-pocket financial loss in the event of project failure and (ii) opportunity costs in the form of forfeited revenues or reputational gain on another project that enjoys a superior commercial or critical outcome. In absolute dollar-value terms, an integrated studio has the greatest investment at stake; however, in relative terms, individual talent and, to a lesser extent, an independent production company, have a far greater proportion of their resources invested in a single production and, most importantly, have a far greater undiversified investment in any individual project. Talent’s major asset is reputational
capital or what is called “bankability”: that is, the perceived ability to improve the likelihood of box-office success. Successful releases add to talent’s reputational capital, which translates into the ability to demand higher compensation (what the industry calls a “quote”) on future projects; unsuccessful releases detract from it, which reduces talent’s market value and the compensation that talent can demand in subsequent projects (Litwak 2009, pp. 211-12). As an individual, talent cannot diversify investments of his or her reputational capital to hedge against the risk of failure on any individual project and there is no outside market for insuring against that risk. Moreover, any actor constitutes a finitely-lived asset with an accelerated depreciation schedule: an actor tends to have a short window in which to monetize his or her perceived value and a single flop may cause irrevocable injury to career prospects. By contrast, an integrated major studio—and, indirectly, its conglomerate parent—is an infinitely-lived entity that can hedge against project risk by holding a portfolio of projects that are in various stages of development and often financed by outside investors (Boyle 2001).

b. **Holdup Risk**

In the studio/talent relationship, the studio is especially exposed to holdup by higher-value portions of the talent pool. The reason is two-fold: (i) a star is a difficult-to-replace asset, due both to the scarcity of high-value talent and the necessity of reshooting in the event a star withdraws from a film; and (ii) the studio makes a disproportionate sunk investment in a film project. Aside from the opportunity cost of an actor’s time dedicated to a specific project, an actor’s reputational capital is not specific to any particular film project and can be easily redeployed elsewhere (and even the opportunity cost can be avoided if the actor’s agent can locate an alternative project for the same time-window); by contrast, the studio makes irrecoverable investments in inputs assembled specifically for a particular project. In particular, the studio’s holdup risk increases sharply at two critical points on the production timeline.

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52 Note that actors’ compensation is widely known in Hollywood as a result of information-sharing among agents and executives at competing studios (Brouwer & Wright (1990, p.61)).

53 For historical evidence showing that actors’ earning potential peaks at a relatively early age, see Bakker (2005, pp. 67-68).
Figure VII: Production Timeline

(1) Pre-Production

The studio is exposed to holdup risk as soon as it enters into agreements with outside investors to finance a particular film or makes some other large irrecoverable expenditure on a film. Outside financing is sometimes used by a major studio and is always required in the case of a “mini-major” studio or other independent production company. In the event the star withdraws from the film, the studio may have breached a representation made to outside financiers concerning the use of a particular star (Studio Counsel Interview III) and the financiers may then be able to withdraw their commitment (or fulfill their commitment subject to renegotiated terms). Absent concerns of reputational or legal liability, a star’s attorney can rationally demand a renegotiation premium just short of the increased cost of capital that would be borne by producers in the event the star withdrew from the project. Illustrating this risk, talent attorneys sometimes resist execution of a long-form agreement in order to preserve leverage on negotiating open deal points (Daily Variety 1997) and even explicitly recommend that clients seek to avoid liability by asserting that no contract ever existed and “being uncooperative” in order to “renegotiate the terms that really concern you” (Ardi and Lobel 1986). In some cases, talent has used the non-existence of a certainly binding contract “to shop the deal” to other interested studios, thereby precipitating a “bidding war” that enables talent to capture a larger share of the project’s expected value.\footnote{In a well-known litigation involving Kim Basinger and an independent production company, the latter argued that the actress’ departure from the film caused the company to lose some of its outside financing commitments (Basinger v. Main Line Productions, 1994 WL 814244 [Cal.App. 2 Dist. 1994]).\footnote{This was the fate of Warner Bros. in a purported agreement with Francis Ford Coppola, who used the lack of a fully-executed long-form agreement to argue in a lawsuit (successfully) that he was free to “shop” to other studios a project originally developed in partnership with Warner Bros (in Coppola et al. v. Warner Bros., Inc. (L.A. Sup. Ct. Case No. BC 135198 [1998]). In that case, Warner Bros. executives testified having great difficulty in obtaining written confirmations of oral commitments from talent attorneys (Schleimer 2001).}}
(2) Production

Once production\(^{56}\) starts, the talent’s holdup leverage increases dramatically. The studio has now made a difficult-to-reverse investment in selected talent and other inputs required for a film production. Even the slightest delay in production translates immediately into significant costs (in some cases, \textit{daily} production costs can total several hundreds of thousands of dollars (Bunting 2007)) and endangers completion given the fact that the cast has typically committed to perform only during a limited period. Exploiting this fact, talent attorneys reportedly demand more perquisites, creative control and other improved secondary terms during this period (Entertainment Attorney Interviews I, II, III; Studio Executive Interview).\(^{57}\) For the same reason, stars who appear in a hit film or television series sometimes threaten not to return for a sequel or additional season without an additional retention payment (Studio Counsel Interview I).\(^{58}\) Absent concerns of reputational or legal liability, the star can demand a renegotiation premium equal to the increased costs associated with retaining substitute talent and reshooting the film.

2. Conventional Solutions

The conventional mechanisms of reputation and contract provide substantial but incomplete protection against holdup risk and project risk.

a. Reputation

It is sometimes asserted that contracts have limited relevance in Hollywood because the studios and talent are subject to reputational sanctions for deviating from

\(^{56}\) By “production”, I am referring to the start of what is known as “principal photography” (also known as “shooting”).

\(^{57}\) The value of typical “perks” can add up to several hundreds of thousands of dollars. For further details from an actual film budget, see Bunting (2007).

\(^{58}\) Examples abound. In a dispute between Universal Pictures and Michael Oliver, a 10-year old actor in the movie series, “Problem Child”, the child actor’s guardian renegotiated his salary shortly prior to the shooting of the sequel, \textit{Problem Child II}. Universal later refused to pay the additional amount on the ground that it had agreed to the increased compensation “under duress” given its investment in production and other expenses. \textit{See Diana Haithman, Problem Child Part III – The Courtroom, L.A. Times, Apr. 23, 1992}. Interestingly, the broadcast television networks were reportedly exposed to the same type of behavior during the period in which the FCC’s “Fin-Syn” (financial interest and syndication) rules compelled the networks to purchase all shows from outside providers, who therefore commanded negotiating leverage with respect to continuations of a “hit” show (Studio Counsel Interview I).
prior commitments. But a reputation-based explanation must assume that talent’s or the studio’s commitment is self-enforcing even in the absence of contractual liability. That requires assuming that no party will ever walk away from a film project because doing so would curtail the talent’s expected profits on all future projects or, in the case of a studio, would harm its ability to recruit the highest-value talent for future productions. Such optimism would be naïve. Hollywood is not usually depicted as a paragon of good-faith behavior (if anything, some would say quite the opposite!). The Hollywood trade press regularly reports cases of apparent opportunism: studios substitute even star actors during development contrary to prior commitments, producers delay moving forward with a project but keep actors indefinitely “on call,” actors withdraw from projects shortly prior to the commencement of shooting, and studios occasionally terminate actors or directors even after shooting has commenced. This mixed performance may reflect the fact that Hollywood exhibits some, but not all, of the characteristics of the small-knit (and usually ethnically homogenous) environments in which reputation-based transacting has been most convincingly documented. Hollywood is at best a relatively small world populated by firms and individuals that do business with each other repeatedly: six major studios, three major talent agencies, a handful of “mini major” studios, a larger number of independent production companies, a small group of high-value talent, and a much larger group of lower-value talent consisting of tens of thousands of actors. Moreover, membership in these constituencies can be unstable. While studios and talent agencies have a long life, independent production companies, individual producers, and actors may often have short careers (Litwak 1994, pp. 228-29). Hence no transacting party can safely assume that any given counterparty is a repeat player with a rational interest in preserving reputational capital. Even repeat players may rationally deviate from a history of good-faith behavior to avoid an extremely large one-time loss or to capture an

59 For a review of incidents involving Robin Williams, John Cusack and other famous actors, see Child (2008).
60 This type of behavior prompted a lawsuit by Sharon Stone (a star actress) against producers in connection with the film, Basic Instinct 2. Due to allegedly missed opportunities attributable to delays in production, she claimed $100 million in damages. The suit was settled out of court (IMDB.com 2012b).
61 This action precipitated litigation by Raquel Welch (a star actress) against MGM for allegedly wrongful termination from the film, “Cannery Row”, ultimately resulting in a $10 million damages award against the studio for damage to the actress’ reputation (in Welch v. Metro-Goldwyn-Mayer Film Co., 254 Cal. Rptr. 645 [Cal. App. 2d 1989]).
62 For well-known examples, see Greif (1993); Bernstein (1992).
exceptionally large one-time gain. Since an exceptional hit is an infrequent occurrence and an exceptional loss is a frequent occurrence in the film industry, the temptation to abandon a losing project in favor of a more promising project may overcome reputational considerations. While reputation exerts some disciplining force, it does not provide a complete governance solution.

b. Contract

Like any contracting environment, talent and the studio face significant specification and forecasting costs, which likely results in chronic design errors. Even implausibly assuming that studio and talent representatives can overcome or mitigate these transacting obstacles, those parties will still face significant enforcement obstacles. First, it is sometimes difficult to show breach; for example, actors who are dissatisfied with existing contract terms are known for suffering from the “blue flu” or “phoning in” a performance (that is, underperform on set) until a resolution is reached (Entertainment Attorney Interview I). Even assuming breach can be shown, the plaintiff-studio in particular still faces numerous obstacles: (i) given the uncertainty of a film project, it may be difficult for the studio or talent to show expectation damages; (ii) the studio cannot obtain a remedy of specific performance to compel talent to perform; (iii) the studio cannot seize and liquidate the talent’s “human collateral”; and (iv) under California law, the studio can only obtain a negative injunction to bar talent from working for another production during the contract term if the actor’s services are deemed to be of a “unique” character (Calif. Civ. Code § 3423).

Additionally, for both studio and talent,

63 See, e.g., Skirball v. RKO Radio Pictures, Inc. (134 Cal. App. 2d 843 [1955]), in which the court found a breach of an oral agreement to acquire literary property from a producer and retain a producer’s services to make a motion picture but refused to award the agreed-upon contingent compensation due to the lack of certainty as to the film revenues, and instead awarded fixed compensation plus the reasonable value of the literary property.

64 Calif. Civ. Code §3423 prohibits specific enforcement of a personal services or employment contract.

65 The lack of any seizable collateral may be a fundamental distinguishing characteristic of a talent/studio transaction as compared to other innovation contexts—for example, a venture capital firm’s investment in a start-up, which is in part supported by the investor’s ability to seize the start-up’s intellectual and physical property in the event of default. That may explain why soft contracts are used in the entertainment context while hard contracts appear to predominate in other innovation contexts.

66 There are additional obstacles to enforcing a contract against talent: (i) talent can raise litigation costs by claiming that his or her manager or agent did not have the authority to bind the actor (a California court denied a breach of contract claim against actress Pamela Anderson in part on this ground, when she
initiating formal legal action can impose significant reputation costs: (i) in the case of the studio, it can suffer a large cost due to disclosures of talent’s compensation or other sensitive information in the course of discovery or trial\textsuperscript{67} or reputational injury in the labor market; and (ii) in the case of talent, he or she can suffer a career-ending reputational injury to the extent that all future employers decline to offer job opportunities given demonstrated litigiousness. To be sure, the threat of contractual liability for breach poses an \emph{in terrorem} effect that may exert some deterrent force (in part due to the significant cost of defending against even a meritless claim); however, it is far from a complete solution to counterparty opportunism.

3. Unconventional Solution: Soft Contracts

It would be incorrect to say that Hollywood relies solely or principally on soft contracting as the standard mode of doing business. Rather, Hollywood relies on a mix of soft and hard contracting forms to govern relationships among the multiple parties that supply inputs to any film project. These differences can be explained as a function of the same risk allocation that is typically used to account for differences in substantive terms in a fully formalized contract. Transacting parties select different formalization levels—specifically, select different points between purely informal and purely formal contracting—to achieve different risk allocations at the lowest transaction cost. The formalization level selected in any particular case reflects parties’ relative valuations of project risk and holdup risk, as adjusted by two factors: (i) the specification and enforcement costs required to formally reflect and implement any agreed-upon risk allocation; and (ii) the parties’ observed reputational capital and transactional knowledge.

\textsuperscript{67}This factor often causes studios to settle quickly (Beck 1988).

allegedly violated a commitment to appear in a film, in \textit{Private Movie Co., Inc. v. Pamela Anderson},(L.A. Sup. Ct. Case. No. BC 136805 [1995]); and (ii) if, as is typical, a star actor contracts with the studio through a “loan-out corporation”, the actor can increase litigation costs by compelling the studio to petition the court to pierce the corporate veil. Studios attempt to preclude this strategy by demanding that talent produce an “inducement letter” whereby the employee covenants to satisfy the loan-out corporation’s obligations. However, this is not always successful. See, for example, \textit{Great Entertainment Merchandise, Inv. v. VN Merchandising, Inc.} (1996 WL 355377 [S.D.N.Y. 1996]), in which the court found that the defendant performer was not liable for certain monetary obligations of the loan-out corporation to the plaintiff because the inducement letter only required that he meet his concert performance obligations; \textit{Main Line Pictures, Inc. v. Basinger} (No. B077509, 1994 WL 81244 [Cal.App. 2 Dist. 1994]), in which the appellate court found that the trial judge had committed reversible error by failing to instruct the jury that liability could only be imposed on the defendant actress if she were found to be the “alter ego” of the loan-out corporation that had purportedly entered into an agreement with the production company.
Parties may place different values on those risks, and may anticipate different costs or observe different levels of reputational capital, in different transactions or when dealing with different counterparties, or, within the same transaction, at different points in the production timeline or with respect to different deal terms. Holding constant all other contractual terms, the selected level of formalization reflects a continuous negotiation over the relative exposure of each party to each type of risk at any given point in the transaction timeline and with respect to each deal term.

a. Formalization Differences Across Transaction Types and Counterparties

Interviewee reports and trade commentary reveal a few basic patterns in Hollywood’s choice of soft and hard contracting instruments. In the case of transactions involving outside investors and lower-value talent, Hollywood appears to prefer hard contracts following conventional business practice. In those cases, the counterparty may lack sufficient reputational capital (or sufficient repeat-play incentives to acquire reputational capital) or transactional knowledge: lower-value talent may be a newcomer to the industry and the investor may be a one-shot player who may misconstrue the implicit termination and renegotiation option embedded in a soft contract. In the case of star and other higher-value talent, some studios are willing to move forward on an unsigned deal basis. That is consistent with theoretical expectations: both the studio and the star hold rich stocks of reputational capital and transactional knowledge and it is difficult to specify all contingencies using verifiable criteria. For both the studio and the star, reputational constraints substitute for investments in increased formalization, allowing

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68 The major studios have more and less tolerant “unsigned deal” policies. Interviewees reported that two of the six major studios require execution of a long-form agreement as a precondition for commencing shooting, one of the major studios has a reputation for being the most tolerant in allowing production to move forward with star talent on an unsigned basis, and the remaining three studios permit unsigned deals with star talent in certain circumstances (Studio Executive Interview; Studio Counsel Interviews I and II; Mini-Major Studio Counsel Interview; Entertainment Attorney Interview I). There are sometimes internal differences within a studio in the characterization of the studio’s “unsigned deal policy”. “Official” policies at two studios exclude “unsigned deals” or limit them to an extremely narrow range of cases or short time period (Studio Counsel Interview I, III) while reports from other in-house counsel and law-firm practitioners indicate that those studios enter into unsigned deals with high-value and some medium-value talent for the entire course of production (Entertainment Attorney Interview I, II; Mini-Major Studio Counsel Interview; Studio Counsel Interview II). While studios may sometimes be willing in practice to enter into agreements with the most highly-valued talent at low levels of formality, an official policy that excludes any such practice protects the studio’s negotiating position with lower-value talent that lacks sufficient reputational capital.
the parties to economize on specification costs and achieve an equivalent risk allocation at a transaction-cost savings. Let’s look more closely at the manner in which reputation effects support soft contracts.

(1) Reputation Effect I: Against Underenforcement

After the studio has commenced shooting, any high-value talent in a lead role should rationally hold up the studio for additional compensation in an amount almost equal to the studio’s entire expected profit on the film. In practice, nothing close to this extreme form of holdup behavior is observed. Talent attorneys sometimes renegotiate perquisites and creative control following production but refrain from renegotiating “money items” (Entertainment Attorney Interview II, Studio Executive Interview) or terms relating to the fixed compensation (Entertainment Attorney Interview III).69 This self-restraint limits the studio’s holdup exposure and enables the parties to enter into the project at a low level of formalization. Reputational capital and transactional knowledge enables high-value talent (and talent’s representative) to commit against abusing the termination and renegotiation option embedded in a soft contract. Absent the star’s reputational bond, the studio would fear that talent would act opportunistically or mistakenly, which would shift downward the threshold level of opportunity costs at which a party will rationally elect to terminate, and compel the parties to contract under a higher level of formalization. Consistent with this assertion, both the trade press and interviewees consistently reported that studios generally only are willing to enter into unsigned deals with the highest-value portions of the talent population (Studio Counsel Interviews I, II; Studio Executive Interview).70

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69 Note that there is, however, renegotiation of “money terms” in the (unlikely) event of a successful film, which often gives rise to a formalized auditing procedure concerning interpretation of the “profit participation” provisions of the agreement between studio and talent. These disputes are commonly resolved by auditing firms or arbitrators that operate subject to industry custom (Studio Executive Interview).

70 One interviewee described the “unsigned deal” policy at a major studio that differentiated explicitly among talent of various caliber: (i) the lowest-value talent were required to be “signed up” prior to production; (ii) higher-value talent could commence production without a signed-up deal but were expected to enter into a signed agreement during production; and (iii) the highest-value talent could commence production without a signed-up deal and were never expected to enter into a signed agreement (Studio Executive Interview). Another interviewee described an alternative protocol at a “mini-major” studio that relies on external financing: (i) the highest-value talent were required to sign because they were designated “essential elements” for purposes of the external financing but (ii) slightly lower-value talent
(2) Reputation Effect II: Against Overenforcement

Stars’ loose attachment to a film project in an unsigned deal inherently gives rise to incidents in which a star abandons a project shortly prior to production. The usual defense is that “no deal” had been reached or that the studio had breached one of its own material commitments.\(^{71}\) Given that the star’s “commitment” often rests on a level of documentation that could give rise to a serious legal claim, it might be thought that studios would vigilantly bring suit against talent for breach of contract. In practice, that is rare. Studios do not usually bring legal action against talent who terminates participation in a film project (Entertainment Attorney Interview III), as illustrated by reported cases where stars withdrew from a film shortly prior to shooting but the studio took no legal action against them (Brennan and Boyer 1994). Even in cases where a lawsuit is initiated or threatened, the survey of the trade press indicates, and interviewees reported (Studio Executive Interview), that the parties often resolve the matter by agreement and put an end to the dispute (see App. A). Consistent with this view, there are few major studios that appear as parties in the list of “unsigned deal” cases litigated in court or reported in the trade press (Apps. A, B).\(^{72}\) Those non-litigious tendencies are consistent with a reputational regime that penalizes parties that resist “reasonable” terminations that are consistent with the parties’ agreed-upon risk allocation. Doing otherwise would result in undertermination by talent, which would shift upward the threshold opportunity costs at which a party may breach consistent with the parties’ implicit agreed risk-allocation, and compel the parties to contract under a higher level of formalization.

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\(^{71}\) In a recent litigation involving the singer Beyonce and a video production company, the singer claimed that her withdrawal from the production was justified because the production company had allegedly failed to meet certain financing requirements that were a condition to her continued participation (Gardner 2011).

\(^{72}\) The only recent exception to this tendency is the well-known litigation between Warner Bros. and Francis Ford Coppolla regarding the Pinocchio film project. See App. B. Interestingly, one trade commentator has suggested that the unusually aggressive litigation response to Kim Basinger’s withdrawal from a film (in the well-known litigation, Basinger v. Main Line Productions, 1994 WL 814244 [Cal.App. 2 Dist. 1994]) was undertaken because the counterparty was a small production company experiencing financial difficulties (Kari 1993), which corresponds to an “end-game” scenario where a party loses its rational incentive to preserve long-term reputational gains by avoiding litigation.
b. *Formalization Differences Across Time*

Formalization preferences can be expected to change as a function of time—or, more specifically, as a function of a party’s sunk investments in the joint project. Consistent with that intuition, hard contracting tends to displace “softer” forms of contracting throughout the course of a film project as one or both of the parties’ sunk investment increases. The Figure below depicts the changing formalization preferences of the studio and a star during the course of a production. The studio has a preference for increased formalization as the film approaches and enters production, which reflects its greater exposure to holdup risk and lesser exposure to project risk. The star continues to prefer low formalization, which reflects the fact the star’s inverted levels of exposure to those risk categories. The ultimate formalization level ($F^*$) reflects a negotiation between the studio and talent and is determined in large part by the studio’s valuation of talent’s reputational capital, which can be pledged as “collateral” against holdup behavior and other forms of opportunism in lieu of formal constraints.73

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73 Interviewees sometimes attributed the prevalence of unsigned deals among stars to the latter’s bargaining leverage over the studio (Studio Counsel Interview III). While that is an intuitive explanation, it is difficult to reconcile with fully rational contracting behavior by sophisticated agents: “compelling” the studio to operate at a low level of formalization would not make the star any better off since the studio would adjust the other contractual terms accordingly to reflect its greater anticipated exposure to holdup risk. It is therefore more coherent to say that the studio agrees to a low level of formalization with a star because the latter can pledge its reputational capital against future holdup behavior, thereby limiting the studio’s holdup risk at a transaction-cost savings relative to a more fully formalized contracting instrument. On the complexities of integrating bargaining power into rational contracting models, see Choi & Triantis (2012).
Figure VIII: Formalization Preferences Across Time

Stage I: Development. Both studio and talent place a high value on being able to withdraw in the event unfavorable information is received, place a low value on contractual protection against holdup given limited sunk investment, and therefore agree on a low level of contractual formality in the form of an oral agreement or unsigned deal memo with poorly specified terms. For both the studio and star, it enables each party the flexibility to terminate involvement in the project at a reduced risk of legal liability (a not infrequent occurrence at this early stage). At a transaction-cost savings, this is equivalent to writing a fully formalized contract with a high degree of flexibility—e.g., a broadly-defined walkaway right and a low breakup fee in an acquisition transaction. Even if greater transactional certainty could be achieved through a more formalized contract, an “unsigned deal” may represent a rational underinvestment in specification costs (and, for the studio, avoids paying the option fee that would be due in a fully-formalized contract\textsuperscript{74}) given the fact that most film projects are shelved or abandoned in the

\textsuperscript{74} For example: (i) a studio or production company pays an option fee to a writer for the right to the writer’s screenplay for a limited period; or (ii) a television network (or, in some cases, a talent agency) pays a “holding” fee to a performer in exchange for which the performer agrees not to work for another agency or network for a certain period of time.
development stage, in which case all sunk legal and other out-of-pocket investments would be forfeited (Entertainment Attorney Interview I).\(^{75}\)

**Stage II: Pre-Production.** The studio places increased value on contractual formality to secure its “talent package”, especially if outside financing or other large expenditures or commitments are predicated on the presence of that element. However, high-value talent often prefers contractual informality in order to maintain its termination and renegotiation option going forward.\(^{76}\) Even in high-value talent/studio transactions, studios insist that talent execute a “certificate of engagement”, which assigns to the studio all of talent’s intellectual property rights in the film production and thereby protects the studio against the most salient holdup threat at a nominal specification cost.\(^{77}\) With respect to all other deal terms, the studio may feel comfortable proceeding at a reduced level of formalization given the star’s large stock of reputational capital, which reduces the studio’s expected holdup risk, and the specification and other costs that would have to be incurred to reach a fully signed-up deal. A signed-up deal does not come for free: studios that insist on an executed long-form agreement, and thereby largely eliminate holdup risk, are compelled to make concessions on large dollar-value items to do so (Studio Counsel Interview III). For that reason, a studio executive reported that it was often “not worth it” to insist on a fully signed-up deal with a major star prior to production (Studio Executive Interview). Put differently: the studio implicitly consents ex ante to a reasonably defined set of “hold up” demands that the star will make ex post, which it anticipates will save on total transaction costs and, as the same interviewee reported, can enable the studio to “outbid” a competitor for the star’s services.

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\(^{75}\) See Caves (2003, p.113) (citing studio executive stating that the studio receives 10,000 treatments and pitches yearly, puts 70 to 100 projects into development, and makes only 12 films); Goldwyn (1983, p. 92) (noting that a studio announced that it had 183 projects in development and asserting that, of those projects, “maybe ten, at the outside, will ever happen”).

\(^{76}\) This strategy will not always be preferred by higher-value talent and, even more often, will not be preferred by lower-value talent who may prefer a higher level of formalization in order to protect against holdup behavior by the studio. This can be achieved by the “pay or play” clause, whereby the studio guarantees payment of a certain amount to talent irrespective of whether or not talent’s services are actually used. This consideration may explain why even stars sometimes insist on a signed agreement when performing for an independent production entity, which lacks the reputational capital of a studio to pledge against future opportunism (Studio Executive Interview). Note that “pay or play” agreements often provide only limited security because they are usually conditioned on a “final approved bonded budget”, which will never arise in the case of a film that is not made (Moore 2000, p. 179).

\(^{77}\) See supra note __.
Stage III: Production. The studio now places a high value on contractual formality since it has made a large sunk investment in talent and other assets. But high-value talent may continue to prefer contractual informality in order to preserve the ability to negotiate continuation payoffs from the studio as production proceeds and the studio’s specific commitments accelerate even further. The very reason why the studio generally prefers an executed agreement prior to the start of shooting induces high-value talent to resist executing any such agreement. Doing so would forfeit renegotiation opportunities once production commences while delivering little value in the form of protection against opportunism by the studio, which has few holdup opportunities and no credible termination threat given the limited pool of substitute talent. Implicit continuation payoffs are a regular feature of talent/studio relationships governed by soft contracts: studios provide stars with “perks”, creative control and other benefits that are negotiated in the course of production (Entertainment Attorney Interviews I and II). For that reason, star actor Charlton Heston boasted that he had never started production on a film with a signed completed contract (Heston 1993)—meaning, he always had sufficient market value and reputational capital in order to preserve his renegotiation option and had little reason to fear being held up by the studio.

III. Why Not Integration?

Sequential investment, severe uncertainty, high specification costs, and mild reputation effects are hardly unique to the movie industry. Those contracting conditions are often resolved through a simpler alternative to soft contracting: namely, vertical integration that eliminates arm’s-length transactions altogether. That well-known solution follows a basic principle of transaction-cost economics: when it is too costly to use contractual mechanisms in order to protect transacting parties from holdup risk, one party may acquire the other party and replace contract with the hierarchical fiat of an employment relationship. Vertical integration also provides a solution to project risk: the studio, which is the more efficient risk bearer, can insure talent against the risk of any individual project failure by diversifying that risk across a portfolio of projects.

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78 For the canonical sources, see Williamson (1975); Klein, Crawford, and Alchian (1978).
This is not a hypothetical option. In the decade between 1910 and 1920, silent-movie stars enjoyed bargaining power that translated into escalating salaries\(^\text{79}\) and creative control. This process culminated in 1919 with the formation of the United Artists studio by Charlie Chaplin, Mary Pickford and other star actors and directors (Kindem 1982). The “studio system” that subsequently dominated Hollywood during the 1920s and flourished until the late 1940s limited these stars’ rent-seeking opportunities by integrating backwards into the talent pool. Studios signed talent to multi-year or multi-picture contracts of varying lengths, with the most secure being a multi-year (usually seven-year) contract that guaranteed fixed compensation during the contract term, subject to the studio’s option to renew the contract at an escalating salary at 6-month or 12-month intervals (Kindem 1982, p. 84). To discourage talent from acting uncooperatively, any actor who refused to perform in a particular project would be “suspended” and the missed time added to the term of the contract (Schatz 2010). The latter clause was effectively a pre-agreed negative injunction designed to mitigate the holdup threat that persists in even the most highly formalized contractual relationship.

The studio system is often if not usually described as a naked exercise of bargaining leverage by the studios in order to “exploit” actors and other talent. It certainly represented a transfer of rents from stars to studios, who largely suppressed per-project bidding for talent’s services that would have taken place in an open market.\(^\text{80}\) But the studio system arguably represents an efficient solution to (i) holdup risk—to which the studio is disproportionately exposed throughout much of the production timeline; and (ii) project risk—to which talent is disproportionately exposed due to his or her limited diversification capacities. The transactional security of a long-term employment arrangement protected the studio against opportunistic renegotiation by a star during production\(^\text{81}\) and allowed the studio to reallocate talent to other projects within the studio’s portfolio at a nominal transaction cost. In return, talent received up to seven years of income that was shielded from the vagaries of any individual movie’s commercial performance, thereby protecting the actor from the project risk associated

\(^{79}\) See Bakker (2005), p. 59, who cites evidence that, in 1915 and 1916, 75% of the average budget of a studio film starring Mary Pickford, then one of the leading female stars, was constituted by her salary.

\(^{80}\) More precisely, the studios conducted per-project bidding by “loaning out” contract actors to other major studios but retaining all rents accrued as a result.

\(^{81}\) For a similar observation, see Chisholm (1993).
with any individual production, which was shifted to the studio (clearly the efficient risk bearer).\(^8\) Put differently: talent purchased protection from the downside risk of project failure in exchange for forfeiting any claim on upside gain in the case of project success (and, implicitly, forfeiting holdup opportunities to extract additional compensation during the course of production and the remaining term of the employment contract).

It is by now well-documented that this description is too simple: some of the highest-value stars either entered into profit-sharing contracts with the studios (Weinstein 1998, pp. 88-89) or engaged in uncooperative behavior to extract improved terms\(^8\) and, in anticipation of both outcomes, studios sometimes voluntarily increased stars’ compensation even prior to the mandatory escalation provided by the renewal option.\(^8\) From a contract theory perspective, this type of behavior is unsurprising: given that the studio bore positive litigation (and presumably, reputational) costs, a high-value actor could induce renegotiation simply by withholding performance or otherwise acting uncooperatively. This finding does not rebut the interpretation of the studio system as an efficient substitution of long-term contracting for spot market contracting. As more nuanced understandings of the firm/market dichotomy recognize, holdup risk persists to some extent even within the confines of the integrated firm (Freeland 2000). For actors situated at the very highest end of the talent distribution, the studio system may have represented a bad deal: it offered protection against project risk at an exorbitant cost—namely, the inability to capture any upside through profit participation rights or to trigger open bidding for a star’s services on each individual project.\(^8\)

\(^8\) For similar views, see Zuckerman (2004). It might be wondered whether the studio contract really offered talent any security given that it provided for a one-way renewal option exercisable at six and twelve-month intervals by the studio. While that certainly limits the extent to which the studio system protected the actor against income variance, even the shortest period (six months) exceeds the typical duration of a per-project movie contract (typically, a few months). Historical commentary indicates that even some headline actors expressly elected long-term contracts over freelance work precisely in order to achieve income security (Kemper 11).

\(^8\) Some of the most famous stars used this strategy, including James Cagney (Schatz 2010, pp. 138-39), and Bette Davis (Schatz 2010, pp. 218-220). In other cases, actors bought out their contracts in order to sign with another studio (who paid the buyout fee) (Shipman 1993, pp. 130-36).

\(^8\) These increases were often tied together with entry into a new long-term contract, thereby providing the studio with access to the actor’s reputational capital for a longer period of time but at a split more advantageous to the actor (Zuckerman 2004).

\(^8\) The gains available to stars who broke their contracts with the studios were substantial. When employed on a long-term basis by Warner Bros., Bette Davis received $143,000 a year, or about $30,000 per film; when Warner Bros. “loaned her out” to MGM, it charged a fee of $385,000 (Albert 1999). The spread between those figures represents the rent captured by Warner Bros. under the studio system.
accumulated some financial reserves and expects a steady flow of employment opportunities, he or she demands less insurance against income loss and is willing to exchange some exposure to project downside (through a reduced guaranteed salary component) in exchange for more exposure to project upside (through some form of revenue or profit participation).

Given that the studio system appears to provide an effective and simple mechanism for alleviating holdup risk (borne mostly by the studio) and project risk (borne mostly by talent), it might be thought that soft contracting is a second-best alternative as a result of some legal obstacle to engaging actors in long-term employment contracts. But there is no legal bar to the use of long-term contracts by the film industry. The landmark decision by the California Supreme Court, *De Havilland v. Warner Bros. Pictures* (67 Cal. App.2d 255 [1944]), prohibited only the use of suspension clauses, on the ground that these clauses could extend an employment contract indefinitely, but not the use of long-term contracts generally. The statutory provision applied in the *De Havilland* decision to invalidate suspension clauses explicitly allows long-term service contracts up to a maximum of seven years (and without any time limitation in the case of recording contracts) (Calif. Labor Code § 2855). California law also specifically provides for injunctive relief to stop breach of a (written and signed) personal services contract relating to services of a sufficiently “unique” character (Calif. Civ. Code § 3423). Consistent with that language, the studios continued to make some use of long-term contracts for more popular stars into the 1950s and 1960s (Kindem 1982, p. 80), television producers regularly bind talent to long-term contracts, and record labels have consistently used long-term contracts, sometimes supplemented by suspension clauses (Selz et al. 2009 §6:3). If a Hollywood studio wished to do so today, it could revive the studio system under California law subject only to the statutory limit of seven years (or it could enter into contracts under the laws of New York or another state that does not

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86 Interestingly, the California legislature adopted this special exception to the previous blanket prohibition on injunctive relief at the same time that it extended the previous limit on the term of personal services contracts (1919). These changes supplied the legal infrastructure for the studio system: long-term employment contracts supported by the threat of negative injunctive relief against breaching parties.
impose any term limit\textsuperscript{87}, an opportunity sometimes exploited by the record industry (Weinstein 1995)).

Economically inclined historians agree on a simple reason why the studio system disappeared (on the upstream talent side): it became too expensive (Schatz 2010; Caves 2002, pp. 94-95). The advent of television, which converted movie-going from a near-daily to a weekly or monthly activity (Stuart 1982), dramatically reduced the volume of product demanded by the market, making it unprofitable for the studio to bear the overhead cost associated with retaining a standing pool of creative and technical personnel (Schatz 2010).\textsuperscript{88} Within a few years, the major studios substantially dismantled their formerly integrated structures based on long-term employment contracts (Stuart 1982, p. 294).\textsuperscript{89} The transactional price for the dismantling of the studio system was steep: studios and talent were now compelled to operate outside the shelter of the firm in an environment characterized by high specification costs and holdup risk throughout the production timeline. For all but the higher reaches of the talent distribution, there was another price: the dismantling of the studio system exposes talent to project risk in any individual film and a lower level of income security.

Standard transaction-cost economics would anticipate that the decline of integrated structures (analogous to the “firm”) in Hollywood would give way to the spot contracting mechanisms of the “market”. This is only partially true. In the wake of the studio system’s demise, Hollywood appears to have adopted a mix of hard and soft contracting mechanisms that do not fit neatly under the “market” rubric. Historical evidence suggests that the soft contract takes on greater prominence in Hollywood roughly coincidentally with the decline of the studio system. The surveys of reported

\textsuperscript{87} California law appears generally to honor the choice of foreign law in employment contracts, subject to the state’s policy against enforcing non-compete provisions. See, for example, Sarmiento v. BMG Entertainment (C.D. Cal. 2003), upholding choice of New York law in contract between a California composer and music director; Hopkinson v. Lotus Development (N.D. Cal. June 21, 1995), upholding choice of Massachusetts law in an employment contract; Flake v. Medline Industries (E.D. Cal. 1995) (June 22, 2011), upholding choice of Illinois law to govern an employment contract.

\textsuperscript{88} At the same time, the consent decrees issued in the 1948 Paramount litigation (United States v. Paramount Pictures, Inc. et al., (334 U.S. 131 [1948])) compelled the studios to divest ownership of theatres and limited the studios’ contractual freedom in licensing packages of films to exhibitors, which exposed studios to greater risk that they would be unable to find exhibitors for a release (Stuart 1982, p. 260).

\textsuperscript{89} Other commentators date the demise of the studio system to the World War II period. Gomery (1986, pp. 9-10) observes that, as of 1945, only 261 of the 1054 members of the Screen Actors Guild who “received feature billing . . . were under exclusive contract to a major studio”.

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litigation and case law described earlier found only one court decision, and one other reported dispute, relating to contract formation in connection with a film project prior to 1947—precisely the time at which the studio system began to unravel under the external cost pressures and legal interventions described above.\(^9\) Moreover, those two disputes arose in the early 1920s, right at the inception of the studio system era. As the studio system begins to unravel in the late 1940s, reported litigation involving contract formation issues in studio/talent relationships emerges with greater frequency and continues through the present day (App. A). While merely suggestive, the historical incidence of “contract formation” litigation is consistent with an organizational narrative where informal contracting, and attendant holdup problems, appear just prior to the start of the studio system, which then seeks to resolve those contracting difficulties through the simple solution of vertical integration; conversely, as the studio system unravels, those same problems reappear.

These shifts in transactional form do not appear to be accidental and lend support to a proposition that deserves further empirical inquiry. If the demise of the studio system inflated the holdup risk and project risk to which studio and talent were exposed in any individual film project, then studio and talent—or more specifically, the repeat-play representatives of studio and talent—may have responded by adopting an intermediate transactional arrangement that lies between the dichotomous alternatives of firm and market. Since the demise of the studio system, Hollywood has evolved a transactional model in studio/star relationships (and, in more irregular fashion, in other settings) that falls somewhere in between the triplet constituted by three canonical transactional forms: (i) long-term formal contracting; (ii) repeated informal contracting driven solely or primarily by reputation; and (iii) short-term formal contracting. Exploiting the two vectors of duration and formality, these transactional options, and the Hollywood alternative, can be depicted as shown below. The old studio system primarily operated in region I: long-term formal contracting, interrupted by periodic renegotiations

\(^9\) A California state court litigation in 1936 involved the famous movie actor, James Cagney, concerning an oral agreement with respect to the number of films in which Cagney had agreed to perform (Daily Variety 1936). However, this dispute (and other disputes at the time between studios and major stars) did not contest the existence of a legally binding agreement between talent and the studio, as distinguished from disputes over the interpretation of specific terms or whether specific terms had been breached.
in the case of the highest-value stars. The unraveling of that system appears to have pushed transactions between studios and the general class of input providers into two transactional alternatives. Transactions between a studio and non-creative input providers (and lower-value creative input providers) tend to operate in region II: short-term formal contracting. Transactions between a studio and high-value creative input providers (as well as some other parties) tend to operate in region III: a boundary zone characterized by substantially incomplete formal instruments supported by repeat-play reputational constraints (which are reflected by a medium-term durational vector).

**Figure IX: A Transactional Typology of Film Production**

IV. **Normative Implications**

I began by treating Hollywood’s predilection for soft contracting as an anomaly. But if the proposed economic rationale for Hollywood’s relaxed contacting practices is correct, then those practices may not be a *non sequitur*. Any industry that shares the characteristics of the film industry—severe uncertainty, high holdup risk, high specification and enforcement costs, and positive but limited reputation effects—are hospitable environments for soft contracting instruments, at least where vertical integration is a more costly transactional option. That presumptively includes creative markets that typically exhibit similar informational constraints, risk characteristics and sequential investment structures (Caves 2002). The use of open-ended precontractual agreements reportedly characterizes some technology transfer, project finance, and
infrastructure projects, in which complexity, uncertainty and multiple parties necessitate prolonged negotiating periods concurrently with performance in lieu of the discrete offer/acceptance sequence contemplated by classical contract law (Lake and Draetta 1994, p.54). Soft contracting instruments with ambiguous enforceability even appear in conventional business environments: merchants exchange letters of credit with documentary defects (Mann 2000); merchants enter into requirements contracts with dubious enforceability (Macaulay 1963); rail-freight carriers and shippers use informal and legally unenforceable contracts to implicitly alter regulatory constraints (Palay 1985); parent firms sometimes issue “comfort letters” or “keepwell agreements” in support of the financial obligations of a subsidiary (DBRS 2010); and underwriters commonly issue “best efforts” commitment letters to an issuer in connection with an initial public offering (Lake and Draetta 1994, pp.14-15). In refusing to enforce an unsigned LLC agreement under the statute of frauds, the Delaware Chancery Court observed that private equity funds sometimes use oral agreements and “roughly-outlined unsigned arrangements or draft agreements” in lieu of definitive LLC agreements.91

The surprising prevalence of soft contracting practices raises normative implications for the formation requirements that contract law imposes to demarcate legally enforceable and unenforceable categories of promissory communications. Contrary to the formalism of classical contract law, modern courts tend to take a more fluid approach that in some cases imposes liability with respect to incompletely specified agreements that would not survive a strict application of the mutuality requirement.92 Some portions of the business community have resisted this trend. Evidence on choice of law and forum clauses indicates that public corporations tend to prefer the formalist approach typically attributed to the contract law of New York and Delaware, as distinguished from the contextualist tendencies ascribed to states like California (Eisenberg & Miller 2009). Also, business lawyers typically recreate a formalist regime by inserting boilerplate that negates all implied and oral terms outside the “four corners”

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92 For example, the UCC loosely defines a legally enforceable contract as “the bargain of the parties . . . as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.” UCC § 1-201(3).
of the contract.\footnote{Personal experience as a corporate lawyer. For a similar view, see Schwartz & Scott (2003).} Other evidence has shown that certain industry groups adopt dispute-resolution systems specifically to avoid the UCC’s contextualist approach and the associated risk of judicial preemption of agreed-upon terms (Bernstein 2000). But that formalist preference is not true of all markets. As documented throughout, entertainment attorneys make few if any efforts to recreate a formalist regime through contractual design. To my knowledge, neither the film industry nor the entertainment bar has taken action to evade or protest the contextualist proclivities of California courts (except to the extent that the state court system has been displaced by the industry-run arbitration system operated through the collective bargaining agreements between the actors’ and writers’ guilds and the studios). That contrasts with the vigorous protests by the New York legal community in response to the 1987 decision of \textit{Pennzoil v. Texaco}, in which a Texas court interpreted New York law to imply that a multi-billion-dollar acquisition agreement had been reached based on a letter of intent.\footnote{Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 795 (Tex. App. 1987).}

If Hollywood wished, it could largely abandon California contract law for the law of a more formalist jurisdiction. California courts tend to honor the choice of other states’ laws to govern employment contracts (except, in some cases, with respect to non-compete clauses)\footnote{For a statement of California’s tolerant position on this point, see \textit{Nedloyd Lines B.V. v. Superior Court} (3 Cal. 4th 459, 470 (1992)) (holding that a “valid choice of law clause . . . encompasses all causes of action arising from or related to the agreement”). For applications of this principle in the employment context, see Sarmiento v. BMG Entertainment (C.D. Cal. 2003) (upholding choice of New York law in contract between a California composer and music director); Hopkinson v. Lotus Development (N.D. Cal. June 21, 1995) (upholding choice of Massachusetts law in an employment contract); Flake v. Medline Industries (E.D. Cal. 1995) (June 22, 2011) (upholding choice of Illinois law to govern an employment contract). For the most recent pronouncement by the California Supreme Court on the nonenforceability of noncompete clauses, see \textit{Raymond Edwards II v. Arthur Andersen LLP} (Cal. 2008).} and have done so without comment in the entertainment setting.\footnote{See, e.g., \textit{Welles v. Turner Entertainment Company}, 488 F.3d 1178 (9th Cir. 2007).} Record labels sometimes take advantage of this opportunity and select New York law in order to evade California law’s restriction on personal service contracts to a maximum of seven years (Weinstein 1995). The fact that Hollywood has not done the same suggests that California’s soft version of contract law is efficient for the motion picture industry relative to all available alternatives.\footnote{There are two other nonexcludable possibilities: (i) California is not as anti-formalist in practice as is commonly believed (or New York law is not as formalist in practice as is commonly believed); or (ii)}
soft contracting instruments in certain cases. If soft contracting relies on a zone of ambiguity in which legal enforceability is not entirely clear, then soft contract law—meaning, adjudicative approaches that obfuscate the boundary between sufficiently and insufficiently formalized agreements—are a required precondition for those practices to emerge and persist.\footnote{Geis (2006) makes a related argument with respect to parties’ use of strategic ambiguity in the drafting of contracts, which he attributes to parties’ rational gamble on judicial interpretation of the relevant terms ex post given the inability to reach agreement on the meaning of those terms ex ante. That strategy depends on courts’ willingness to uphold and fill in gaps in contracts that suffer from indefiniteness (rather than deeming them to be presumptively invalid).} Increases in required levels of contractual formality would constrain or eliminate that zone of ambiguity and compel parties to operate under either certainly enforceable agreements (above the formalization threshold) or certainly unenforceable agreements (below the threshold). The result may be an efficiency loss: no transaction can be entered into at all or can only be entered into at a higher cost. That may explain why, in response to the Delaware Chancery Court’s decision mentioned above, private equity funds successfully lobbied the Delaware legislature to reverse the court’s ruling by providing that the statute of frauds does not apply to those agreements (77 Del. Laws ch. 287 [June 10, 2010]).\footnote{See Milbank, Tweed, Hadley & McCloy LLP (2008).}

To illustrate this argument, let’s run a brief thought experiment. Suppose California increased its formalization threshold: for example, courts would be prohibited from enforcing any agreement absent execution of a notarized agreement initialed by both parties with representation by a licensed attorney. That type of requirement eliminates all ambiguity over the availability of legal recourse in the event of breach but, for the same reason, may distort parties’ efficient choice of contracting form or even frustrate certain transactions altogether. Ambiguous enforceability enables parties to operate in a “low-F” contracting zone that supplies some protection against both counterparty opportunism (which demands some threat of legal liability) and project risk (which demands some constraint on legal liability). Upward adjustments in the formality threshold would eliminate or curtail that ambiguous zone by clarifying that even low-F contracts imply zero legal risk. That would compel parties to elect among three transactional alternatives: (i) untailored “high-F” contracts that provide strong protection against hold-up risk but

Hollywood has adapted to a second-best legal infrastructure and switching costs preclude operating under the law of alternative contract-law regimes.
no protection against project risk, (ii) tailored “high-F” contracts that provide a mix of protection against hold-up risk and project risk but require a substantial investment in specification costs, and (iii) contracts at all lower values of $F$ that provide strong protection against project risk but, given the absence of legal enforceability, no protection against hold-up risk. Given that parties are already electing to operate in a zone of ambiguous legal enforceability—that is, the partially formalized documentation of an “unsigned deal”—and could substitute toward high-$F$ or zero-$F$ instruments if so desired, eliminating that zone by raising the formality threshold for contract enforceability to only encompass high-$F$ contracts necessarily compels parties to adopt less efficient transactional forms. In the extreme case, transactions will be entirely blocked: tailored high-$F$ contracts are too costly to negotiate, untailored high-$F$ contracts save on negotiation costs but impose excessive project risk, and zero-$F$ contracts save on negotiation costs but, given the lack of enforceability, impose excessive holdup risk.

**Conclusion**

Hollywood contracting provides the most salient illustration of a typical mode of ambiguous commitment situated between the alternatives of reputation and contract. The persistent use of soft contracting in Hollywood and elsewhere suggests that it promotes an efficient purpose. In certain transactional settings, ambiguous contracts implement an efficient allocation of holdup risk and project risk in an environment where any alternative governance structure, ranging from formal contract to reputation to vertical integration, cannot achieve a superior expected outcome net of transaction costs. Hollywood dealmakers are neither reckless nor imprudent. Rather, their transactional choices reflect an assessment of the marginal net value of increased specification effort in an environment in which formal contract has limited but positive efficacy, reputation effects are powerful but unreliable, and integration is no longer economically feasible. The result is the soft contract: a hybrid instrument that lies between the formal world of single-shot contractors protected by law and informal communities of repeat players constrained by reputation.
### Appendix A: Reported contract formation disputes involving talent and studio or other production entity (through year-end 2012)

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Parties (T/S)</th>
<th>Film (Actual or Proposed)</th>
<th>Type of Agmt</th>
<th>Party in Alleged Breach</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1923</td>
<td>A. Jolson/D.W. Griffith</td>
<td>His Darker Self</td>
<td>O</td>
<td>T</td>
<td>Enforced</td>
</tr>
<tr>
<td>1924</td>
<td>D. Collins/Bennett et al.</td>
<td>Queen of the Flat Top</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1947</td>
<td>Johnston/20th C. Fox</td>
<td>The Clock Struck Twelve</td>
<td>O</td>
<td>S</td>
<td>Enforced</td>
</tr>
<tr>
<td>1948</td>
<td>De Toth/Columbia Pictures</td>
<td>N/a (long-term contract)</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1949</td>
<td>Mason/Rose</td>
<td>N/a (series of movies)</td>
<td>W</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1950</td>
<td>N. Algren/Roberts Prods. Inc.</td>
<td>The Man with the Golden Arm</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1952</td>
<td>Werker/M. Briskin, Morjay Prods. et al.</td>
<td>Cry Tough</td>
<td>O/W</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1955</td>
<td>Unidentified actress/RKO</td>
<td>Not specified</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1955</td>
<td>Skiba/RKO</td>
<td>Appointment in Samarra</td>
<td>O</td>
<td>S</td>
<td>Enforced</td>
</tr>
<tr>
<td>1955</td>
<td>H. Lloyd/California Pictures Corp.</td>
<td>Mad Wednesday</td>
<td>O</td>
<td>S</td>
<td>Remanded</td>
</tr>
<tr>
<td>1956</td>
<td>B. Donlevy/Carthy Prods.</td>
<td>King of Hearts</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1956</td>
<td>S. Hayden/Warner Bros.</td>
<td>Tension at Table Rock</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1957</td>
<td>C. Heston/Warner Bros.</td>
<td>Darby’s Rangers</td>
<td>Unknwn</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>1958</td>
<td>K. Briggs/MGM et al.</td>
<td>High School Confidential</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1958</td>
<td>Holden/Paramount</td>
<td>The Horse Soldiers</td>
<td>O</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1959</td>
<td>K. Frings/United Artists et al.</td>
<td>Two for the Seesaw</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1959</td>
<td>Carter/Milestone</td>
<td>Operation Mad Ball</td>
<td>W</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1960</td>
<td>R. Parrish/Omat Prods.</td>
<td>Brotherhood of Evil</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1961</td>
<td>J. Landis/J. Gentile</td>
<td>Tragedy in a Small Town</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1963</td>
<td>B. Breen/S. Goldwyn</td>
<td>Porky &amp; Bess</td>
<td>O</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1963</td>
<td>C. Oedt/MGM</td>
<td>The Actor</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1964</td>
<td>A. Quinn/United Artists</td>
<td>The Magnificent Seven</td>
<td>O</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1964</td>
<td>Boyd/T. Mann, Benton Film Prods.</td>
<td>The Unknown Battle</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1965</td>
<td>D. Murphy/G. Conway et al.</td>
<td>This Hero Breed</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

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100 All disputes identified through the Lexis-Nexis and Westlaw databases, the *Variety* digital archives and the trade press. All disputes involve filing of lawsuit except in two cases as indicated. Any dispute for which the outcome is indicated as “enforced” or “not enforced” indicates that a court or jury reached a final determination, in which case the dispute is also referenced in App. B. Sources for all other items can be found under “References—General and Trade Press Sources”. The search was restricted to contract formation disputes involving talent (writer, director or actor) and a studio (including any type of production company or individual producer). I excluded: (i) talent/studio disputes involving claimed contracts relating to a particular term of an agreement but without raising any doubt as to talent’s or studio’s commitment to perform; and (ii) “idea submission” disputes involving allegations by a writer or producer that a studio or other production entity misappropriated an “idea” pitched to the studio or production entity. For brevity, not all parties’ names are always listed.

101 Joint venture to form production company.

102 WGA arbitration.
<table>
<thead>
<tr>
<th>Year</th>
<th>Parties (T/S)</th>
<th>Film (Actual or Proposed)</th>
<th>Type of Agmt</th>
<th>Party in Alleged Breach</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>F. Dunaway/O. Preminger</td>
<td>Hurry Sundown</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>1968</td>
<td>P. Lawford/Embassy Pictures and Paramount</td>
<td>Something Beginning with M</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1968</td>
<td>E. Taylor, R. Burton/J. Blaustein</td>
<td>Taming of the Shrew</td>
<td>O</td>
<td>T</td>
<td>Dismissed</td>
</tr>
<tr>
<td>1969</td>
<td>E. Silverstein/Warner Bros.</td>
<td>Nobody Loves a Drunken Indian</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1971</td>
<td>M. von Sydow, L. Ullman/MGM</td>
<td>Man’s Fate</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1972</td>
<td>J. Palance/S. Peckinpah et al.</td>
<td>The Getaway</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1973</td>
<td>N. Montex/20th Century Fox</td>
<td>Che</td>
<td>O</td>
<td>S</td>
<td>Dismissed</td>
</tr>
<tr>
<td>1976</td>
<td>F. Dolan/Columbia</td>
<td>Ann Carver’s Profession</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1984</td>
<td>M. Steenburg/MGM</td>
<td>Roadshow</td>
<td>O</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>1986</td>
<td>F. De Felitta/Polygram</td>
<td>Sea Trial</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1987</td>
<td>R. Dangerfield/Warner Bros.</td>
<td>Caddyshack II</td>
<td>O</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>1988</td>
<td>B. Lancaster/Columbia</td>
<td>The Old Gringo</td>
<td>O; W</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1989</td>
<td>A. Pacino/E. Kastner, Cinema Corp.</td>
<td>Carlito’s Way</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1989</td>
<td>B. De Palma, O. Litto/orion Pictures</td>
<td>Dressed to Kill</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1989</td>
<td>Pickney/Valente-Kritzer</td>
<td>Callenetics</td>
<td>O</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1991</td>
<td>E. Lloyd/orion Pictures</td>
<td>Mermaids</td>
<td>O</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>1991</td>
<td>Garcia Marquez/Roth</td>
<td>Love in the Time of Cholera</td>
<td>W</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1992</td>
<td>J. Mattson/De Laurentis Productions</td>
<td>Milk Money</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1992</td>
<td>H. King/Inpiration Pictures</td>
<td>Romola</td>
<td>O</td>
<td>S</td>
<td>Settled[103]</td>
</tr>
<tr>
<td>1992</td>
<td>R. Mulcahy/Davis-Panzer Prods.</td>
<td>Highlander III</td>
<td>O</td>
<td>T</td>
<td>Unknown</td>
</tr>
<tr>
<td>1993</td>
<td>Konigsberg/Rice</td>
<td>The Mummy</td>
<td>O</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1993</td>
<td>K. Basinger/Main Line</td>
<td>boxing Helena</td>
<td>O</td>
<td>T</td>
<td>Enforced</td>
</tr>
<tr>
<td>1993</td>
<td>A. Bening/Samuel Goldwyn Co.</td>
<td>The Playboys</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>1993</td>
<td>J. Milius/Price Entertainment</td>
<td>Texas Rangers</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1993</td>
<td>W. Goldberg/T Rex Prod. Co.</td>
<td>T. Rex</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>1995</td>
<td>P. Anderson/Private Movie Co.</td>
<td>Hello, She Lied</td>
<td>O</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>1997</td>
<td>J. Travolta/Mandalay Entertainment</td>
<td>The Double</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>1997</td>
<td>J. Foster/Polygram</td>
<td>The Game</td>
<td>O</td>
<td>S</td>
<td>Unknown</td>
</tr>
<tr>
<td>1997</td>
<td>F. Dunaway/L. Persky</td>
<td>Master Class</td>
<td>O</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>1998</td>
<td>M. Myers/Universal</td>
<td>Dieter</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>1998</td>
<td>F. F. Coppola/Warner Bros.</td>
<td>Pinocchio</td>
<td>O; W</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2000</td>
<td>Rappaport/Buske</td>
<td>Fabulously Fit and Famous</td>
<td>O</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2000</td>
<td>S. Stone/unnamed production co.</td>
<td>Basic Instinct 2</td>
<td>O</td>
<td>S</td>
<td>Suit withdrawn</td>
</tr>
<tr>
<td>2002</td>
<td>T. Kaye/Flashwork Prods.</td>
<td>Victim of Deceit</td>
<td>O</td>
<td>T</td>
<td>Dismissed</td>
</tr>
<tr>
<td>2002</td>
<td>Lombardo/Mauriello</td>
<td>Mother and Child</td>
<td>W</td>
<td>S</td>
<td>Enforced</td>
</tr>
<tr>
<td>2003</td>
<td>Rai/Unidentified studio</td>
<td>The Rising</td>
<td>O</td>
<td>T</td>
<td>Settled[104]</td>
</tr>
<tr>
<td>2003</td>
<td>D. Lane/Intermedia Films</td>
<td>Me Again</td>
<td>W</td>
<td>S</td>
<td>Settled</td>
</tr>
<tr>
<td>2007</td>
<td>B. Pitt/Universal</td>
<td>State of Play</td>
<td>O</td>
<td>S</td>
<td>Settled[105]</td>
</tr>
</tbody>
</table>

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103 Settlement is assumed based on information that plaintiff-director (who claimed breach by studio) directed the film. See www.imdb.com/title/tt0015289/
104 No lawsuit filed; hence, I assume a settlement.
105 No lawsuit filed. Parties resolved dispute once acceptable replacement for Pitt was found (Baz 2009).
<table>
<thead>
<tr>
<th>Year</th>
<th>Parties (T/S)</th>
<th>Film (Actual or Proposed)</th>
<th>Type of Agmt</th>
<th>Party in Alleged Breach</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>J. Goodman/Constantin Films</td>
<td>Pope Joan</td>
<td>O</td>
<td>T</td>
<td>Settled</td>
</tr>
<tr>
<td>2008</td>
<td>Hansen/Geisler</td>
<td>Desperadoes</td>
<td>W</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2009</td>
<td>Shade/Gorman</td>
<td>American Heroes</td>
<td>W</td>
<td>S</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2010</td>
<td>Fiat Risus (R. Williams)/Gold Circle Films</td>
<td>Cop Out (formerly titled A Couple of Dicks)</td>
<td>W</td>
<td>T</td>
<td>Not enforced</td>
</tr>
<tr>
<td>2012</td>
<td>Fraser/Moyer et al.</td>
<td>Not specified</td>
<td>W</td>
<td>S</td>
<td>Pending</td>
</tr>
</tbody>
</table>
Appendix B: Published or other reported judicial decisions involving contract formation disputes in film and television projects

Legend:

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

<table>
<thead>
<tr>
<th>Case (Year)</th>
<th>Type of Agmnt</th>
<th>Parties; Transaction</th>
<th>Enforced?</th>
<th>Grounds</th>
<th>Governing Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Columbia Pictures Corp. v. de Toth, 87 Cal.App.2d 620, 624 (Cal. Ct. App. 1948)</td>
<td>O</td>
<td>Studio/director</td>
<td>Y</td>
<td>Def.</td>
<td>CA</td>
</tr>
<tr>
<td>Mason v. Rose, 176 F.2d 486 (2nd Cir. 1949)</td>
<td>W</td>
<td>Actor/studio (joint venture to form movie production company)</td>
<td>N</td>
<td>Indef.</td>
<td>England/CA</td>
</tr>
</tbody>
</table>

106 Databases (Lexis-Nexis): “All Federal, New York, and California (from start of databases coverage through June 30, 2011); “All Federal and State except for New York and California (January 1, 1980-June 30, 2011)”. Note that these databases generally do not cover state trial courts, which usually issue unpublished or otherwise unreported opinions. Search terms identified fully litigated cases that (i) primarily involved a film or television production and (ii) addressed the enforceability of an oral or written agreement (excluding cases that addressed only the enforceability of a particular term in an otherwise enforceable oral or written agreement and cases that involved “idea submission” scenarios). Some unpublished but fully litigated cases were added that were identified through supplemental searches in Westlaw or other sources.

107 Governing law refers to state law as selected in a claimed written contract, state law as designated by the court in the case of a claimed oral contract or claimed written contract that does not specify governing law; and federal law in the case of a claimed violation of Section 204(a) of the Copyright Act.

108 The court declined to rule on the existence of a binding contract (which was remanded to the lower court), but also declined to issue an injunction against the actor working for another employer during the contract term due to the absence of a written agreement. I therefore treat this outcome as the functional equivalent of the court having declined to enforce the claimed contract.
<table>
<thead>
<tr>
<th>Case (Year)</th>
<th>Type of Agmnt</th>
<th>Parties; Transaction</th>
<th>Enforced?</th>
<th>Grounds</th>
<th>Governing Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Breen v. Samuel Goldwyn Co.</em> (1963) (Times Daily 1963)</td>
<td>O</td>
<td>Director/producer</td>
<td>N</td>
<td>Not stated</td>
<td>CA</td>
</tr>
<tr>
<td><em>Anthony Quinn v. United Artists et al.</em> (Santa Monica Superior Court, 1964) (Daily Variety 1964)</td>
<td>O</td>
<td>Actor; studio</td>
<td>N</td>
<td>Indef.</td>
<td>CA</td>
</tr>
<tr>
<td><em>Winston v. Mediafare Entertainment Corp.</em>, 777 F.2d 78 (2nd Cir. 1985)</td>
<td>W; O</td>
<td>Agent/producer (finder’s fee for sale of movie rights)</td>
<td>N</td>
<td>No intent to be bound.</td>
<td>NY</td>
</tr>
<tr>
<td><em>Valente-Kritzer Video v. Pinckney</em>, 881 F.2d 772 (9th Cir. 1989)</td>
<td>O</td>
<td>Producer/writer (right to sell movie rights to studio)</td>
<td>N</td>
<td>Statute of frauds</td>
<td>Fed.; CA</td>
</tr>
<tr>
<td><em>Effects Ass’n, Inc. v. Cohen</em>, 908 F.2d 555 (9th Cir. 1990)</td>
<td>O</td>
<td>Video effects firm/producer</td>
<td>Y</td>
<td>Implied nonexclusive license</td>
<td>Fed.</td>
</tr>
<tr>
<td><em>Roth v. Garcia Marquez</em>, 942 F.2d 617 (9th Cir. Cal. 1991)</td>
<td>W</td>
<td>Producer/writer (sale of option to develop film)</td>
<td>N</td>
<td>Indef; agreement to agree</td>
<td>CA</td>
</tr>
<tr>
<td>Case (Year)</td>
<td>Type of Agmnt</td>
<td>Parties</td>
<td>Enforced?</td>
<td>Grounds</td>
<td>Governing Law</td>
</tr>
<tr>
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</tr>
<tr>
<td>In re My Left Hook, LLC; Lemon v. Lapin, 403 F.3d 1041 (9th Cir. 2005)</td>
<td>W</td>
<td>Production company/financiers</td>
<td>N</td>
<td>Indef.</td>
<td>CA</td>
</tr>
<tr>
<td>Network Enters. v. APBA Offshore Prods., 427 F. Supp. 2d 463 (S.D.N.Y. 2005)</td>
<td>O; W</td>
<td>Cable network/producer (broadcast of sports event)</td>
<td>Y</td>
<td>Intent to be bound</td>
<td>NY</td>
</tr>
<tr>
<td>Case (Year)</td>
<td>Type of Agmnt</td>
<td>Parties; Transaction</td>
<td>Enforced?</td>
<td>Grounds</td>
<td>Governing Law</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
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<td>------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Fiat Risus v. Gold Circle Films, L.A. Superior Ct. (Feb. 5, 2010)</td>
<td>W</td>
<td>Actor (Robin Williams); production company</td>
<td>N</td>
<td>Indef.</td>
<td>CA</td>
</tr>
</tbody>
</table>
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November 10. Available at http://www.milbank.com/images/content/7/9/794/111008_Olson_v_Halvorsen.pdf


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*Daily Variety.* 1924. Dana Collins in Court Over Lost Picture Role. November 5.


*Daily Variety.* 1946. 20th Loses $20,000 Suit on Oral “Flat Tops” Deal.


Draft February 7, 2013


**Interviews**

Interview with former general counsel at major studio, Los Angeles, February 8, 2011 (“Studio Counsel Interview I”)

Interview with in-house counsel at major studio, Los Angeles, various dates in February-December 2011 (“Studio Counsel Interview II”)

Interview with in-house counsel at major studio, Los Angeles, August 29, 2011 (“Studio Counsel Interview III”)

Interview with general counsel at “mini major” independent studio, Los Angeles, various dates in February-December, 2011 (“Mini-Major Counsel Interview”)

Interview with business affairs executive at a major studio, Los Angeles, August 10, 2012 (“Studio Executive Interview”)

Interview with senior attorney with entertainment practice, Los Angeles, May 31, 2011; e-mail communication, Sept. 9, 2012 (“Entertainment Attorney Interview I”)

Interview with law firm partner with entertainment practice, Los Angeles, June 2, 2011 (“Entertainment Attorney Interview II”)

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Interview with law firm partner with entertainment practice, Los Angeles, November 23, 2011 (“Entertainment Attorney Interview III”)

Interview with law firm partner with entertainment practice, Los Angeles, July 19, 2012 (“Entertainment Attorney Interview IV”)

Draft February 7, 2013