8 DOING THE DEAL
TALENT CONTRACTS IN HOLLYWOOD

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Since its inception, the Hollywood entertainment industry has employed contracts to regulate a variety of industry practices that engage with and, in some instances, have helped to shape US law. Put most simply, a contract is a legal agreement, either expressed or implied, between two or more parties. In the USA it is governed by contract law, which varies in each state though much legislation is shared. These laws are part of the US common law system that draws on the body of case law produced by judicial court decisions, and this establishes legal precedents in making future rulings. Hollywood contracts have included minimum guarantees with distributors, block-booking agreements with exhibitors, optioning of scripts, standardised union and guild contracts for workers and individually negotiated contracts for major talent. Contracts and the agreements made by and through agents, managers and lawyers reveal detailed information about the industrialisation of creative processes in Hollywood, highlight the balance of power in negotiating deals between parties and present us with important material through which to analyse the historical development of the Hollywood industry.

Commonplace reports about industry deal-making, as regularly announced in industry trade papers *Variety* and *Hollywood Reporter*, reveal how Hollywood depends on such legal frameworks and how the accumulation of past case law has informed and established contemporary industry practices and norms. Nowhere is this more evident than in the development and evolution of Hollywood contracts and the laws that regulate and enforce them. Contracts exist in every aspect of Hollywood production, distribution and exhibition, from the hiring of below-the-line production labour to the deals that govern the division of revenues between cinema and distributor. This chapter will focus on the industry contract that has attracted the most visibility: the high-profile above-the-line talent contract. Most below-the-line contracts are offered on standardised terms, usually negotiated as set contracts through recognised craft guilds and unions. Even above-the-line talent can draw on such standard contracts – for instance, the minimums ('scale') specified by the Directors Guild of America (DGA), the Screen Actors Guild (SAG) and the Writers Guild of America (WGA) (see Chapter 9).[1] However, above-the-line contracts involving high-profile 'talent', actors, directors, producers and writers, which are commonplace in many Hollywood features, are individually negotiated and have, over time, evolved into large, complex legal agreements, negotiated by agents and lawyers who represent their clients' interests.

Although some scholars have studied film industry contracts, there has been relatively little research on how such contracts, and the processes through which they have been negotiated and contested, enact forms of agency.[2] Contracts formalise promises, helping to codify, hierarchise and publicise the market value for talent, establishing their place in the industry through

salary compensation and recognition of status via possessory credits, expense accounts and so on. In short, they provide the necessary legal frameworks to allow Hollywood's industrial processes to function. For example, the agreement to use an 'A-list' actor to perform and promote a particular film requires the licensing of rights (i.e., the use of that actor's services, specified assignment of their image rights) that are negotiated by the actor's agent and lawyer with the studio or production company (which has its own legal representation). Such contracts also spell out in great detail the precise terms of their employment duration and compensation. More recently, 'pay or play' contracts have included the requirement for payment whether or not the film is produced. The contracting of the services of high-profile freelance talent has, since the 1930s, often been via a loan-out agreement with their personal service corporation, done for tax efficiency (see Chapter 7 for more on the practice of loan-out companies). In addition, such an agreement specifies various add-ons (such as travel expenses), possessory screen credits, promotional duties and, crucially, extensive annexes with definitions of the key contractual terms (such as 'net profits', 'break-even' and so on).

Our aim in this chapter is to suggest that the analysis of contracts – and their historical evolution – can offer scholars important historical evidence about the functioning of Hollywood's organisational and industrial processes. First, we trace the evolution of the long-term 'option contract' for talent in the vertically integrated Hollywood studio system. As 'personal service contracts', these exclusive agreements were originally part of the California Civil Code Section 1980 – later transferred to the Labor Code Section 2855 as part of the Industrial Labor Relations Act of 1937 – and were widely used by the studios until they were abandoned in the 1950s in favour of individually negotiated freelance deals.[3] However, even during the zenith of the old studio system, motion picture actors began to contest the legality of these binding option contracts – most famously the Warner Bros. stars James Cagney and Bette Davis – especially after the establishment of their box-office power. The most prominent legal challenge came in 1944, when the actress Olivia de Havilland sued Warner Bros. over their attempt to extend her contract by adding on her cumulative suspension time when she had refused film assignments, even though her seven-year contract had expired. The 'De Havilland Law' (as it is referred to in legal parlance, although the actress's name was misspelled by the Court and henceforth the case was published as '*De Haviland*') remains the seminal case that interpreted Section 2855. Moreover, the case reveals how California public policy laws shaped the framework of the talent contract in the studio era.[4]

Second, this chapter will analyse the development of complex and intricate contracts developed through the 1950s to present-day Hollywood, including 'gross' and 'net' profit and 'break-even' definitions, extensive possessory credit demands and – in comparison to union and guild minimum contracts – inflated up-front salaries as well as deferred compensation. The *Buchwald v. Paramount* lawsuit of 1990–2 offers a ground-breaking legal case as it demonstrates not only the complexity of recent Hollywood contracts, but also how the creative accounting routinely adopted in Hollywood since the 1970s developed as a studio response to the increased profit participation demands from freelancing stars, leading to a shift by major A-list talent towards gross rather than net profit participation contracts. We conclude the chapter by assessing the current applications of the *De Haviland* and *Buchwald* decisions in recent contract negotiations and legal disputes in Hollywood.[5]

The Talent Contract in Studio-era Hollywood

From the early days of cinema, the studio contract was a pliable document. The standard studio contract could span anywhere from two to seven years, and for many artists in Hollywood, ranging from character actors to top stars, directors and writers, these contracts guaranteed steady employment and ensured regular film production schedules. As Tom Kemper puts it, a studio contract represented 'an achievement all of its own ... as an object of desire and value for artists' in the studio era.[6] During the 1920s, the typical Hollywood studio contract for actors was limited to a five-year term – until August of 1931, when the California State Senate officially approved Section 1980 statute of the Civil Code that extended personal service contracts to seven years, which enabled film studios and producers to hold exclusive, long-term agreements with talent.[7] The law reads as follows: 'A contract to render personal service … may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service.'[8] The only clue that this law pertained to the film industry was in its definition of personal service: 'to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value'.[9] This language is reminiscent of the terminology used in the studio talent contracts that define the performance of an actor as a commodity.[10] Thus, motion picture actors' labour was legally recognised as a 'master/servant continuous employment agreement' to a specific studio, producer, or corporate entity, bound by contract.[11]

Not surprisingly then, the new seven-year option contract perplexed Hollywood's acting community, and these sentiments were voiced in the industry trades – for example, in 'Objections to the 7-Yr. Contract', in *Variety* in 1931:

> New California law allowing seven-year contracts is not looked on favorably by talent, who see it only as an advantage to the producer. It gives the film company a chance to shake the player at option time, but binds the artist for full length of time, according to the players' side. Present five-year contracts are called only that in name because of the semi-yearly options to be taken at the producer's preference. Adding two years to these would only lengthen the agony, these contractees contend.[12]

Here *Variety* illuminated the clashes over the contract between producers and actors at play in the early 1930s, as both the existing and new law favoured the producer over the actor to exercise renewal options. By this time, Hollywood had weathered financial challenges from the conversion to sound film and the economic hardships inflicted by the Depression, and the major studios used the climate of fiscal uncertainty to subvert the empowered and financially lucrative contracts that popular, money-making stars had enjoyed in the 1920s as they reorganised their business practices to be a vertically integrated, big business oligopoly in the 1930s.

Indeed, the studio long-term option contract was an ingenious legal document that reserved the studio's exclusive right to 'option' the services of talent every six months for up to seven years that usually included an increase in salary raise at each renewal. It especially enabled the studios to develop and promote a stable of stars who epitomised the company's signature style as a visual trademark, like Joan Crawford and Clark Gable of MGM, for

example. The 'option' worked in the following ways, as Tino Balio explains: 'Every six months the studio reviewed an actor's progress and decided whether or not to pick up the option. If the studio dropped the option, the actor was out of work; if the studio picked up the option, the actor continued on the payroll for another six months.'[13] Thus, talent did not always have the corresponding authority to opt out of their contracts if they so wished. If there was a dispute about roles or salary, these long-term option contracts enabled the studios to suspend talent without pay if they refused film assignments, disputed the terms of their contracts, or desired to become freelance artists. As Jane Gaines writes,

> Suspension effectively stopped the seven-year contract clock, thus adding more time to the actor's required employment for every day he or she was laid off. Actors who wanted to be free to work for other studios on scripts of their own choice felt trapped by the compulsory extension of their contracts.[14]

Understood in this context, movie stardom appeared to be what Balio characterises as a 'dazzling illusion to the degradations of servitude' during the 1930s.[15] What emerged, then, was a paradox between the stars' 'glamorous' images and their material labour as contractually obligated workers in the film industry; although they were extremely well-compensated employees, stars still had to conform to the decrees of studio bosses and the hierarchies of their oligopolistic business practices.

The key legal disputes over the studio long-term option contracts in the 1930s resulted from its suspension policies, mainly at Warner Bros., with actors James Cagney, Bette Davis and Olivia de Havilland being the demonstrative examples. All attempted to get out of their long-term contract agreements with the studio, but for different rationales and legal justifications. Each lawsuit pertained to California Civil Code Section 1980/Labor Code Section 2855, but only de Havilland's resulted in the setting of a new legal precedent. Cagney brought a lawsuit against Warner Bros. in 1936 to cancel his contract due to the studio's failure to deliver on verbal promises that he appear in no more than four films a year. The actor's original legal argument had been that Warner Bros. over-exposed his image by requiring him to appear in more than four pictures. Ultimately, though, it was a violation of the actor's billing clause in his contract that persuaded Judge Charles L. Bogue to rule in Cagney's favour in Los Angeles Superior Court on 3 March 1936 and nullify his contract, effectively declaring him a free agent.[16] While Warner Bros. appealed the decision to the California Supreme Court, no other major studio risked employing Cagney, in case the court reversed the decision. During this period, the actor made only two films for the independent production company Grand National (both of which lost money and were a great personal financial loss to the actor, since he also produced the films). This adverse experience led to Cagney's return to Warner Bros. prior to the California Supreme Court verdict.[17] Nevertheless, his experience attests to how Hollywood actors used the legal system to attain increased leverage over their celebrity and, in this instance, it indirectly led to a better contract and working terms at Warner Bros. When he returned to the studio in 1938, his new contract specified eleven films in four years, with story approval and star billing, as well as the right to make his own radio appearances and personal endorsements of commercial products.[18]

A similar situation occurred in 1936 with Bette Davis, Warner Bros.' most prominent female star, over her film assignments, which she felt were unjustifiable given her recent Best Actress Oscar for *Dangerous* (1935). She rejected Warner Bros.' new contract offer with only a 'vague promise of better roles', after which the studio placed her on suspension.[19] Davis ultimately fled to England to make a film with Toeplitz Productions. Warner Bros. sued her, citing their suspension policy in their contract with the actress, and the studio won the case in the English courts in October 1936. Davis acquiesced to Warner Bros. and returned to Los Angeles to sign a new contract, but it was still bereft of any star billing or story selection guarantees.[20] Nonetheless, Davis's experience echoes Cagney's in that her recalcitrance with the studio paid off – Jack Warner did give Davis better roles in 'A' pictures, one of which, *Jezebel*, was purchased specifically for her and resulted in a second Best Actress Oscar for her in 1938.

Cagney and Davis, along with other Warner Bros. stars, battled the studio through litigation in order to gain some degree of control over their careers rather than simply to defeat the studio or invalidate their long-term contracts.[21] But, as Kemper notes, these legal battles 'also betray poor management, a dimension that is generally elided in most histories on classical Hollywood' and that 'Cagney and Davis were stuck with bad contracts' from an 'equally bad strategy and bad countermoves' by their agents.[22] Indeed, a long-term contract could be empowering to talent and work to their advantage in studio-era Hollywood, especially with the help of a good agent. Savvy talent agents like Myron Selznick, Charles Feldman, Leland Hayward and others were instrumental in bargaining for and the writing of contracts for their star clients in studio negotiations.[23] As their market value grew, it was customary practice for talent to renegotiate long-term contracts with elements of creative control, including director, cast, crew and/or story approvals, as well as protection from overwork, and innovative financial agreements such as percentage shares that awarded them a cut of their films' box-office profits. In some cases, stars went freelance, working independently at an array of studios on specific film projects of their choosing. For instance, Carole Lombard exited Paramount after a seven-year long-term option contract in 1937 to negotiate two impressive freelance deals with Paramount and Selznick International Pictures that not only made her Hollywood's highest-paid star of that year, but also bestowed to her several contractual provisions that included her choice of director, cinematographer, co-star, producer or screenwriter, story discretion, designer of choice and/or make-up, hairstylist and even her publicist and a 'no loan-out' clause.[24] What's more, these agents regularly requested profit participation deals for their top clients. For example, in 1933 and 1934, negotiated by Selznick and Hayward, Katherine Hepburn signed a series of deals with the studio RKO that allocated her between 5 and 12.5 per cent of the gross receipts (depending on the total box-office takings), plus up-front salary. These contracts, while not widespread, were also not unusual for top talent. For example, Feldman arranged for a lucrative deal for client Irene Dunne in 1933 that gave her 15 per cent of her film's gross receipts once it had recouped twice the amount of the film's budget back in distribution; she collected a respectable salary from the third film that she made in this agreement, *Roberta* (1935), with her percentage earnings reaching a grand total of $157,948.50 by November 1941.[25] A 1934 deal between MGM and the Marx Brothers offered 15 per cent of the gross receipts for *A Day at the Races* (1937) and *A Night at the Opera* (1935). Claudette Colbert, loaned out by Paramount and represented by Feldman, received $65,000 plus 2 per cent of the gross receipts for the 1934 Universal film *Imitation of Life*.[26]

However, the widespread practice of freelancing can be also attributed to another case involving the film industry, that of *De Haviland v. Warner Bros.* in 1944, which resulted from the lawsuit Olivia de Havilland brought against Warner Bros., who tried to apply their suspension policy and prevent the actress from becoming a free agent after the expiration of her seven-year long-term contract. The verdict for de Havilland's case litigated Section 2855 of the CA Labor Code and, in doing so, set a landmark legal precedent for the US entertainment industry that legally recognised artists as free agents.[27]

The De Havilland Law

Although the de Havilland lawsuit is continually cited in American film and legal histories as an important achievement for screen actors' rights, the key details and events leading up to her case and how it pertained to the Section 2855 statute, as well as how the case impacted Hollywood talent contracts thereafter, merits more detailed scrutiny. The actress first entered into a long-term contract with Warner Bros. in 1935 after appearing in their film production of Shakespeare's *A Midsummer Night's Dream* (1935).[28] Her weekly salary began at $250, and rose each time the studio exercised the option in her contract, culminating in $2,500 in 1943. Yet her contract did not give the actress any creative discretion over her film roles, and she found herself typecast as the brunette ingénue at the studio, appearing often as Errol Flynn's love interest in films like *The Adventures of Robin Hood* (1938). De Havilland finally received a career-changing role when she convinced Jack Warner to loan her out for the plum role of Melanie Hamilton Wilkes in David O. Selznick's blockbuster *Gone with the Wind* (1939), for which she received an Academy Award nomination for Best Supporting Actress. De Havilland followed up this success with another Oscar-nominated performance, this time as Best Actress, for *Hold Back the Dawn* (1941), when she was loaned out to Paramount. Back at her home studio, the actress felt that she kept receiving lacklustre material, despite her proven talent and market value; as De Havilland herself recalled:

> I finally began to do interesting work like Melanie, but always on loan out to another studio ... So I realised that at Warner Bros. I was never going to have the work that I so much wanted to have. I knew that I had an audience, that people really were interested in my work, and they would go to see a film because I was in it, and I had a responsibility toward them, among other things. I couldn't bear to disappoint them by doing indifferent work on an indifferent film.[29]

The emboldened actress began declining assigned film roles and, by 1943, she had been suspended by Warner Bros. five times.[30] It is interesting to consider the studio perspective in their handling of de Havilland's career. Although Warner Bros. had a reputation for their careful management of top talent, Jack Warner found the actress's claims of unworthy roles 'ridiculous'. Warner elaborated his position in this studio memo from 1943, noting that de Havilland:

> made no complaint about the pictures that she did make, which were successful, so we certainly know what we were doing equally as much in the pictures we wanted her to do that she would not appear in ... If Miss de Havilland wants to compare all pictures with *Gone with the Wind* I will get David Selznick, Daniel O'Shea, and every other top producer to testify that such a comparison would be absurd.[31]

De Havilland playing second fiddle to Errol Flynn in *The Adventures of Robin Hood* (1938) (BFI)

From the point of view of Warner Bros., the actress had unrealistic expectations – not every Warner film in which de Havilland appeared could be of the quality and stature of her loan-out films.

Perhaps the financial success of her Warner Bros. films explains why de Havilland entered into negotiations with the studio to renew her agreement with the studio but this time on a non-exclusive basis. The actress asked for a three-picture deal at a salary of $75,000 per film, with the following rationale, as outlined by producer Steve Trilling:

> She originally preferred to be free at the end of her present contract, but realizes Warner Bros. have been very good for her and probably in some respects it would be best to be tied up with us. But she wants to reserve the right to do at least one outside picture each year, so that when a *Hold Back the Dawn* … role does come along she would be in a position to accept.[32]

Trilling concluded the memo by asking his boss whether he had any interest in pursuing this offer, which Jack Warner rejected, even though he had sanctioned similar deals with freelance talent at the studio.[33] Instead, he elected to extend de Havilland's long-term contract by adding up the cumulative sum of her suspension time to extend her original seven-year contract (approximately nine months).

In response, de Havilland's agents, Phil Berg and Bert Allenberg, had a plan of legal action. They advised the actress to seek a judgment declaring that her prior contract was unenforceable after seven years because it was a violation of the California Labor Code 2855. De Havilland proceeded with the lawsuit and, as expected, Warner Bros. countered that the actress had 'effectively waived the protection of section 2855 by her breaches of the contract', which were due to personal choice, and 'was thus stopped from disputing the validity of the contract extensions'.[34] The actress expected to lose in the Superior Court and planned on appealing for a win in the Appellate Court, but, to her surprise, the Superior Court ruled in her favour, thereby guaranteeing the rights of the employee over the corporation. Warner Bros. immediately appealed to the Appellate Court, which upheld the prior ruling and sided with the actress. Arbitrating Judge Charles S. Burnell ruled that:

> Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers. … [T]hereafter they may make a change if they deem it necessary. … As one grows more experienced and skilful there should be a reasonable opportunity to move upward and employ his abilities to the best advantage and for the highest obtainable compensation.[35]

The court's ruling underscored an artist's right to the highest salary possible contingent upon their market value, which in de Havilland's case equated to becoming a freelance artist. At the same time, this ruling did not eradicate the seven-year option contract norm; in fact, the court reaffirmed the legality of it in their interpretation of Section 2855 as a strong public policy that could not be extended beyond the calendar time of seven years because doing so would 'nullify any practical effect of the statute'.[36] Hence, the *De Haviland v. Warner Bros.* verdict upheld the right for Hollywood talent to be free agents and provided a legal path for freelancing in the film industry, but *only after* they had completed the full term of any prior contractual obligations to a maximum of seven years. This was the major legal obstacle that derailed the case brought against Warner Bros. by Bette Davis in 1936; she had signed an exclusive long-term option contract that prevented her ability to work elsewhere.

After the conclusion of her court battles, Olivia de Havilland received multiple freelance offers from other major studios, despite Jack Warner's attempt to bar other major studios and producers from hiring her.[37] The first of these was Paramount's *To Each His Own* (1946), which brought not only critical praise, but also de Havilland's first Best Actress Oscar. The De Havilland Law was part of several larger film industry shifts that occurred in postwar Hollywood that helped to furnish the free agency that largely remains in place for A-list screen talent today. Factors included: the slow-down of film production after the Paramount Decree, which forced the studios to divest themselves of their exhibition chains (for more on the legal impacts of this decision, see Chapter 4), as well as the emergent rival medium of television, which began to chip away at Hollywood's audience – both of which resulted in less predictable demand for product and a decline in film production. Moreover, it was no longer economically feasible to retain high-priced studio talent on long-term contracts with the downturn in production, as the studios needed to cut their overheads. Thus, it was both cheaper and lower risk for the studios to hire film talent on freelance contracts. Nonetheless, the De Havilland Law continues to be invoked in contractual legal disputes over Section 2855 in entertainment industries, such as the popular music business, as Jonathan Blaufarb has shown in an analysis of the lawsuit that singer Melissa Manchester brought against Arista Records in 1981.[38]

De Havilland as a freelance star in her Oscar-winning role as Jody Norris in *To Each His Own* (1946) (BFI)

Post-Studio System Deal-making and Evolution of the Gross and Net Participation Contract

Freelancing would increasingly become standard practice for A-list Hollywood talent, especially in the postwar years after the 1948 Paramount Decree verdict declared that the vertically integrated practices of the film industry were anti-competitive (see Chapter 4). Continuing the negotiating tactics established by Selznick, Feldman and Hayward, the agents Lew Wasserman, Ray Stark, Phil Gersh and Irving 'Swifty' Lazar were instrumental in innovating contracts for their clients and pushing for deferred compensation via complex profit-sharing deals. By 20 January 1953, industry changes in talent contracts were such that the front page of *The Hollywood Reporter* could announce: 'Long-term Deals on the Way Out'. The accompanying article detailed how only a handful of stars remained under contract with the studios, citing reasons such as poor box-office returns, studio down-sizing and a preference by studios for open market bidding for talent. By the end of the 1950s the majority of Hollywood talent were on non-exclusive freelance contracts, usually contracted on a film-by-film basis. The change is striking. In 1944 there were 804 actors under contract with the major studios, by 1961 it had declined to just 164 and it continued to fall throughout the 1960s.[39] As we have established, such structural changes in the industry only increased the importance of agents in the packaging of talent and the reliance on talent as guarantors of finance and underwriters of risk. The new freedom for the most powerful star talent allowed them to negotiate contractual terms in their favour, especially through the development of more complex participation contracts, where talent was paid a percentage of contractually defined box-office proceeds, often movable at various points, after contractually agreed deductions.

Perhaps the most famous net participation contract was MCA agent Lew Wasserman's deal with Universal for James Stewart's services on *Winchester '73* (1950) and *Harvey* (1950). Stewart was paid $200,000 for his work on *Harvey* but on *Winchester '73* he substituted his usual fixed compensation for 50 per cent of the film's net profits, payable only when receipts in excess of twice the negative costs (i.e., the production cost of the film) had been recouped and then calculated after various deductions had been made (distribution fees, expenses, studio overheads).[40] However, the most notable element of this deal was that Stewart effectively became a financial backer of the film, forgoing his up-front salary and instead taking on a significant risk in anticipation of a larger reward if the film was successful, thus reducing the overall risk to Universal. If the film failed, he would have received no salary, but box-office success promised a lucrative return. The film grossed approximately $2.25 million, paying Stewart a reported $600,000 (50 per cent of the net profits, calculated out of the distributor's share of box-office receipts after deductions).[41] However, it was not a template for the contemporary 'net profits' deals that followed, which, as a rule, do not forgo all up-front compensation, as this did, and are rarely on such generous terms. Although called a 'net profit' contract, as Mark Weinstein notes it was really an unusual 'adjusted gross' contract as Stewart was paid a large percentage of the gross-after-deductions by deferring all his salary.[42] However, the contract was striking in pointing out how a major established star such as Stewart was willing to underwrite the risk of a film through his deferment of salary, by instead accepting contingent compensation.

Concepts such as 'gross receipts' and 'net profits' were routinely defined in the annexes of postwar talent deals and, with the ending of long-term contracts, top talent saw themselves as partners rather than employees of the studios, aware of their power in raising finance and promoting the film. Again, it was talent agents who paved the way for the package-unit system in which they and managers became as fundamental to film production as financiers and producers. Wasserman was even prescient enough to recognise the importance of television and residuals for his clients, adding clauses negotiating future television rights, such as Alfred Hitchcock's lucrative franchise contract for the 1950s television series *Alfred Hitchcock Presents*.[43] Wasserman also acted as financial advisor to his clients, developing complex subcontracting and tax-sheltering companies that helped them avoid paying hefty personal income tax. The star independent production trend became more pronounced in the 1950s, with examples such as Kirk Douglas's Bryna Productions, Burt Lancaster and his agent Harold Hecht's Hecht–Lancaster, John Wayne's Wayne–Fellows Productions and The Filmmakers, founded by actress, turned director, producer and writer Ida Lupino, with her husband producer Collier Young and writer Malvin Wald.[44]

Wasserman also persuaded the SAG, via its president (and MCA client) Ronald Reagan, to grant MCA a secret ten-year waiver to both represent talent and make television productions, concealing a major conflict of interest. This gave MCA a substantial advantage over the studios as it could package talent and control contracts. In the 1950s MCA became the leading supplier of prime-time programming to television and was able to package talent and dictate the terms of their contracts to the television networks. This lasted until the 1960s, when MCA bought Universal Pictures and had to relinquish its talent agency. Established through his talent agency as a leading industry powerbroker, Wasserman was highly influential for many years at Universal, being instrumental in installing Jack Valenti at the MPAA and remaining a close friend of US President Ronald Reagan at the White House.[45]

During the 1960s and 70s, building on the negotiating success of Wasserman and others, talent and their agents began to demand both up-front fixed compensation and 'back-end' compensation in the form of profit participation. The weakened studios, and the rise of independent producers, meant that stars often took on producing roles and increasingly worked outside the major studios. Less powerful talent (often writers and producers) were more likely to be rewarded with net participation, which represents a percentage of profits after deductions of costs (including gross participation). Through the 1980s and 90s, higher gross percentage participation for A-list stars became more common, as did the packaging of talent by agencies such as the powerful Creative Artists Agency (CAA), under Michael Ovitz, a former William Morris agent who co-founded CAA in 1975. The clout of CAA during the 1980s and 90s was extraordinary, as they represented major Hollywood talent including actors Tom Cruise, Sylvester Stallone, Kevin Costner, Barbra Streisand and directors including Steven Spielberg and Barry Levinson. However, even for the exclusive A-list, very few of these contracts were true 'first dollar gross' contracts, but were subject to negotiated and agreed 'off the top' deductions of costs by the studio (thus being a form of adjusted gross contract, often expressed as 'gross after recoupment' contracts). Early $10 million plus adjusted gross compensation contracts were struck at the end of the 1980s by Sylvester

Stallone and Arnold Schwarzenegger. The increase in gross participation by the most bankable talent (including Eddie Murphy and Tom Cruise in the 1980s, and Demi Moore, Julia Roberts, Tom Hanks and Jim Carrey in the 1990s) had the effect of further diminishing the likelihood of net profits, and hence receiving any deferred payment through participation in the 'net' for less powerful players. This delineation of power was not limited to actors. Less glamorous, but at times even more well-remunerated, were producers of franchises such as Jon Peters and Peter Guber (from the *Batman* franchise) and top producer-directors such as George Lucas, Steven Spielberg and, in the 2000s, Peter Jackson.[46] The importance of negotiating gross participation in a successful franchise was infamously illustrated by the venerable actor Alec Guinness, who, in the 1970s, chose to defer some of his salary for the initial three *Star Wars* films and instead negotiated to receive 2 per cent of the gross participation that was due to producer, George Lucas. By doing so, he earned more than all his other roles combined: by 2009, a reported £56 million, or approximately $84 million.[47] For *Mission Impossible*, in 1996, Tom Cruise was widely reported as receiving a fixed payment of $20 million plus profit participation of 25 per cent of the gross receipts. According to Edward J. Epstein, for the 2003 film *Terminator 3: Rise of the Machines*, Arnold Schwarzenegger was paid $29.25 million up-front for his role, plus $1.5 million of perks (including use of a private jet) and, once a defined break-even point was reached, 20 per cent of the gross receipts from all worldwide sources including (very unusually) not only theatrical, but also video, DVD, television and licensing revenues.[48]

Such contracts are, of course, exceptional, and enabled the most powerful talent to become major financial investors in a film or franchise. Successful films that spawn franchises uniquely allow star talent to exploit the monopoly power they hold over their images and performances – they (and the studios) also recognise that successful franchises often spawn lower-risk sequels. The centrality of Schwarzenegger's image to the first two *Terminator* films was such that he could leverage this monopoly power in his remarkable deal for the third film. However, whether this reflects the true bankability of unique talent is less certain, as Arthur De Vany has noted.[49] The reboot of the *Terminator* franchise in 2009, *Terminator Salvation*, with Christian Bale taking the role of John Connor, grossed $371 million worldwide at the box office, a lesser though not dissimilar amount to *Terminator 3*'s $430 million (albeit significantly less after adjusting for inflation).[50] Other than a fleeting appearance in virtual form, Schwarzenegger is absent from the reboot. T*erminator Salvation*, while critically unsuccessful, performed decently at the box office without its previous lead, drawing instead on the box-office lure of Bale, a major star following his lead role in the reboot of the *Batman* film series. Both the *Terminator* and *Batman* franchises demonstrate that the monopoly nature of star power is rarely absolute, and that major star talent for certain films can often be replaced. Franchise reboots, such as the *Amazing Spider-Man* series (2012–), have deployed new talent to potentially successfully reduce the costs associated with above-the-line talent and profit participation, as well as renew a familiar narrative through the casting of new stars. It is also notable that the hierarchies of star talent established by contracts are also gendered, with fewer female stars in recent years negotiating such lucrative contracts – especially in terms of fixed compensation – as their A-list male counterparts, and far fewer women commanding star roles over the age of forty-five.[51]

A consequence of the rise in freelancing talent, and the ongoing evolution of contemporary talent contract forms, has been to gradually shift much of the core emphasis of the Hollywood studios towards the more lucrative and less risky activity of distribution. Deal structures favour the distributor over the producer or net profit participant, as studio distribution charges and overheads are deducted before participation for all but very top 'first dollar' talent. Indeed, gross participation by talent can have the effect of actually *increasing* studio profits, as the costs of gross participation are charged to the film, and the studios are able to add charges and overheads on this charge. With a distribution fee often as high as 30–40 per cent, depending on territory, plus an additional distribution charge, and the deduction of production costs and gross participation, the likelihood of net profits on most studio movies becomes increasingly small. Instead, film costs are inflated, especially by very top A-list talent who, as we have seen, can cost $10–25 million, plus 10–20 per cent 'off the top' gross profit participation, and by large distribution charges, fees and studio overheads that do not reflect actual costs of distribution.[52] As a way of controlling these costs, studios increasingly use a 'cash-break' contract where levels of percentage participation are only triggered when a film moves into positive 'cash-break-even' territory, reducing the potential risk attached to star compensation (similar to the James Stewart deal outlined earlier). Sometimes termed 'creative accounting' or even simply 'Hollywood accounting', this process offers a key explanation for many of the clauses in contemporary Hollywood contracts. Furthermore, the method of allocating video revenues into the participation pot, and, more recently, revenues from online distribution, have been further key points of negotiation by talent. Although rarely on as generous terms as the gross participation deals for theatrical revenues, significant 'back-end' royalties on these revenues can be negotiated by the most powerful talent. In addition, all actors and directors are paid residuals (required by the SAG/American Federation of Television and Radio Artists and the DGA) when a film is released on video or broadcast on television.

Contemporary Hollywood Contracts: Revisiting *Buchwald v. Paramount* (1990)

By the 1980s, as we have outlined, the freelance contracting of talent was well established and agencies such as CAA negotiated lucrative deals on behalf of their star clients. Yet, in January 1984, just thirty years after *The Hollywood Reporter* announced the end of long-term studio deals, the *Los Angeles Herald Examiner* proclaimed that 'Studio–Star Marriages Make a Comeback'.[53] The story went on to detail how three comedy stars – Richard Pryor, Eddie Murphy and Michael Keaton – had signed to long-term contracts with studios that included large up-front fees, plus gross participation: Columbia's multiple film deal with Pryor was reported as being worth $40 million over five years; Paramount offered Murphy, having starred in just two pictures (albeit the hugely successful *48 Hrs* [1982] and *Trading Places* [1983]) the sum of $15 million, plus approximately 15 per cent of the gross, for his next five films (later revised upwards to $8 million per picture); and 20th Century-Fox offered Keaton a deal guaranteeing he could make four from five films with the studio and also direct one.[54] By 26 August 1987 *Variety* reported that, following the success of *Beverley Hills Cop 2*, Murphy's contract with Paramount had again been renegotiated to offer him even greater payment – approximately $15 million per film – in a new open-ended five-picture deal extending into the 1990s.[55] In the article Murphy was quoted as saying:

> When you make a deal to … do like five pictures, and the (first) movie did so well, we went back and said, 'Hey, let's renegotiate' … 'This is a business where you renegotiate deals. Do I believe in living up to contracts? Yes. Do I believe in being underpaid for something I do? No.'[56]

In the same article, Paramount President Sidney Ganis proclaimed Murphy the 'bona fide number-one box-office star in all the world' based on the box-office grosses of his Paramount features – totalling more than $632 million domestically to that date, and almost equally lucrative overseas.[57] Following this contract, Murphy's next proposed film was called 'Quest', which was retitled – eventually becoming the hugely profitable 1988 Paramount comedy, *Coming to America.*

Coming to America reunited *Trading Places* director John Landis with Murphy, and went on to gross $288 million worldwide on its initial release.[58] However, it also gave rise to a landmark lawsuit that opened up Hollywood contracts and questioned the routine accounting processes upon which these contracts are based. As we will outline, the high-profile lawsuit *Buchwald v. Paramount* was revealing as it caused major ripples through Hollywood, as Paramount had to disclose both how deals were struck (in particular, nuances of the net profits contract) and to justify how such a film could have made no net profit despite being one of the top box-office hits of the year.

In considering this lawsuit, the details of what underpinned the case need to be briefly outlined.[59] In early 1982, Art Buchwald, a famous American writer and humourist, wrote an eight-page screen treatment for a film, titled 'It's a Crude, Crude World', later renamed 'King for a Day', based on an incident he had witnessed on the state visit of the Shah of Iran to America.[60] The story focused on the visit to the USA of an extremely wealthy, handsome and spoiled young African king. In Buchwald's treatment, the king is taken on a grand tour of

Eddie Murphy, star of, and gross profit participant in, *Coming to America* (1988). Produced by Paramount Pictures and Eddie Murphy Productions; distributed by Paramount Pictures; directed by John Landis

the USA and arrives at the White House, where a remark made by the President infuriates him. While in the USA, he is deposed, deserted by his entourage and left destitute. He ends up in a Washington ghetto, stripped of his clothes and befriended by a woman. He obtains employment as a waiter and, in order to avoid extradition, marries the woman who befriended him and lives happily ever after.[61] Buchwald's friend, a producer named Alain Bernheim (who later also became a plaintiff in the case) registered the treatment with the WGA. Bernheim suggested to Buchwald he reduced the treatment from eight to two to three pages, with the view to a friend – Louis Malle – directing the film.[62] Later that year, Bernheim met Jeffrey Katzenberg, then Head of Production at Paramount, to pitch the story for Eddie Murphy to star, who was under contract with them for the five-film deal mentioned above.[63] By February 1983, Paramount and Bernheim set up a legal agreement for the latter to produce the film – should it be green-lit – that entitled him to payment and, in March that year, Buchwald sold the rights to the story and concept to Paramount.[64] Paramount then engaged another writer, Tab Murphy, to write a script, and budgeted the film at $12 million, with John Landis to direct.[65] A script was delivered in September 1983 but reportedly not well received by the studio. Paramount extended their option on the treatment, while seeking another writer to deliver a further script by October 1984, eventually bringing the development costs to in excess of $418,000.[66] However, by early 1985, progress on the film began to stall. A new writing team had been engaged but then aborted and, in March 1985, Bernheim was informed by Paramount that the project had been abandoned and was in turnaround.[67] After Paramount's option on the treatment lapsed, Buchwald and Bernheim set about selling the idea to Warner Bros. and, in May 1986, optioned the treatment to them.[68]

However, in August 1985 a new idea was developed by Paramount titled 'Ambassador At Large' and, by 1987, this had developed into a film idea, the aforementioned 'The Quest', based on a story by Eddie Murphy and written by two more writers. In November 1987, Buchwald learned that Paramount were planning to shoot a movie with a very similar premise to his treatment, in which Eddie Murphy was to play an African prince who comes to America to find a wife. Paramount insisted that the film was unrelated to Buchwald's original idea; however, despite this Warner Bros. abandoned Buchwald's project once they learned of a film with a similar premise.[69] Outraged by Paramount's denial, Buchwald and Bernheim decided to sue the studio for 19 per cent of the net profits of *Coming to America*, as would have been their contractual entitlement had their film been made. In the contracts originally agreed, Buchwald was due 1.5 per cent of net profits, plus $65,000 payment, while as producer Bernheim was due 17.5 per cent of net profits, plus $200,000 payment.[70]

The lawsuit was extensive and took over two years. Although the case revolved around a two and a half-page treatment, it produced over 10,000 pages of sworn testimony, 200 pleadings, and – to their discomfort – Paramount was forced to make over a million pages of documents available to the court.[71] From a dispute over a two-page treatment, an estimated $12 million was spent fighting the lawsuit, producing appellate court records running to 37,000 pages.[72] The courts examined at length the legality of the studio's contract with Buchwald and Bernheim, and engaged in a detailed discussion about the definition and calculation of the net profits contract.[73]

The initial stages of the lawsuit resulted in significant wins for Buchwald and Bernheim, rocking the industry. The first stage of the action was to determine if, indeed, the concept for *Coming to America* was based upon a 'material element' within or 'inspired by' Buchwald's treatment. This 'material element' test was received to consider if there was a *prima facie* case to answer – clearly the issue of compensation would have been irrelevant unless it could be proven to have been based on Buchwald's idea. This raised a number of important questions. Despite similarities, the film also had key differences from the treatment. However, case law had established that the 'test for similarity' was lowered if the court could establish that there been access to the treatment, which they duly did. The court also noted that both scripts included key 'gimmicks', such as Eddie Murphy playing multiple characters and the use of a mop to foil a robbery. The Court, however, was clear that this was not a case about Eddie Murphy's own integrity, stating that:

> At the outset the Court desires to indicate what this case is and is not about. It is not about whether Art Buchwald or Eddie Murphy is more creative. It is clear to the Court that each of these men is a creative genius in his own field and each is an uniquely American institution. This case is also not about whether Eddie Murphy made substantial contributions to the film 'Coming to America.' The Court is convinced he did. Finally, this case is not about whether Eddie Murphy 'stole' Art Buchwald's concept 'King for a Day.' Rather, this case is primarily a breach of contract case between Buchwald and Paramount (not Murphy) which must be decided by reference to the agreement between the parties and the rules of contract construction, as well as the principals of law enunciated in the applicable legal authorities.[74]

The court duly established there was, indeed, a 'substantial similarity' between Buchwald's treatment and the final film. After careful consideration of meetings, deal memos and story comparisons, Judge Harvey A. Schneider opined, in Phase 1 of the lawsuit, that the film was based on Buchwald's treatment.[75] He also noted that the eventual director, John Landis, had been sent the treatment and considered as a director for the project. And, despite the court making clear that the case was not about Murphy stealing the idea, his proven access to Buchwald's treatment was used as additional evidence in favour of Buchwald to show that the similarities were not a coincidence. Yet, despite holding that *Coming to America* had been 'based upon' Buchwald's treatment, the court refused to extend this to consider the law of torts – damages that might stem from fraud or acting in bad faith.[76]

The result of Phase 1 of the lawsuit was that it established Buchwald and Bernheim were, indeed, net profit participants in the film, as per their contracts with Paramount. Phase 2 set about determining whether the contracts and business dealings were fair. Paramount's argument was that, as both plaintiffs held net profit participation contracts, they were due no more than their fixed compensation, as they claimed the film had made a net loss of $18 million.[77] Challenged on this, the argument of Paramount's counsel centred on the claim that while talent with power make deals that guarantee them fees and percentages of gross profits, net profits were deals made by the relatively powerless.[78] Murphy, who earned over $20 million from the film, even referred in his deposition testimony to net profit participation points as 'monkey

points', so worthless were they usually to their recipients.[79] However, the court examined the net profit deductions, and Buchwald and Bernheim's lawyers contested the studio's justifications and accounting for the costs and revenues of the film. The court revealed that Paramount had charged interest on the film's negative costs, its distribution fee and its fee. It also deducted 15 per cent of the gross for overhead on Eddie Murphy's operational allowance, and a further 15 per cent of this amount on top of the first charge.[80] The court thereby argued that this was, in effect, a double charge, an 'overhead on overhead', that had no correspondence to any actual incurred costs. In response, Paramount attempted to mount a 'risky business' defence, arguing that the Hollywood business relied on winners to compensate for more numerous losses.[81] However, when challenged by an unimpressed Judge Schneider to allow an independent auditor to examine the Paramount accounting books, the studio panicked and withdrew this defence to ensure that finances of all their films were not placed in public view.

In his tentative decision, Judge Schneider called the contracts held by Buchwald and Bernheim 'overly harsh' and 'one sided', forcing the plaintiffs to be 'a party in a vastly inferior bargaining position'.[82] He ruled that the net profits contract was 'unconscionable' on seven provisions and that *Coming to America* did, indeed, evolve from the two-page synopsis presented to Paramount by Buchwald and Bernheim, that Paramount's accounting formula – an industry-wide practice that limited the likelihood of any film ever reaching net profitability – was unconscionable and that the parties had been subject to an unfair 'contract of adhesion'.[83] Phase 3 of the lawsuit then moved to calculate the appropriate compensation for Buchwald and Bernheim. Judge Schneider concluded that the Buchwald–Bernheim synopsis was worth $900,000 ($150,000 to Buchwald and $750,000 to Bernheim), adding in provision for profit participation based on figures arrived at after removing a number of studio deductions from net profits, and thus discounting the studio's claims that the film had made a loss.[84] The case dragged on for two years, with escalating legal costs. Fearing that all their books would be reopened for similar cases, Paramount filed an appeal, but eventually settled with Buchwald and Bernheim for $900,000 just before the appellate court issued an opinion, an attempt (according to industry commentators) to avoid the setting of a legal precedent for future litigation by similarly aggrieved plaintiffs.[85]

The *Buchwald v. Paramount* lawsuit caused ripples across Hollywood as the major studios had never been fully challenged on their accounting deductions in court, and studio executives feared the legal judgment would lead to a rush of lawsuits on similar grounds. It was historically important, then, for a number of key reasons. First, Paramount had to disclose details of the contracts to prove how a film that had grossed over $288 million worldwide had made a net loss, requiring no payment to net profit participants, and they failed to convince the court of this. Second, Paramount were forced to abandon their 'risky business' assertion that movie production was high risk and that wins are needed to offset the studio losses, for fear that audits would further expose the creative accounting and contracting methods revealed in the court-room. The *Buchwald v. Paramount* lawsuit, therefore, usefully scrutinised the contracts and profit definitions that typify contemporary film industry deals, which are subject to the 'creative accounting' practices routinely adopted by Hollywood studios.

So did *Buchwald v. Paramount* change industry contracts? Despite the claims that the case would overturn the way the studios calculate net profits, this is unproven. Further cases, such as *Batfilm Productions, Inc. v. Warner Bros.* (1994) did not reinforce the 'unconscionable contract' judgment made in this case.[86] The relatively low level of payment made to the plaintiffs, when their legal fees ran to over $2.5 million (luckily for the pair, borne by the law firm, who took the case on a contingent fee basis) did not offer emphatic encouragement for future attempts. Nonetheless, it did highlight the unequal nature of contracts in the industry, as well as a greater recognition by talent and their agents of the need to carefully negotiate definitions of net profits. Further cases demonstrate the relative power of Hollywood talent. For instance, another surprising example of a recorded net loss, also leading to a lawsuit, concerned the film *Forrest Gump* (1994). Despite earning $678 million at the box office and $382 million domestically, the studio reported a net 'loss' of $62 million and no net profits for writer Winston Groom, who was contracted for a fixed fee plus 3 per cent of net profits. The film declared this substantial loss despite returning revenues to the studio through distribution ($128.3 million) and finance ($21.3 million).[87]

The *Buchwald v. Paramount* lawsuit is a landmark case, therefore, in that it publicly revealed the disproportionate balancing of profit participation definitions for talent in favour of the studio and the lucky few gross participants. Yet, despite the court declaring that such net profits contracts were unconscionable, such contracts continue to be common currency in Hollywood and the case ultimately failed to transform studio accounting practices, which have grown even more sophisticated. However, the case did reveal the industry machinery of lawyers, accountants and complex contractual clauses that structure contemporary Hollywood deals. Contractual disputes such as those in *Buchwald v. Paramount* can, therefore, be seen as representing a power struggle between talent and the Hollywood studios, articulated through their agents and lawyers.

Hollywood Contracts into the Twenty-first Century

For conglomerate Hollywood today, use of the seven-year option contract is more commonplace in television, where shows have the potential for long-running seasons and years of stable production, than in major feature production, where the freelance deal has supplanted the long-term studio contract. One of the most recent legal uses of the De Havilland Law was by the *Modern Family* sitcom stars – Julie Bowen, Ty Burrell, Jesse Tyler Ferguson, Ed O'Neil, Eric Stonestreet and Sofia Vergara – in July 2012, when table readings for the upcoming fourth season were due to begin.[88] The lead actors brought a lawsuit in LA Superior Court against 20th Century-Fox TV as contract renegotiations for higher salaries with the company came to a stalemate. What is interesting, however, is their reason for bringing a case against their employers: their original contracts, signed with Fox TV, 'violate California's seven-year limit on personal service contracts'. *Variety* made the analogy to de Havilland on 24 July 2012, remarking that this legal precedent 'was established in 1944 after actress Olivia de Havilland waged a long contract fight against Warner Bros.'.[89] The trade journal went on to highlight the precise difference between de Havilland's long-term studio contract and the *Modern Family* stars' TV sitcom deal. 'In common industry practice, actors starting out on a series sign deals that run for *seven television seasons*. Depending on the time an actor is signed up for the pilot, the term

often runs *longer than seven years*.'[90] Like Warner Bros.' attempt to tack on the accumulated suspension time on the end of de Havilland's contract in 1943, the TV talent contract based on show seasons as opposed to actual calendar time is a violation of Section 2855, and the lead actors of *Modern Family* argued this point – Vergara had originally signed up with ABC in 2007 to a holding deal before she was assigned to *Modern Family* in October 2008, while Bowen, Burrell, Ferguson and Stonestreet all asserted that their contracts should end in February 2016, as opposed to June 2016.[91]

Ultimately, the case never went to court, as three days later, on 27 July, the actors reached a deal with 20th Century-Fox TV. Cynthia Littleton, for *Variety*, noted that 'the family drama is over', and explained that, although 'details of the deal' were 'sketchy', it was understood that the actors agreed to an additional season, higher salaries and won a key provision – a syndication deal.[92] Although the actors only achieved a quarter point share, the article underscored its significance in the long run, given that the show is expected to 'gross hundreds of millions in syndication': 'Achieving a profit participation stake, however small, had been an important point to the thesps.'[93] She elaborated on this point, stating that the actors had been wrangling with the studio for over a year about getting a cut of *Modern Family*'s syndication earnings. This was the crucial bargaining point for the actors rather than the actual calendar time of their seven season contracts. Nonetheless, this legal technicality established by the De Havilland Law brought 20th Century-Fox TV to the bargaining table; as *Variety* noted in their coverage of the deal, use of that lawsuit was 'a ploy to take the dispute public and force the studio to sweeten its offer'.[94]

Conclusion

This chapter has illuminated the legal terms of the talent contract and considered how the resulting precedents established by California case law have shaped Hollywood's industrial practices, particularly in terms of high-profile above-the-line talent contract negotiations. Both *De Haviland v. Warner Bros.* and *Buchwald v. Paramount* are landmark cases that reveal important and contested aspects of contractual battles in Hollywood's history that are still relevant in the industry today. However, further analysis of Hollywood contract negotiations faces significant research challenges in terms of access to primary sources. Although the *De Haviland v. Warner Bros.* legal materials are available at the USC Warner Bros. Archive in Los Angeles, and the *Buchwald* case is available from the LA Superior Court files, this access remains a novelty for studying contracts and legal dealings of the Hollywood studios. Likewise, there is a paucity of primary documents through which to analyse the media industries of conglomerate Hollywood. The data is not available for researchers, who therefore have to draw on a range of other methods. One key resource for accessing contemporary industry contracts is through litigation in the LA Superior Court, since these documents become public record.[95] Moreover, the major talent agencies – William Morris Endeavor, Creative Artists Agency, United Talent Agency and the contemporary studios – do not make their archives accessible to researchers, presumably for reasons of commercial confidentiality. In addition, the majority of lawsuits are settled before they go to a legal decision, so consequently are unable to establish a precedent in case law, and out-of-court settlements are usually kept confidential. This presents substantial challenges for scholars wishing to produce an accurate history of Hollywood's legal contracts, as most accessible contracts are either concerning contractual disputes (which become matters

of legal record) or standard 'boiler plate' contract agreements, such as those negotiated by the major guilds (DGA, SAG and WGA).

We should also note additional issues of method in using secondary sources such as trade journals to examine the brokering of deals. Industry trade and newspaper articles are a vital and valuable resource to trace key events and trends of the business due to the scarcity of access to conglomerate Hollywood contracts and corporate records.[96] Hence, scholars utilise the trades and press in addition to new media outlets like industry insider blogs such as *Deadline Hollywood* and *The Wrap* to study the media industries of today. However, frothy speculation about talent and box office has long been used by agents and studios for creating publicity around their projects, with *Variety* and *The Hollywood Reporter* being important industry journals in this respect, so we also require a critical view of the relationship between the trade papers and the industry they report on.

In this chapter, we have not only analysed Hollywood contracts, but also considered their impact on the talent, as both employees and labourers. In doing so, we have highlighted the importance of comprehending contracts and their clauses and of deciphering Hollywood's creative accounting. Thus, to fully understand these deal structures, we must unpack complex legal documents and digest their numerous pages of clauses. At the same time, we also echo Jane Gaines in being cognisant to what she calls the 'truth status' of contracts, which can become seductive in their apparent authority.[97] Contracts tend to be most relevant when matters reach dispute and go to court. While they rarely reveal simple industry axioms of film authorship or creative decision-making, contracts do inform and regulate the conditions of film production. Nevertheless, as this chapter has illustrated, contracts can also be an instrument of agency and power as well as oppression/control, especially in Hollywood.

Notes

1. Danae Clark, *Negotiating Hollywood: The Cultural Politics of Actors' Labor* (Minneapolis: University of Minnesota Press, 1995).
2. Some economists and lawyers have attempted to address this, including: Darlene C. Chisholm, 'Profit-sharing Versus Fixed-payment Contracts: Evidence from the Motion Pictures Industry', *Journal of Law, Economics, & Organization* vol. 13 no. 1 (1987): 169–201; Darlene C. Chisholm, 'Two-part Share Contracts, Risk, and the Life Cycle of Stars: Some Empirical Results from Motion Picture Contracts', *Journal of Cultural Economics* vol. 28 no. 1 (2004): 37–56; Joe Sisto, 'Profit Participation in the Motion Picture Industry', *Entertainment and Sports Lawyer* vol. 21 no. 2 (2003): 1, 21–8; Mark Weinstein, 'Profit-sharing Contracts in Hollywood: Evolution and Analysis', *Journal of Legal Studies* vol. 27 no. 1 (1998): 67–112. Examples of analysis within film, media and communications include: Emily Carman, '"Women Rule Hollywood": Ageing and Freelance Stardom in the Studio System', *Celebrity Studies* vol. 3 no. 1 (2012): 13–24, and *Independent Stardom: Freelance Women in the Hollywood Studio System* (Austin: University of Texas Press, 2016); Philip Drake, 'Reputational Capital, Creative Conflict and Hollywood Independence: The Case of Hal Ashby', in Geoff King, Claire Molloy and Yannis Tzioumakis (eds), *American Independent Cinema: Indie, Indiewood and Beyond* (London: Routledge, 2012), pp. 140–52; Tom Kemper, *Hidden Talent: The Emergence of Hollywood Agents* (Berkeley: University of California Press, 2010); and Paul McDonald, *Hollywood Stardom* (Malden, MA: Wiley-Blackwell, 2013), in particular, on the inflation of star compensation in conglomerate Hollywood.

3. Jonathan Blaufarb, 'The Seven-Year Itch: California Labor Code Section 2855', *Communications and Entertainment Law Journal* vol. 6 no. 3 (1983–4): 656. We are indebted to Matt Stahl, who pointed us to Blaufarb's essay for his analysis on the evolution of Section 2855 in California and for underscoring the importance of Olivia de Havilland's case as the key litigation for the interpretation of this statute. Stahl's work on recording artist contracts is also exemplary in understanding the struggles between artists and the music industry. See Matt Stahl, *Unfree Masters: Recording Artists and the Politics of Work* (Durham, NC: Duke University Press, 2013).
4. We will use the misspelling of her last name when referring to the case and the actress's correct spelling when referring specifically to her. Additionally, while motion picture contracts are now performed on a freelance basis, option contracts remain for television talent, mirroring the old studio system long-term option contracts.
5. The residual payments from DVD/video, television and online, paid to talent, have become increasingly important as, by the 1990s and 2000s, revenues from ancillary markets provided a much larger proportion of revenues and profit for the Hollywood studios than that produced at the theatrical box office. This ultimately transcends our analysis of contracts in the chapter, but is a compelling subject for further research. See also Chapter 9 in this book, which considers residuals in regard to the Writers Guild.
6. Kemper, *Hidden Talent*, p. 127.
7. In 1872, the term was limited to two years, extended to five in 1919. See Forty-Ninth Session of California State Senate, Chapter 705, Section 1980, approved by the Governor on 10 June 1931, and put into effect on 14 August 1931.
8. Ibid.
9. Ibid.
10. For example, provision number twelve in actor Ronald Colman's 1935 contract with Selznick International Pictures nearly replicates this parlance: 'It is mutually understood and agreed that your services are special, unique, unusual, extraordinary, and of an intellectual character, giving them a peculiar value.' See contract dated 23 July 1935, Ronald Colman Legal file, David O. Selznick Collection (DOSC), Harry Ransom Center (HRC), University of Texas-Austin.
11. Blaufarb, 'The Seven Year Itch': 657.
12. 'Objections to 7-Yr. Contract', *Variety*, 30 June 1931, p. 3.
13. The studio, not the star, had the right to drop or pick up the option. See Tino Balio, *Grand Design: Hollywood as a Modern Business Enterprise, 1930–1939* (Berkeley: University of California Press, 1995), p. 145.
14. Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), p. 152.
15. Balio, *Grand Design*, p. 143. See also Richard Jewell, *The Golden Age of Hollywood 1929–1945* (Malden, MA: Blackwell, 2007), pp. 255–7.
16. Cagney's 1932 contract guaranteed star billing and specified that Warner Bros. must obtain consent from the actor if they sought to bill anyone else before the star. Cagney's lawyer found evidence that Pat O'Brien had been billed over Cagney on a downtown Los Angeles theatre marquee for their film *Ceiling Zero* (1936), to which the star had not agreed. See James Cagney legal file, Warner Bros. Archive (WBA), USC. See also Robert Sklar, *City Boys: Cagney, Bogart, Garfield* (Princeton, NJ: Princeton University Press, 1994), p. 53.

17. The CA Supreme Court upheld the earlier decision in 1938.
18. Contract dated 7 July 1939, see James Cagney legal file, folder marked 1939–40, WBA, USC.
19. See Thomas Schatz, "'A Triumph of Bitchery:" Warner Brothers, Bette Davis, and *Jezebel*', in Janet Staiger (ed.), *The Studio System* (New Brunswick, NJ: Rutgers University Press, 1995), p. 81. Schatz's essay remains the best source for Davis's legal battles with Warner Bros., the trial in England with Warner Bros. and its resulting change in her star status at the studio in the 1930s.
20. Ibid. Schatz notes how even the Warner Bros. studio lawyer in London sided with Davis, counselling Jack Warner after the trial that while 'the company "should have the right to suspend" there "should be a limit to the period which the Producer can add on to the existing period of the contract"'. Ibid., p. 81.
21. Other stars include George Brent, Kay Francis and Ann Dvorak. See Thomas Schatz, *The Genius of the System* (New York: Henry Holt and Company, 1988), pp. 217–18, 220.
22. Kemper, *Hidden Talent*, p. 131.
23. See Kemper's *Hidden Talent* for an overview on the important role talent agents played in studio-era Hollywood, in particular chapter 6, 'Sealing the Deal: The Contract Industry', on how agents parlayed their clients' contracts into greater professional autonomy.
24. For information on the A-list freelancers of the 1930s, all of whom had impressive contracts, see Emily Carman's book, *Independent Stardom*, Chapter 2, The [Freelance] Contract in Context.
25. The last percentage earnings statement in Dunne's RKO files is from 1948, which states that her total cut of the profits was $161.969.09. See contract with RKO dated September 1933, Irene Dunne Collection, USC Cinematic Arts Library.
26. See Kemper, *Hidden Talent*, p. 84.
27. See California State court brief dated 23 March 1944. *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 225, 153 P.2d 983 (1944) (her name was misspelled in the Court's final verdict).
28. See contract dated 12 February 1934 (effective 28 February 1935), WBA, USC.
29. Interview, 'The Last Belle of Cinema', Academy of Achievement, 5 October 2006, http://www.achievement.org (accessed 4 January 2015). De Havilland is one of the last living actresses of her generation (born 1916).
30. De Havilland declined to appear in the following four pictures: *Saturday's Children* (1940), *Flight Angels* (1940), *George Washington Slept Here* (1942) and *One More Tomorrow* (1946), also known as *The Animal Kingdom.* The parts she refused pale in comparison to the number of assignments she accepted between 1935 and 1943: twenty-eight in total.
31. Undated Jack Warner memo titled 'Olivia de Havilland Case', circa 1943. The actress's films had all made profits for the studio, and even those that she refused to appear in made a profit, with *George Washington Slept Here* making over $1 million at the box office. Financial information provided by studio figures in Olivia De Havilland legal file, WBA, USC.
32. Memo to Jack Warner from Trilling, dated 20 February 1942, De Havilland legal file, WBA, USC.
33. For example, Warner Bros. had made freelance deals with Carole Lombard, Barbara Stanwyck and Gary Cooper, among others in the 1930s and early 40s. See Carman, *Independent Stardom*, chapter 2, 'The [Freelance] Contract in Context' and chapter 4, 'Independent Stardom Goes Mainstream', in particular.
34. See Blaufarb, 'The Seven Year Itch': 666.
35. *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d at 235, 153 p.2d, 988.

36. Blaufarb, 'The Seven-Year Itch': 668.
37. See Olivia de Havilland legal file, WBA, USC as well as 'De Havilland Sues For Work', *Variety*, 14 July 1944, p. 1.
38. See Blaufarb, 'The Seven-Year Itch': 669–75. Manchester attempted to free herself from a series of contracts with Arista Records, and her case relied on the *De Haviland* interpretation of Section 2855 to do so.
39. S. Abraham Ravid, 'Information, Blockbusters, and Stars: A Study of the Film Industry', *Journal of Business* vol. 72 no. 4 (1999): 482.
40. Weinstein, 'Profit-sharing Contracts in Hollywood': 84. See also McDonald, *Hollywood Stardom*, p. 146. For an account of Wasserman's important influence upon the contemporary Hollywood cinema see Douglas Gomery, 'Hollywood Corporate Business Practice and Periodizing Contemporary Film History', in Steve Neale and Murray Smith (eds), *Contemporary Hollywood Cinema* (London: Routledge, 1998), pp. 47–57.
41. Box-office gross figures estimated by authors based on Stewart's earnings from the deal. See also John W. Cones, *The Feature Film Distribution: A Critical Analysis of the Single Most Important Film Industry Agreement* (Carbondale: Southern Illinois University Press, 1996), pp. 21–2, and Dennis McDougal, *The Last Mogul* (New York: Crown, 1998), p. 153, on the particulars of Stewart's earnings.
42. Weinstein, 'Profit-sharing Contracts in Hollywood': 84n26.
43. See Connie Bruck, *When Hollywood Had a King: The Reign of Lew Wasserman, Who Leveraged Talent into Power and Influence* (New York: Random House, 2003) and McDougal, *The Last Mogul*.
44. See introductory chapter of Denise Mann, *Hollywood Independents: The Postwar Talent Takeover* (Minneapolis: University of Minnesota Press, 2008). See also McDonald, *Hollywood Stardom*, pp. 107–16, for more extensive examples from the 1950s to the 90s and 2000s.
45. See Bruck, *When Hollywood Had a King.*
46. For more on Peters and Guber, see Nancy Griffin and Kim Masters, *Hit and Run: How Jon Peters and Peter Guber Took Sony for a Ride in Hollywood* (New York: Touchstone, 1997).
47. Reported in David Stephenson, 'Fortune is Strong with Alec's Estate NINE Years Beyond the Grave, the Force, or Fortune, is Still with the Late Star Wars Actor Sir Alec Guinness', *Daily Express*, 17 May 2009. Exchange rate converted at £1 as $1.5.
48. Edward J. Epstein, *The Big Picture: The New Logic of Money and Power in Hollywood* (New York: Random House, 2005), p. 18.
49. Arthur De Vany, *Hollywood Economics: How Extreme Uncertainty Shapes the Film Industry* (London: Routledge, 2003).
50. Reported worldwide box-office grosses from Internet Movie Database, accessed 15 September 2014, http://www.imdb.com/title/tt0181852/business and http://www.imdb.com/title/tt0438488/business
51. McDonald, *Hollywood Stardom*, p. 28. See also Carman, "'Women Rule Hollywood'", p. 22.
52. For an analysis, see the case-study of the creative accounting of *Forrest Gump* (1994), in Philip Drake, 'Distribution and Marketing in Contemporary Hollywood', in Paul McDonald and Janet Wasko (eds), *The Contemporary Hollywood Film Industry* (Oxford: Blackwell, 2008), pp. 140–52.
53. Aljean Harmetz, 'Studio–Star Marriages Make a Comeback', *Los Angeles Herald Examiner*, 8 January 1984, E4.
54. Ibid.

55. 'Murphy Gets More Cash, Clout in Renegotiated Par Contract', *Variety*, 26 August 1987, pp. 1, 11.
56. Ibid., p. 1.
57. Ibid., p.11.
58. Reported worldwide box-office gross of *Coming to America*, accessed 15 September 2014, http://www.imdb.com/title/tt0094898/business?ref_=tt_ql_dt_4
59. For this and the details that follow, see *Buchwald v. Paramount Pictures Corp*., 1990 Cal. App. LEXIS 634 (1990); Adam J. Marcus, '*Buchwald v. Paramount Pictures Corp*. and the Future of Net Profit', *Cardozo Arts & Entertainment Law Journal* vol. 9 (1991): 545–85; Pierce O'Donnell and Dennis McDougal, *Fatal Subtraction: The Inside Story of Buchwald v. Paramount* (New York: Doubleday, 1992). The latter's appendix includes the judicial decisions for each of the three phases of the case.
60. *Buchwald v. Paramount Pictures Corp*., 1990 Cal App. LEXIS 634, *18 [asterisk in original].
61. Ibid., *30.
62. Ibid., *1.
63. Ibid., *3
64. Ibid.
66. Ibid., *16.
67. Ibid., *14–15.
68. Ibid., *14–16.
69. Ibid., *16–18.
70. O'Donnell and McDougal, *Fatal Subtraction*, p. xxv.
71. Ibid., p. 524.
72. Robert W. Welkos, 'Buchwald, Paramount Settle Film Dispute', *Los Angeles Times*, 13 September 1995, accessed 15 August 2014, http://articles.latimes.com/1995-09-13/business/fi-45442_1_paramount-pictures
73. Marcus , '*Buchwald v. Paramount Pictures Corp*. and the Future of Net Profit', 547.
74. *Buchwald v. Paramount Pictures Corp*., 1990 Cal App. LEXIS 634, *17–18.
75. Ibid., *39
76. Ibid., *43.
77. Marcus, '*Buchwald v. Paramount Pictures Corp*. and the Future of Net Profit': 559.
78. Ibid.
79. O'Donnell and McDougal, *Fatal Subtraction*, p. 238.
80. 'Tentative Decision (Second Phase)', *Buchwald v. Paramount Pictures Corp*., Los Angeles Superior Court, Case No. 706083 (21 December 1990), reprinted in the appendix of O'Donnell and Dennis McDougal, *Fatal Subtraction*, p. 550.
81. Ibid., p. 566.
82. Ibid., pp. 550–1.
83. Ibid., pp. 543, 550–1.
84. 'Statement of Decision (Third Phase)', *Buchwald v. Paramount Pictures Corp*., Los Angeles Superior Court, Case No. 706083 (16 March 1992), reprinted in the appendix of O'Donnell and Dennis McDougal, *Fatal Subtraction*, pp. 558, 560. See also *Buchwald v. Paramount Pictures Corp*., Cal.Super.Ct., LASC No. 706083 (16 March 1992) [ELR 13:11:3].
85. Nina J. Easton 'Hollywood's Ledger Domain', *Los Angeles Times*, 6 January 1991, pp. 5, 78.
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89. Ibid.
90. Ibid.
91. On Vergara's holding deal, see Maria Elena Fernandez, 'Sofia Vergara Heats Up ABC's *Modern Family* and Makes us Laugh', *Los Angeles Times*, 6 December 2009, accessed 4 January 2015, http://latimesblogs.latimes.com/showtracker/2009/12/sofia-vergara-heats-up-abcs-modern-family-and-makes-us-laugh.html
92. Cynthia Littleton, '"Modern Family" Actors Reach Deal with 20th TV', *Variety*, 27 July 2013, accessed 15 August 2014, http://variety.com/2012/tv/news/modern-family-actors-reach-deal-with-20th-tv-1118057178/
93. Ibid.
94. Ibid.
95. For an example, see Drake 'Reputational Capital, Creative Conflict and Hollywood Independence', pp. 140–52.
96. As we completed this chapter in autumn 2014, the industry was rocked by the illegal hacking of Sony Pictures Entertainment computers, placing a large volume of contractual documents and confidential emails into the public domain and providing unprecedented access to the industry practices of a contemporary major media conglomerate. Hence, researching the 'Sony hack' presents scholars with additional complex ethical questions about the use of contractual data made public through unofficial or illegal means.
97. See Gaines, *Contested Culture*, p. 146.

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