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NOTES & COMMENTS

HERE'S WHY HOLLYWOOD SHOULD KISS THE HANDSHAKE DEAL GOODBYE

I. THE SET UP

"Movie makers do lunch, not contracts."¹ This is how Judge Alex Kozinski of the Ninth Circuit summarized Hollywood's use of oral agreements.² Although such "handshake" deals are by no means new to the film business,³ Judge Kozinski's comments evidence an increasing distaste for their use in the industry.⁴ Indeed, the tide seems to be rising against handshake deals in Hollywood, for good reason. Although oral contracts are thought to provide flexibility for a fast-paced and dynamic industry, the reality is that their lack of clear and defined contractual terms often leaves parties making up the rules as they go along.

Part II of this Comment examines the history of legal controversy surrounding the movie industry's reliance upon handshake deals. Part III demonstrates the disparity of bargaining power between Hollywood artists⁵ and their employers, and examines the manner in which oral contracts are used to exploit this disparity. Part IV identifies the essential functions of formal, written agreements and the advantages they offer the movie business. Part V refutes the usual excuses for the industry's use of oral contracts, and further identifies a judicial distaste for Hollywood's handshake deals. To conclude, Part VI examines the existing precedent for legislating against the handshake deal, the policy reasons for doing so, and the concrete steps the California legislature should take to "cure"

1. *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991).

2. *See id.*

3. Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 (2001).

4. *See infra* Part V.C.

5. The term "Hollywood" as used in this Comment shall refer to the motion picture industry. Hereinafter, the terms "actors," "directors," and "writers" shall be collectively referred to as "artists."

Hollywood of its addiction to oral agreements. As will become apparent from the history and consequences of handshake deals, particularly with respect to artists, the effects of handshake deals are such that the film business should do away with them altogether.

II. HISTORY OF THE WORLD, PART I: THE CASELAW ON HANDSHAKE DEALS

The handshake deal is by no means "fresh off the bus" as they say in the business. Hollywood's reliance upon oral contracts and the controversy surrounding them goes back almost as long as films have been made in Hollywood.⁶ The first major case on the subject was *Columbia Pictures Corp. v. De Toth*,⁷ decided in the 1940s. In *De Toth*, Andre de Toth entered into a seven-year oral contract to direct films for Columbia Pictures.⁸ The defendant then gained a measure of "notoriety" from several movies he directed under the deal.⁹ When he left to pursue a more lucrative contract with another studio before his deal with Columbia expired, Columbia sued him to enforce the handshake agreement.¹⁰ The defendant argued successfully that the contract did not fall within the statute of frauds¹¹ because it was structured as a one-year deal with six consecutive one-year options.¹² However, the court still held that the oral agreement was binding, and ordered De Toth to honor its terms.¹³

In still another case from the forties, *Johnston v. Twentieth Century-Fox Film Corp.*,¹⁴ the studio entered into an oral agreement to buy the rights to the plaintiff's book.¹⁵ After this handshake deal was made, the studio presented an additional written contract asking Johnston to waive certain rights, a provision to which he had not previously agreed.¹⁶ When Johnston refused to agree to the waiver, Fox claimed it had no agreement to

6. Jay M. Spillane, *Lawsuits over "Handshake Deals" Are as Old as the Entertainment Industry (and Can Be Easily Avoided)*, 11 THE ENT. & SPORTS LAW. 15, 15 (1993).

7. 197 P.2d 580 (Cal. Ct. App. 1948).

8. Spillane, *supra* note 6, at 15.

9. *Id.*

10. *Id.*

11. *See infra* Part VI.B.

12. *See* *Columbia Pictures Corp. v. De Toth*, 197 P.2d 580, 587-88 (Cal. Ct. App. 1948).

13. Spillane, *supra* note 6, at 15; *see also De Toth*, 197 P.2d at 586.

14. 187 P.2d 474 (Cal. Ct. App. 1947).

15. *Id.* at 477.

16. *Id.* at 479.

purchase the book rights.¹⁷ The jury disagreed, finding the existence of an oral contract, and awarded damages to Johnston.¹⁸

Perhaps the most infamous case involving a Hollywood handshake deal is the unpublished case *Main Line Pictures, Inc. v. Basinger*.¹⁹ In *Basinger*, actress Kim Basinger orally agreed several times to star in the film *Boxing Helena*.²⁰ For reasons that are subject to dispute,²¹ Basinger eventually refused to perform in the film.²² When the producers sued her for breach of contract, the jury found that there was indeed a handshake deal, and awarded the producers damages of \$8.92 million.²³ Although the decision was reversed on a technicality and then settled before it was retried,²⁴ some commentators thought the case might be the “death knell” for the handshake deal in Hollywood.²⁵

In another modern case, Warner Brothers sued Francis Ford Coppola over ownership of his *Pinocchio* film project, claiming that Coppola breached a contract for his services.²⁶ Coppola and the studio had entered into negotiations regarding the film, but did not sign any written, long-form documents.²⁷ When Coppola entered discussions with another studio to produce the film, Warner Brothers threatened to commence litigation, claiming it had a handshake deal with Coppola.²⁸ Fearing litigation, the other studio dropped out of the picture, and Coppola lost a lucrative contract.²⁹ Coppola sued Warner Brothers, claiming tortious interference, and “[t]he jury found against Warner Brothers and awarded Coppola \$80

17. *Id.* at 479–80.

18. *Id.* at 489.

19. *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994); see also Michael T. Giordano, Comment, *Boxing Basinger: Oral Contracts and the Manager's Privilege on the Ropes in Hollywood*, 9 UCLA ENT. L. REV. 285, 289 (2002).

20. Giordano, *supra* note 19, at 288.

21. See *infra* Part IV.B (discussing Kim Basinger's purported reasons for withdrawing from the film *Boxing Helena*).

22. See Giordano, *supra* note 19, at 288–89.

23. See McLaughlin, *supra* note 3, at 102.

24. David Ainbender, *Main Line Pictures, Inc. v. Kim Basinger, et al.*, Suit Talk Case Closet, HOLLYWOOD LAW CYBERCENTER (Jan. 1996), at <http://www.hollywoodnet.com/Law/suittalk/closet0196.html>.

25. Spillane, *supra* note 6, at 15.

26. McLaughlin, *supra* note 3, at 110; see also *Coppola v. Warner Bros.*, No. B154280, 2003 Cal. App. Unpub. LEXIS 1782 (Ct. App. Feb. 25, 2003).

27. See McLaughlin, *supra* note 3, at 125.

28. See *id.* at 124.

29. *Id.*

million, including \$60 million in punitive damages.”³⁰

These cases demonstrate that Hollywood’s reliance on oral agreements is long-established and that it has generated a good deal of controversy over the years. But despite the controversy evidenced by these cases, the handshake deal has persisted.³¹ By looking at the reasons proffered for continuing this reliance, it will become clear that the arguments are fairly weak. First, however, it is important to put Hollywood’s reliance on handshake deals into context by identifying the essential disparity in bargaining power from which the studios benefit.

III. THE UNTOUCHABLES: BARGAINING POWER DISPARITY BETWEEN ARTISTS AND THOSE WHO HIRE THEM

To understand the problem with Hollywood’s handshake deals, it is first necessary to reveal the unequal bargaining power that artists possess with respect to their employers, the studios, and producers. This inequality is due to a factor commonly found in employment situations—a disparity in sheer numbers between artists and those who hire them that effectively saps artists of their bargaining power.³² To see how this works, it is important to look at the numbers.

A. Murder by Numbers

There can be no doubt that there is a wide gap in numbers between the few studios on the one hand, and the multitude of artists on the other. To witness, there are roughly ten major film companies that control almost the entire business of film production and distribution.³³ Of the roughly 500 films distributed every year, major studios distribute less than half of them, but earn more than ninety-five percent of the box office revenue.³⁴ By contrast, there are at all times a multitude of actors available.³⁵ The Screen Actors Guild, the actors’ union that admits only a fraction of those

30. *Id.* at 110.

31. *Id.* at 102–03.

32. *See infra* Part III.A (discussing bargaining power disparity).

33. Cinema Screen, Distributors and Production Companies, CinemaScreen.Com.UK, at <http://www.cinemascreen.co.uk/directory/default.asp?c=6.html> (last visited Feb. 13, 2003).

34. MARK LITWAK, DEALMAKING IN THE FILM & TELEVISION INDUSTRY 2 (2d ed. 2002) [hereinafter LITWAK, DEALMAKING].

35. Dave McNary, *SAG, AFTRA Agree to Maybe Agree*, VARIETY.COM (Nov. 15, 2002), at <http://www.variety.com/index.asp?layout=story&articleid=VR1117876142&categoryid=1066&cs=1.html>.

seeking employment, boasts approximately 98,000 members.³⁶ With a ratio likely even greater than 9,800 to 1,³⁷ there can therefore be no doubt that artists exponentially outnumber their prospective employers in Hollywood.

Such a disparity in numbers effectively works to sap employees of their bargaining power, a result that is evidenced both by caselaw and legislation. For instance, California courts have found that an employee generally has unequal bargaining power with respect to her employer, and that the employer usually dictates the terms of employment.³⁸ For similar reasons, Congress enacted the National Labor Relations Act (“NLRA”), in part based on its finding of a general “inequality of bargaining power between employees . . . and employers.”³⁹ Typically, this condition exists because “employer[s] . . . use competition among workingmen to drive down wage rates and enforce substandard conditions of employment.”⁴⁰ Where employees have diminished bargaining power due to a lack of alternative employment, and therefore cannot negotiate for more favorable terms, an employer may use its position to impose unfavorable terms on the employee.⁴¹

These same competitive employment conditions are standard in the film industry. For the average “union” actor, the prospect of supporting one’s self with the craft is grim—seventy percent of all SAG members earn less than \$7,500 per year from acting.⁴² Even famous actors are not immune from these conditions—the fact that even stars have to compete ferociously for roles bears this proposition out.⁴³ When people say the business is “tough,” they are likely referring to the fact that artists are plenty, jobs are scarce, and even successful artists must compete aggressively for work. Although neither the text of the NLRA nor existing caselaw mentions the acting profession specifically, the dog-eat-dog world

36. *See id.*

37. *See id.*

38. *Janzen v. Workers’ Comp. Appeals Bd.*, 71 Cal. Rptr. 2d 260, 263 (Ct. App. 1997).

39. *Grant-Burton v. Covenant Care, Inc.*, 122 Cal. Rptr. 2d 204, 215 (Ct. App. 2002).

40. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 723 (1965) (Goldberg, J., dissenting).

41. *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Ct. App. 1996).

42. Dave McNary, *SAG’s Bitter Pill*, VARIETY.COM (Nov. 6, 2002), at <http://www.variety.com/index.asp?layout=story&articleid=VR1117875637&categoryid=1066&qquery=sag%27s+and+bitter+and+pill&display=SAG%27s+bitter+pill&cs=1.html> [hereinafter McNary, *Bitter Pill*].

43. *See* Steve Weinstein, *Amy Madigan: A Voice for Tough Choices*, L.A. TIMES, Aug. 19, 1989, Part V (Calendar), at 1 (remarking that “[s]cores of accomplished, mature actresses compete for the tiny handful of star roles”).

of professional acting clearly exemplifies the dangers of bargaining power disparity.

Although it is established that an employer, in this case a Hollywood studio, will in most instances maintain an advantage in dictating the terms of an agreement, what remains to be seen is whether the studios have used this tactical advantage to impose unfavorable conditions on their employees, namely the artists. “Handshake deals,” which are typically thrust upon the artist, generally favor the studio over the artist.⁴⁴ These oral agreements are unfair in two ways: they allow the studios a “way out” that the artist does not have, and when they are broken, they impact the artist much harder than they do the studio.⁴⁵ An examination of each of these points will reveal how employers are the ones that benefit from handshake deals in Hollywood.

First, handshake deals “allow studios to gain an unfair advantage because so little is spelled out.”⁴⁶ In other words, even though such an agreement binds the artist, there is no guarantee by the studio that the film will actually be made, or even what the parameters of the movie will be.⁴⁷ This leaves the studio with a “way out” of a handshake deal that the artist clearly does not have: the studio can decide not to produce the film.⁴⁸ Because there are any number of reasons why a film might not be produced, including lack of funding, withdrawal of talent, and problems with a script, the studio is equipped with an arsenal of excuses.⁴⁹ Because the artist is bound, but the studio has a “way out,” such a deal clearly favors the studio.

In addition, handshake deals favor the studio because the effect of a broken agreement is far worse for the actor than for a studio or production company. “[O]ne cannot deny that actors are at both a professional and a financial disadvantage [with respect to the studios] when a relationship based on an oral agreement goes sour.”⁵⁰ Studios and producers have the financial incentive to remain uncommitted until *all* of the talent has committed,⁵¹ and view paying a particular artist off as a minimal cost in the

44. See Giordano, *supra* note 19, at 299–301 (discussing the problems created by oral contracts).

45. *Id.*

46. *Id.* at 299.

47. See *id.* at 300.

48. See *id.*

49. See *id.*

50. Giordano, *supra* note 19, at 300.

51. See *infra* Part IV (discussing “precontractual reliance”).

event that they cancel a production.⁵² The artist, however, is out of a paycheck if the deal is scuttled, and may even have to pay damages.⁵³

Perhaps that is why the cases suggest that studios prefer handshake deals. In both *Main Line Pictures, Inc. v. Basinger*⁵⁴ and *Columbia Pictures Corp. v. De Toth*,⁵⁵ the courts found the existence of an oral contract to the studio's benefit.⁵⁶ In *Coppola v. Warner Bros.*,⁵⁷ the court found the absence of an oral contract, which was to the studio's detriment.⁵⁸ Although the court found the existence of an oral contract to the artist's benefit in *Johnston v. Twentieth Century-Fox Film Corp.*,⁵⁹ it did so based on the existence of a collateral agreement that the studio presented to the artist after they made the handshake deal.⁶⁰ In other words, the studio in *Johnston* was happy to bank on the existence of an oral agreement until the artist refused to waive additional rights.⁶¹ As these cases suggest, oral contracts appear to be equated with the studio's interest and not with the artist's.

But do the studios impose handshake deals on artists? Given that they are so favorable to studios, the fact that oral contracts are prevalent in Hollywood suggests that they are indeed forced upon artists. There is no question that handshake deals are widely used. Charlton Heston famously boasted that he never signed a completed contract before beginning production on any of his more than sixty films.⁶² Even in modern times "[a]n agent may commit his client to a project, and the written contract may not be signed until the project has been completed."⁶³

When viewed in light of the highly competitive market for acting jobs, however, it should come as no surprise that even Charlton Heston would agree to work his entire career without a written agreement.⁶⁴ In

52. See ART LINSON, *A POUND OF FLESH: PERILOUS TALES OF HOW TO PRODUCE MOVIES IN HOLLYWOOD* 92 (1993).

53. See *supra* Part II.

54. No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994).

55. 197 P.2d 580 (Cal. Ct. App. 1948).

56. See *supra* Part II.

57. No. B154280, 2003 Cal. App. Unpub. LEXIS 1782 (Ct. App. Feb. 25, 2003).

58. See *supra* Part II.

59. 187 P.2d 474 (Cal. Ct. App. 1947).

60. *Id.* at 488-89.

61. See *id.* at 479.

62. Charlton Heston, *Of Trust, Manners and How Hollywood Works*, L.A. TIMES, Apr. 12, 1993, at F5.

63. LITWAK, *DEALMAKING*, *supra* note 34, at 251.

64. See Heston, *supra* note 62.

Hollywood, “[i]f you argue, you get a reputation for being obstreperous, and you will be replaced”⁶⁵ Because oral agreements are “so commonplace in Hollywood that few players ever even consider walking out on one,”⁶⁶ an actor who refused to work under an oral agreement might well be unable to find a job. In such an environment it is plain to see why artists are willing to work with only a handshake deal: they have no choice.

B. A Star Is Born

The disparity in bargaining power, although more prevalent among unknown actors, still exists for those actors who have achieved “star” status. As proof of the numerical differential, one need only look at the sheer number of so-called “movie stars” on the market. Kim Basinger, for example, is only thirty-seventh on the list of female actors when ranked by total box office sales.⁶⁷ She drops to fifty-eighth on the list of female actors in a starring role when ranked by average box office gross sales, and to fifty-ninth on the list when narrowed to movies released in the 1990s,⁶⁸ the period during which *Boxing Helena* was produced. While Basinger’s box office rankings by no means prove the availability of comparable actors to the producers of *Boxing Helena*, they cast doubt upon the utter exclusivity of her services.

Although the presence of a superstar in any motion picture may increase the chance of the movie’s success, this name recognition alone does not necessarily level the bargaining power disparity. The argument against the proposition that even stars have diminished bargaining power is two-pronged: the first is based on the concept of predicted box office value, and the second is based on the high salaries stars command.⁶⁹

Because stars generate speculative financing based on their predicted box office success,⁷⁰ it might appear that they are able to negotiate more

65. LITWAK, DEALMAKING, *supra* note 34, at 163.

66. Giordano, *supra* note 19, at 297.

67. *Top Actress by Total Box Office Gross of All Movies*, Movie Times, at <http://www.the-movie-times.com/thrsdir/actors.mv?actress+ByTG.html> (last updated July 5, 2002) [hereinafter *Top Actress by Total Box Office*].

68. *Top Actress by Avg Box Office Gross of Movies in Role*, Movie Times, at <http://www.the-movie-times.com/thrsdir/actors.mv?actress+ByAGS.html>; *Top Actress by Avg Box Gross of All Movies in the 90s*, Movie Times, at <http://www.the-movie-times.com/thrsdir/actors.mv?actress+ByTG.html>.

69. See LITWAK, DEALMAKING, *supra* note 34, at 13–14.

70. *Setting the Pace*, HOLLYWOOD REPORTER (Feb. 5, 2002), at http://www.hollywoodreporter.com/hollywoodreporter/search/article_display.jsp?vnu_content_id=1429527.html [hereinafter *Setting the Pace*].

favorable employment terms, and therefore must have at least equal bargaining power with the studios and producers. "Major studios are usually more comfortable with important stars in their films as a way of verifying decisions on the green lighting of production budgets."⁷¹ Perhaps that is why actors are routinely ranked according to their box office value.⁷² In addition, to raise money to make a film, the producers often engage film distributors to advance money to produce the film in exchange for the exclusive right to distribute the finished movie.⁷³ "[H]istorically, attaching star power to a film is a key piece of the puzzle for companies and individuals that finance pictures through presales."⁷⁴ According to David Dinerstein, Co-President of Paramount Classics, "[i]n this day and age, when you . . . are selling international rights, you have to sell a star in the film."⁷⁵

There is reason to doubt, however, whether a star's box office value guarantees the success of the film. Renowned director Sidney Lumet disagrees with the view that a star's name on the marquee is a predictor of the film's success:

I don't know what makes a hit. I don't think anyone does. It's not the stars. My own movie *Family Business* starred Dustin Hoffman, Sean Connery, and Matthew Broderick. It died. So did Hoffman's and Warren Beatty's *Ishtar*. Kevin Costner and Clint Eastwood in *A Perfect World* did no business, but Eastwood alone chalked up major grosses with *In the Line of Fire*. The inconsistencies of box office grosses in relation to stars are endless.⁷⁶

Producer Art Linson sides with Lumet on the issue: "While a movie is in production, it seems more exciting to have a recognizable name. Once the movie is completed, however, it only matters if it is good."⁷⁷ Thus, a star's box office value may not be so predictable.

Nor is it clear that box office value levels out the bargaining power disparity. Because a star's box office value can be unpredictable, and because even stars have to compete for roles,⁷⁸ one cannot assume that box

71. *Id.*

72. See, e.g., *Top Actress by Total Box Office*, *supra* note 67.

73. LITWAK, *DEALMAKING*, *supra* note 34, at 15.

74. *Setting the Pace*, *supra* note 70.

75. *Id.*

76. SIDNEY LUMET, *MAKING MOVIES 198-99* (1995).

77. LINSON, *supra* note 52, at 100.

78. See Weinstein, *supra* note 43.

office value allows a star to dictate the terms of her employment. In addition, presales are possible even without a big star. In *Basinger*, for example, Main Line was still able to receive *some* foreign guarantees once Basinger departed, albeit at a reduced amount.⁷⁹ Thus, a star's box office value does not necessarily enable a star to negotiate better terms or equalize the difference in bargaining power between the star and the studio.

It should also be noted that an artist's agent or manager arguably makes up for some of this bargaining power differential, particularly for well-known or influential agents and managers. Indeed, "[a]gents today are among the most powerful people in the entertainment industry. They handle every facet of their clients' careers and represent everyone from the artists to their employers. Because of the experience and influence of agents, entertainers trust their agents' judgment and often develop close relationships with them."⁸⁰ However, once a relationship has been established with a powerful agent, the artist still may have a lack of bargaining power, because an agent's "underlying confidence comes from knowing that if one of their clients dries up they can always get another one."⁸¹ Often "[t]he attitude of some agents is to grab as much as you can when the client is hot, because who knows if you will be representing him two years from now."⁸² Furthermore, the best-known agents may represent more than one famous actor who may end up competing for the same starring role.⁸³ Thus, there is a serious question whether a top agent's bargaining power necessarily transfers to his clients. What is clear, however, is that the artist could use the extra bargaining power.

It must also be conceded that, in addition to the stars' box office value, the high salaries stars command are evidence that they can negotiate for more favorable terms of employment. "Because the studios compete so heavily for the services of a small pool of stars and big-name directors, the price of these commodities has risen dramatically."⁸⁴ However, stars make up only a fraction of all union actors.⁸⁵ Thus, even if we remove the stars from the equation, the overall picture certainly seems to suggest, not surprisingly, that the Hollywood market is bloated with artists seeking to

79. McLaughlin, *supra* note 3, at 123.

80. Stephen P. Clark, *Main Line v. Basinger and the Mixed Motive Manager: Reexamining the Agent's Privilege to Induce Breach of Contract*, 46 HASTINGS L.J. 609, 628 (1995).

81. LINSON, *supra* note 52, at 35.

82. LITWAK, *DEALMAKING*, *supra* note 34, at 14.

83. Giordano, *supra* note 19, at 308.

84. LITWAK, *DEALMAKING*, *supra* note 34, at 5.

85. *See* McNary, *Bitter Pill*, *supra* note 42.

make their fortune.

C. *The Critic*

The bargaining power argument presented here is definitely not without its critics. For instance, Giordano attempts to refute the proposition that artists have unequal bargaining power.⁸⁶ He starts with the assertion that artists “simply lack the downside risk that studios cannot avoid” and claims that this negates any bargaining power disparity.⁸⁷ But while it is true that the movie business is risky, the studios have “devise[d] complex schemes to reduce the financial risks of moviemaking,” including the use of presale finance agreements and outside investors.⁸⁸ Studios are run by executives whose main motivation is avoiding risk, and they clearly have the means of doing so at their disposal.⁸⁹

Moreover, when viewed in light of the scarcity of acting jobs, the argument that actors lack the downside risk becomes logically suspect. “In the creative community, actors have the worst lot. It is often said that they are always waiting to be invited to the party. They cannot perform their craft unless a director casts them in a role. They have little control over their careers.”⁹⁰ Actors are therefore almost powerless in securing their own employment. Both in the negotiation process and after a handshake deal has been broken, it is difficult to see why the loss of a scarce job on which an actor was relying would not present a downside risk.

Even assuming that Giordano’s argument is true where the studio decides to honor a handshake deal it has already made, it fails to consider the effect of unequal bargaining power before any deal has been struck. He seems to be grounded upon his assumption that if the studio decides not to produce a picture, actors “get paid whether or not a project . . . is even released.”⁹¹ When a production gets canceled, he says, “[s]tudios . . . are in the hole, as they have to finance everything that has taken place up to the point at which a project is discontinued.”⁹² During the negotiating process, however, studios are free to break off talks and move on to the multitude of other actors with relatively no penalty. Because jobs are so scarce, an actor

86. See Giordano, *supra* note 19, at 300 (arguing that studios do not have a bargaining power advantage).

87. *Id.*

88. LITWAK, DEALMAKING, *supra* note 34, at 5.

89. See *id.* at 5–7 (discussing studio executives’ risk aversion and their ways of it).

90. *Id.* at 191.

91. Giordano, *supra* note 19, at 300.

92. *Id.*

negotiating for a job simply cannot do the same.⁹³ Moreover, as the cases examined in Section II demonstrate, even when an oral agreement is reached, the assumption that the studio will actually honor it is suspect. Thus, the assertion that actors lack the downside risk is open to serious question.

Still, Giordano argues that the huge financial risk assumed by the studios is not offset by any similar risk taken by the artist, and therefore “[r]equiring a studio to commit to a project is not analogous to requiring an actor to do the same.”⁹⁴ He asserts that a studio should be able to cancel a production since the “decision most likely reflects the studio’s informed opinion that it cannot make a profit by following through on its intentions.”⁹⁵ His inference is that, because the studios are taking the financial risk, they should be allowed to break their agreements, since they are doing so based on their assessment of that risk.

This financial risk argument has two problems, however, and each must be looked at separately. First, there are certainly reasons unrelated to profitability for why a studio might decide not to move forward on a project. For example, when a team of executives in charge of production at a studio changes, the new executives often “pull the plug” on any projects that were initiated by their predecessors, starting fresh with their own ideas.⁹⁶ This would seem to cast doubt on Giordano’s assertion that studios only break their agreements based on financial considerations.

Furthermore, even if Giordano’s financial risk proposition were assumed to be true, would it really excuse the studios from honoring that commitment? After all, isn’t the purpose of contracts to allocate risk? If studios can be excused from oral agreements because of their risk, as he suggests, it would obviously render the value of the handshake agreement worthless for the artist. A handshake deal literally would not be “worth the paper it’s written on.”⁹⁷ Thus, while Giordano disagrees with the bargaining power argument, his reasons simply do not support his conclusion that the studios and producers should be excused from their oral agreements.

93. See *supra* Part III.A (discussing the numerical disparity between artists and studios).

94. Giordano, *supra* note 19, at 300.

95. *Id.*

96. See generally LINSON, *supra* note 52 (citing as examples the “[h]eadlines . . . FOX CLEANS HOUSE, GLICKSBURG AND MYER ARE OUT, TWO PICS CANCELED”).

97. McLaughlin, *supra* note 3, at 102.

IV. WRITTEN CONTRACTS: DON'T QUIT YOUR DAY JOB

Having identified Hollywood's reliance on handshake deals and the disparity of bargaining power associated with them, it becomes important to highlight the advantages that a regime of written agreements might bring to the equation. In order to demonstrate the benefits of moving to a system of written contracts in the movie industry, it is necessary to identify the functions fulfilled by formal, written contracts. Formal contracts fulfill four important, interrelated functions: evidentiary, cautionary, channeling, and signaling.⁹⁸

A. Clue

The "evidentiary" function is the one commonly thought of in reference to a written contract; it is "evidence of the existence and purport of the contract, in case of controversy."⁹⁹ Simply put, written contracts prove the existence of an agreement where no such proof might otherwise be available. This function can be particularly useful in Hollywood, because "when a dispute over . . . a handshake deal erupts, and the only written evidence, if any, consists of a few ambiguous letters or short-form 'deal memos,' it may be difficult to prove who is correct."¹⁰⁰ Obviously, where there is a final, written, signed contract, there is seldom a controversy over whether a contract exists.¹⁰¹ For this reason, entertainment attorneys know that "it is usually advantageous to have an agreement in writing, if only for the sake of creating evidence."¹⁰²

Such evidence is often invaluable in an industry that is "extremely volatile, risky, and beset with problems."¹⁰³ Furthermore, in an environment where anyone can call himself a producer, people routinely use "smoke and mirrors and gossip and innuendo . . . to generate the illusion that they have something desirable."¹⁰⁴ For these reasons, parties are hesitant to commit until they are sure a project is really going to happen.¹⁰⁵ Written contracts are thus helpful because they relieve the

98. See CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 110–11 (4th ed. 1999) (quoting Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–04 (1941)).

99. McLaughlin, *supra* note 3, at 105 (internal citations omitted).

100. Spillane, *supra* note 6, at 15.

101. See *id.* at 16.

102. LITWAK, DEALMAKING, *supra* note 34, at 17.

103. *Id.* at 1.

104. *Id.* at 254.

105. See *id.* at 13.

parties from worry about whether a deal is real or not. Moreover, even when everyone's intentions are legitimate, there are "many reasons why, despite [the filmmakers'] great efforts and talent, [they] may not succeed in getting the [film] produced."¹⁰⁶ For example, an actor around whom the project is based might pull out because the producers fail to "secure financing, or obtain the right co-star, or attract a studio-acceptable director."¹⁰⁷ Written agreements can provide evidence of whether everyone is indeed committed or not.

The evidentiary function of written contracts also serves to avoid undue confusion or surprise by clarifying or specifying contractual terms, particularly where what is agreed to in the beginning changes drastically over the course of the production. For example, the script is generally always in flux and "often changed, even ruined, by those with more clout."¹⁰⁸ "When a director or star comes aboard, they often want to change the script."¹⁰⁹ Furthermore, even after everyone has agreed upon a final script, the film may change due to the editing process. What is eventually seen by the public depends upon factors such as the angle of the shot and the lighting, the focus and the zoom, and most of all the editing.¹¹⁰ Producer Sidney Lumet notes that the "editor, the director, and the cameraman . . . [are] the only ones who know everything that was shot in the first place."¹¹¹ And, as Lumet learned in the days before he could demand full creative control over his movies, "[o]nce the studio puts its hands on a picture, there's no way of knowing what will finally emerge."¹¹²

These changes can sometimes *materially* alter the terms of an artist's employment, regardless of the intent of the parties.¹¹³ Nudity on film serves as perhaps the best example. When performing a nude scene, an actress may not even know exactly what nudity will "emerge"¹¹⁴ until she actually sees the completed film. As an example, Sharon Stone claimed she did not realize the director of *Basic Instinct* was filming the infamous, fully-lit, frontal view of her naked crotch until she saw the finished film at

106. *Id.*

107. *Id.*

108. LITWAK, *DEALMAKING*, *supra* note 34, at 162.

109. *Id.*

110. *See* LUMET, *supra* note 76, at 155.

111. *Id.*

112. *Id.* at 153.

113. *See generally id.* at 153 (explaining that a "two minute" portion of film may wind up unrecognizable).

114. *See id.*

the premiere.¹¹⁵ Although the director of the film disputed her claim,¹¹⁶ Stone's reaction to the scene reinforces the notion that nudity is perhaps the most material aspect of an actor's agreement to perform. "Actors are very different about love and sex scenes. Some shy away from them."¹¹⁷ Indeed, in the *Basinger* case, Kim Basinger "refused to participate in the project solely because she "was concerned about the amount of unnecessary and gratuitous nudity in the picture."¹¹⁸ Thus, it is clear that nudity can be a material factor of an actor's employment.

Because nudity is so often material to the terms of employment, SAG has adopted several requirements so that these terms will be well-defined.¹¹⁹ For instance, SAG requires that actors be notified in advance of their interview for employment if any nudity or sex acts are expected in the role, and gives the performer the right to have a person of his or her choice present during the audition.¹²⁰ More importantly, SAG has adopted several *written contract requirements* for nudity on film in order to further protect its members from surprises, such as the rule that a performer must give written consent prior to appearing in a nude scene.¹²¹ "Such consent must include a *general description as to the extent of the nudity and the type of physical contact* required in the scene."¹²² In addition, no nude still photography may be taken without the performer's written consent.¹²³ Given that application of the SAG rules would appear to have invalidated any handshake deal that existed in *Basinger*, at least with respect to the nudity content, it is unclear why Basinger did not make that argument. However, the rules highlight the special nature of nudity on film, and they demonstrate how written agreements protect actors from the constant and often *material* changes that take place in Hollywood.

115. See Paul Morley, *Aiming Thigh High*, SUNDAY TIMES, Mar. 21, 1993; see also *Basic Instinct*, Barnes and Noble.Com, Reviews, at <http://video.barnesandnoble.com/search/product.asp?wrk=3619588.html> (last visited Feb. 13, 2003).

116. See Jim Slotek, *Instinct for Controversy: Hollow Man Director Paul Verhoeven Upfront About Nudity*, TORONTO SUN, Aug. 2, 2000, available at http://www.canoe.ca/JamMoviesArtistsV/verhoeven_paul.html (last visited Feb. 14, 2003).

117. LUMET, *supra* note 76, at 65.

118. Giordano, *supra* note 19, at 293.

119. Screen Actors Guild Codified Basic Agreement of 1995 for Independent Producers § 43.

120. *Id.* § 43.A.

121. *Id.* § 43.D.

122. *Id.* (emphasis added).

123. *Id.* § 43.C.

B. One False Move

The “cautionary” function refers to the fact that signing a written document acts as a “check against inconsiderate action.”¹²⁴ It serves as a deterrent to those who have not considered the consequences of making the agreement,¹²⁵ something that might certainly be of help in the film business. By way of example, Kim Basinger withdrew from *Boxing Helena* because, after “lengthy negotiations and alleged oral agreements,” she finally decided there was too much gratuitous nudity in the film.¹²⁶ Had she been required to sign a written contract spelling out the terms of her employment, it would likely have caused her to consider those terms more thoroughly, and she might have made the decision to withdraw before the studio deemed her to be committed to the project. This “cautionary” aspect of written contracts would likely prevent many such disputes in the film business.

Next, there is the “channeling” function of written contracts.¹²⁷ The use of a written contract “furnishes a simple and external test of enforceability.”¹²⁸ Basically, a written contract makes it much easier for the judge to determine whether the agreement is enforceable or not, and is likely to save judicial resources and costs in the event of a controversy.¹²⁹ A look at the cases presented in Section II makes it clear that such disputes do arise in Hollywood. If enforceability of a performance contract were predicated upon the existence of a written memorandum, then judicial enforcement would be made simple: no memo, no contract. Thus, both the cautionary and the channeling functions provide benefits to the film business that handshake deals do not.

C. Signs

Finally, there is the “signaling” function of written contracts.¹³⁰ Simply put, a written memorandum helps to “signal” to all parties that the negotiations are over and the final terms have been reached.¹³¹ In the

124. KNAPP, *supra* note 98, at 110.

125. *See id.*

126. Ainbender, *supra* note 24; *see also* Giordano, *supra* note 19, at 293.

127. *See* KNAPP, *supra* note 98, at 110.

128. *Id.*

129. *See id.*

130. *See generally id.* at 111 (explaining the necessity of “some external mark which will signalize the testament and distinguish it from non-testamentary expressions of intention”).

131. *See id.*

planning stages of a motion picture, the requirements for each participant are often in flux as the parties engage in creative development.¹³² This is very important, since the law is well-established that “[w]here a person offers to do a definite thing and another introduces a new term into the acceptance, his answer is a mere expression of willingness to treat [sic] or it is a counter proposal, and in neither case is there a contract.”¹³³ An agreement therefore “cannot be mutual unless all parties agree upon the same thing in the same sense.”¹³⁴ In applying this logic to performance contracts, it follows that the introduction of new terms and requirements for the artist’s employment would necessarily preclude the formation of a contract until the artist agreed to them. Because the script and cast are often constantly changing in the early stages of a production,¹³⁵ the signaling function of written agreements is therefore a crucial indicator that the parties have agreed on the terms and are actually bound.

This is particularly important given that in the early stages of the production the parties are likely to engage in “precontractual reliance.”¹³⁶ An explanation of this term is helpful:

Before a contract is made, there is generally a period (sometimes a long one) in which the parties negotiate the contract’s terms. During this period, the parties might make reliance expenditures—investments that will raise the value of performance if the contract is formed but will have a lesser value otherwise. For example, in negotiating an employment contract . . . the employer may prepare tasks and facilities for the potential employee.¹³⁷

The disparity in the possible results of such actions (i.e. either higher or lower value of the investment depending on whether a contract is formed or not) creates a financial risk inherent in precontractual reliance.¹³⁸ The risk is that, after making expenditures in reliance upon the future agreement, the “other party may walk away from negotiations without having incurred any cost,” leaving the party that made the expenditures at a

132. See LINSON, *supra* note 52, at 91–92.

133. *Apablaza v. Merritt & Co.*, 1 Cal. Rptr. 500, 505 (Ct. App. 1959).

134. *Id.*

135. See LINSON, *supra* note 52, at 91–92.

136. Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 J. LEGAL STUD. 423, 424 (June 2001).

137. *Id.* at 423.

138. See *id.*

loss.¹³⁹

In the film business, parties often make decisions based on precontractual reliance. For instance, the artist may engage in precontractual reliance by “turn[ing] down competing offers,” putting the actor at risk of remaining unemployed in a market where jobs are scarce.¹⁴⁰ In addition, producers often use precontractual reliance in obtaining financing for a film by indicating a star’s interest in the project.¹⁴¹ A problem can arise, however, if producers confuse a star’s “interest” in the project with her “commitment” to the project. Without a written contract, the producer and actor may differ over the extent to which they feel bound.¹⁴² *Main Line Pictures, Inc. v. Basinger*¹⁴³ once again provides an excellent example of this problem and how the signaling function of a written memo requirement would have been invaluable. Had either the producers or distributors insisted on getting Basinger’s agreement to perform in writing, it would have been clear to all parties that Basinger was committed, and the film could have been financed by the original presales amount. This is why experts advise that a “film investor should never accept oral assurances from a producer or distributor,” but should demand written assurances instead.¹⁴⁴ Requiring the artist and the studio to commit in writing eliminates the possibility that the parties will later differ on whether an agreement was actually in place.

V. THE USUAL SUSPECTS: ARGUMENTS FOR RETAINING HANDSHAKE DEALS ARE WEAK

The reasons most often given for justifying Hollywood’s reliance on handshake deals merge into two key *uniqueness* arguments: 1) the business is unique due to its speed and complexity; and 2) there is a unique honor code in Hollywood that binds the various parties to their oral agreements.¹⁴⁵ To see why these arguments are both suspect, it is important to examine

139. *Id.* at 432.

140. *See id.* at 423.

141. *See Setting the Pace*, HOLLYWOOD REP. (Feb. 5, 2002) at http://www.hollywoodreporter.com/hollywoodreporter/search/article_display.jsp?vnu_content_id=1429527.html.

142. *See supra* Part II (discussing *Main Line Pictures, Inc. v. Basinger*, No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994)).

143. No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994).

144. Mark Litwak, *Minimizing the Risk for Motion Picture Investors*, 24 L.A. LAWYER 18, 22 (Apr. 2001).

145. McLaughlin, *supra* note 3, at 103; *see infra* Parts V.A–B.

each separately.

A. *The Fast and the Furious*

First, it is argued that the business is somehow unique because it involves too many players and moves too fast to require written contracts.¹⁴⁶

The practice of relying on oral agreements seems to have developed because filmmaking is a unique creative venture that requires participation from so many disparate players: producers, directors, actors, writers, financiers, cinematographers, editors, wardrobe personnel, and production designers. The widespread belief is that stopping to haggle and document the details of every relationship will cause a project to lose steam.¹⁴⁷

Indeed, many feel that if written documents were required in Hollywood, then “nothing would get done in this town.”¹⁴⁸

Surely there is no doubt that the moviemaking business is sophisticated, complicated, and full of expensive transactions. As for equipment, “[e]ven a small, low-budget picture . . . need[s] . . . one grip truck, one electric truck, one prop truck, one generator truck, one make up and hair truck, and two campers”¹⁴⁹ “Because of overhead and union contracts, the costs for major studios far exceed those for small independent companies The *average* studio cost for each film, without including charges for prints and advertisements, exceeds \$20 million.”¹⁵⁰ Litwak places the price tag even higher for the typical studio film, at “about \$50 million to produce and another \$31 million to market.”¹⁵¹ These costs include the “hiring of crews, the building of sets, the expenses for locations, the renting of sound stages, the manufacturing of wardrobe, the casting of actors” and so on.¹⁵² One gets the idea.

Given these huge budgets, the potential profits, and the enormous amount of labor and resources involved in making a film, Hollywood should adopt the view of written contracts that other professions hold:

146. See McLaughlin, *supra* note 3, at 103.

147. Giordano, *supra* note 19, at 297.

148. *Id.*

149. LUMET, *supra* note 76, at 133.

150. LINSON, *supra* note 52, at 94.

151. LITWAK, DEALMAKING, *supra* note 34, at 2.

152. LINSON, *supra* note 52, at 115.

Business people in any industry can take certain simple precautions in their dealings to spell out in writing the circumstances under which the parties will or will not have an agreement and whether it will be written or oral. Most persons outside the entertainment industry (and those to whom they report) would be aghast to commit services, goods, or substantial sums of money to a transaction without taking such minimal precautions.¹⁵³

Because handshake deals are often considered “naive and neglectful,” many outside Hollywood are often shocked to learn that such a “sophisticated and complicated business would so widely rely on them for large transactions.”¹⁵⁴

Not only is the business complex, but “[d]ealmaking has become more complex as well.”¹⁵⁵ Initiating a motion picture production often consumes countless hours of negotiation between directors, producers, actors, and those financing the film.¹⁵⁶ Director Billy Wilder lamented late in his career that he spent “80% of the time making deals, and 20% making pictures.”¹⁵⁷ Because of the dauntingly large endeavor of producing films, it is unsound business practice for the parties involved not to reduce to a written contract the countless hours spent in the negotiation process.

Furthermore, though the film business undoubtedly involves many players, this does not mean the movie business moves “too fast” to use written agreements. In *Main Line Pictures, Inc. v. Basinger*,¹⁵⁸ for example, the actress first read the *Boxing Helena* script and indicated her interest in January of 1991.¹⁵⁹ Basinger’s agent confirmed the star’s intention to appear in the film in late February.¹⁶⁰ In fact, it was not until June 10 that the star expressly reneged on her oral agreement to star in the movie.¹⁶¹ Why this period of more than five months was not enough time to have a written contract executed for Basinger’s performance is not clear, since the actress apparently had enough time to execute a contract with a

153. Spillane, *supra* note 6, at 16.

154. See McLaughlin, *supra* note 3, at 103.

155. LITWAK, DEALMAKING, *supra* note 34, at 11.

156. See *id.*

157. *Id.* (quoting the late director Billy Wilder).

158. No. B077509, 1994 WL 814244 (Cal. Ct. App. Sept. 22, 1994).

159. See Giordano, *supra* note 19, at 288.

160. *Id.*

161. See *id.* at 289.

new talent agency during the same period.¹⁶²

B. *A Few Good Men*

The other key argument for Hollywood's reliance on oral contracts is that the practice is safeguarded by a unique "honor code" that has been built up in the movie business:

The top Hollywood dealmakers are sometimes referred to as "players." These agents, attorneys, studio executives and producers regularly conduct business with one another and observe an unwritten code of behavior. While players are admired for being tough and shrewd, dishonesty is not respected.

For an industry with a reputation for chicanery, outsiders may be surprised to find that many players take great pride in keeping their word. They make oral agreements with one another that are relied upon¹⁶³

The thrust of this argument is that this trust-based honor system ruins the reputation of parties who break them, eliminating the need for written contracts.¹⁶⁴ "Just as one could destroy another's career by taking her to court for breaching a contract, one could destroy another's professional reputation by spreading word that he is unreliable and dishonest."¹⁶⁵

The suggestion that this honor code extends to studios, however, seems to defy logic, given the disparity in bargaining power between artists and employers. In an environment where there are roughly 90,000 union actors competing for the chance to secure paid employment,¹⁶⁶ and only about eleven studios willing to provide jobs,¹⁶⁷ can anyone seriously argue that studios who break their oral contracts will somehow find themselves unable to find actors to hire? Unfortunately, Giordano gives no practical evidence to support his contention that this honor system works to "compel [studios] to *act* more virtuous" toward artists.¹⁶⁸

162. See generally *id.* at 288 (describing how Basinger was able to change agents in less than two months during the same time period).

163. LITWAK, DEALMAKING, *supra* note 34, at 251.

164. See Giordano, *supra* note 19, at 298.

165. *Id.*

166. McNary, *Bitter Pill*, *supra* note 42.

167. See CinemaScreen, *Distributors and Production Companies*, at <http://www.cinemascreen.co.uk/directory/default.asp?c=6.html> (last visited Feb. 13, 2003).

168. See Giordano, *supra* note 19, at 298.

Other evidence, however, indicates that, rather than acting virtuous, these dealmakers have developed tactics and strategies that can be downright nasty, particularly for the "uninitiated."¹⁶⁹ Incredibly, they routinely use tactics such as hype, exaggeration, stressing the positive, ignoring the negative, high-balling, low-balling, creating confusion, uncomfortable silence, outright intimidation, irrational behavior, and even feigning insanity.¹⁷⁰ Bizarre as they may sound, these "shenanigans" are apparently acceptable under the Hollywood honor code.¹⁷¹

Furthermore, whether this code gives studios an incentive to honor their handshake deals with artists is open to question.

If the studio backs out [before the talent has been hired], no real harm is done. It will be quickly forgotten by everyone but the writer. . . . Once the studio obligates to a star or director . . . [however,] it is too late to turn back. Suddenly, from nothing, tens of millions of dollars are at stake, and if that money is lost, it will be remembered.¹⁷²

Thus, contrary to suggestions of an honor code binding them to their oral agreements, studios would seem to have an incentive to remain uncommitted for as long as possible.

C. Judge Dread

Interestingly enough, a federal court has already rejected the argument that moviemakers are unique and should therefore be exempt from written contract requirements.¹⁷³ In addition, several other judges and a jury have shown their distaste for handshake deals. By looking at each of these developments in turn, a judicial disfavor for Hollywood's use of oral contracts becomes apparent.

The Ninth Circuit Court of Appeals has already rejected the argument that the film business is somehow too unique to use written contracts.¹⁷⁴ In *Effects Associates, Inc. v. Cohen*,¹⁷⁵ movie producer Larry Cohen argued that he should be exempt from a federal statute requiring transfers of

169. See LITWAK, DEALMAKING, *supra* note 34, at 251.

170. See *id.* at 251-53 (discussing the different tactics and strategies used for negotiations in the film business).

171. *Id.* at 251.

172. LINSON, *supra* note 52, at 92.

173. *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 556-57 (9th. Cir. 1990).

174. *Id.*

175. 908 F.2d 555 (9th. Cir. 1990).

copyright to be in writing.¹⁷⁶ Cohen had commissioned some film footage to be produced by a special effects company for his low-budget horror movie entitled *The Stuff*.¹⁷⁷ When he saw the footage, Cohen claimed he was completely dissatisfied and refused to pay the full price, even though he included the footage in his finished film.¹⁷⁸ As a result, the special effects company sued Cohen, claiming that his use of the footage was a copyright infringement since there was no written transfer of copyright as required by federal law.¹⁷⁹ In his defense, Cohen argued that it was customary in Hollywood to rely on handshake deals rather than written contracts, stating that “moviemakers are too absorbed in developing ‘joint creative endeavors’ to ‘focus upon the legal niceties of copyright licenses.’”¹⁸⁰

In an opinion that could almost be described as *Intro to Written Agreements*, Judge Kozinski seemed to scold the movie industry for its reliance on handshake deals.¹⁸¹ First, the judge stated that “[c]ommon sense tells us that agreements should routinely be put in writing.”¹⁸² He continued, stating:

This simple practice prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it’s harder to backtrack on a written contract than on an oral one.¹⁸³

In rejecting the argument that moviemakers are “too involved” to use written contracts, Judge Kozinski stated that the “writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so.”¹⁸⁴

Judge Kozinski then added some of his trademark humor in indicating

176. See *id.* at 556; see also 17 U.S.C. § 204 (2001) (requiring that all transfers of copyright must be made in writing).

177. *Cohen*, 908 F.2d at 555–56.

178. *Id.* at 556.

179. See 17 U.S.C. § 204; see also *id.* § 106A(e)(1).

180. *Cohen*, 908 F.2d at 556–57.

181. *Id.* at 557.

182. *Id.*

183. *Id.*

184. *Id.*

his distaste for Hollywood's attitude towards the written contract. "It doesn't have to be the Magna Charta; a one-line pro forma statement will do."¹⁸⁵ After citing several other cases, the *Cohen* court concluded that "[t]he Supreme Court and this circuit, while recognizing the custom and practice in the industry, have refused to permit moviemakers to sidestep . . . [the] writing requirement."¹⁸⁶ Thus, *Cohen* was a flat rejection of the argument that Hollywood's uniqueness should somehow exempt filmmakers from using written contracts. The Supreme Court denied review of this decision.¹⁸⁷

In addition, there is reason to believe that other courts and judges view moviemakers' reliance on the oral contract with dismay.

In 1988, Warner [Brothers] sued comedian Rodney Dangerfield because of his alleged breach of an oral contract to appear in the motion picture *Caddyshack II*. When the matter first came to court, Los Angeles Superior Court Judge John Zebrowski delivered a blistering rebuke to Warner Bros.' attorneys [for their failure to produce written contracts].

Judge Zebrowski has since been elevated to California's Second District Court of Appeal, and he may well be one of the justices who hears any Warner appeal from the *Coppola* verdict. Judge Madeleine I. Flier, the trial judge in *Coppola*, is clearly among the judges who share Justice Zebrowski's point of view. Before submitting *Coppola*'s tort claims to the jury, Judge Flier granted the director's motion for summary judgment ruling as a matter of law that there was no contract between Warner Bros. and *Coppola*. Why not? Because a draft "long-form" agreement had never been signed.¹⁸⁸

Given the judicial reluctance to accept the informalities of handshake deals, some have argued that Hollywood desperately needs to change its ways. It has been suggested that the "view about the importance of having a signed contract should be duly noted by transactional attorneys in the motion picture industry, because *that opinion is widely held by the California judiciary*."¹⁸⁹ Similarly, "the [*Coppola*] jury awarded the

185. *Cohen*, 908 F.2d at 557.

186. *Id.* at 558.

187. *Danforth v. Cohen*, 498 U.S. 1103 (1991).

188. Joseph D. Schleimer, *Coppola Verdict's Impact on Studio/Talent Talks*, 14 ENT. L. & FIN. Sept. 1998, at 1.

189. *Id.* (emphasis added).

punitive damages because the message . . . [they wanted] to send is that Hollywood has to revise the way it does business. It seems that at least some judges and jurors feel oral contracts are unsatisfactory tools for doing business, even in the entertainment industry.”¹⁹⁰ These comments identify a trend among judges and juries to treat Hollywood handshake deals with “contempt.”¹⁹¹ It logically follows that the more skeptical judges and juries are about enforcing oral agreements, the more risk the industry parties will assume in relying on them.

VI. WE DON'T NEED NO STINKIN' BADGES: THE CASE FOR LEGISLATION

Rather than allow judges to slowly carve the oral contract out of the motion picture industry through the use of the judiciary, the California legislature (and those of other film industry states, such as New York) should do so by statute. California already protects parties from being bound to unconscionable contracts, and it allows tailoring of this protection to particular industries.¹⁹² Furthermore, California has already singled out certain types of performance artist contracts for special treatment, including those for actors and directors.¹⁹³ A look at the existing law will give a framework for changes that could be easily made to end Hollywood's reliance on oral contracts.

A. *The Sting*

To begin with, California law protects parties who have been ensnared by unconscionable contracts.¹⁹⁴ By enacting California Civil Code section 1670.5, the California legislature has given courts the power to declare a contract or any provision within it unconscionable as a matter of law.¹⁹⁵ In interpreting section 1670.5, courts have repeatedly found contracts to be unconscionable where there is, among other factors, an inequality of bargaining power resulting in a lack of meaningful

190. McLaughlin, *supra* note 3, at 110–11 (internal quotes omitted).

191. *Id.* at 110.

192. *See* CAL. CIV. CODE § 1670.5 (West 1985). “The basis test is, whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.” *Id.* cmt. 1.

193. *See* CAL. CIV. PROC. CODE § 526(b)(5) (West 1979 & Supp. 2003) (allowing injunction in contracts where promised service is of a unique or intellectual character that gives it particular value); *see also* CAL. CIV. CODE § 3423(e) (West 1985 & Supp. 1997).

194. CAL. CIV. CODE § 1670.5(a).

195. *Id.*

negotiation.¹⁹⁶ Thus, in California, both the legislature and the courts have moved to alleviate disparity in the bargaining power between contracting parties.

Not only does existing law allow for protection against unequal bargaining power, but there is also precedent for singling out particular industries for protection. In making its determination under section 1670.5, a court may consider the “commercial setting” of the challenged contract.¹⁹⁷ This language reflects “legislative recognition that a claim of unconscionability often cannot be determined merely by examining the face of the contract, but will require inquiry into its setting, purpose, and effect.”¹⁹⁸ Tailoring any new law to the needs of the motion picture business would certainly be to consider the “commercial setting” as allowed by California law.¹⁹⁹

More pointedly, there is precedent in California for granting movie artists special treatment by requiring their contracts to be in writing.²⁰⁰ For instance, there are two California laws that prohibit the granting of an injunction to enforce personal service contracts unless the contracts were made in writing.²⁰¹ The laws both apply to the “rendition of personal services from one to another where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value.”²⁰² In other words, where a dispute arises over an unwritten agreement for personal services in California, a party can sue for damages, but cannot seek the equitable relief of an injunction.²⁰³

Caselaw makes it clear that the language of these laws applies to acting and similar activities. In *Paramount Pictures Corp. v. Holden*,²⁰⁴ the studio sued actor William Holden, claiming he had defaulted on an oral agreement to appear in motion pictures.²⁰⁵ Holden denied that he had entered into the oral contract.²⁰⁶ The court declined to decide upon the

196. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982).

197. CAL. CIV. CODE § 1670.5(b).

198. *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 148 (Ct. App. 1997) (quoting *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 512 (Cal. 1985)).

199. *See* CAL. CIV. CODE § 1670.5(b).

200. *See* CAL. CIV. PROC. CODE § 526(b)(5); *see also* CAL. CIV. CODE § 3423(e) (West 1997).

201. *See id.*

202. *Id.*

203. *See id.*

204. 166 F. Supp 684, 686 (C.D. Cal. 1958).

205. *Id.*

206. *Id.*

existence of the handshake deal,²⁰⁷ and refused to issue an injunction preventing Holden from performing for a third party.²⁰⁸ In interpreting one of the two aforementioned laws requiring written agreements, the *Holden* court held that “even those courts which enforce contracts for personal services will not compel *acting* or activities of similar character.”²⁰⁹ Clearly then, California law already singles out actors and similar artists by requiring their service contracts to be in writing. Therefore, if lawmakers are persuaded that artists have a lack of bargaining power with respect to the studios,²¹⁰ ample precedent no doubt exists for using the law to specifically alleviate this disparity.

B. A Civil Action

Having determined that there is precedent for legislation requiring written agreements, what remains is to look at real means of doing so. One way to accomplish this goal would be for California to add such personal service contracts to the list of agreements falling within California Civil Code section 1624,²¹¹ otherwise known as the Statute of Frauds. The law prevents parties from making false assertions about oral contracts.²¹² It does so by declaring certain types of contracts unenforceable unless evidenced by a signed, written contract.²¹³ The “[p]urpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring . . . more reliable evidence of some writing signed by the party to be charged.”²¹⁴ The reasoning for the statute’s application is that “[a]s a matter of policy, the understanding of the parties should be definite and clear, and should not be left to mere conjecture.”²¹⁵

There is indeed precedent for singling out particular industries within the Statute of Frauds. California’s current statute, like most others, specifically includes contracts for real estate.²¹⁶ The policy reason behind

207. *Id.* at 687 (stating that a determination of whether a contract existed should not be made in a preliminary proceeding).

208. *Id.* at 694.

209. *Id.* at 691 (emphasis added).

210. *See supra* Section III (discussing the bargaining power disparity between artists and studios).

211. CAL. CIV. CODE § 1624 (West 1985 & Supp. 2002).

212. *See Realty Corp. of Am. v. Burton*, 327 P.2d 948, 957 (Cal. Ct. App. 1958).

213. *See* CAL. CIV. CODE § 1624.

214. *Sousa v. First Cal. Co.*, 225 P.2d 955, 961 (Cal. Ct. App. 1950).

215. *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1322 (Cal. 1995) (citations omitted).

216. *See* CAL. CIV. CODE § 1624.

application in this particular industry is that it requires specific protection against “[v]agueness of expression, indefiniteness and uncertainty.”²¹⁷ Similarly, the motion picture industry is quite susceptible to these same problems.²¹⁸ The legislature could thus add to California Civil Code Section 1624 new language bringing motion picture personal service contracts within the statute that would be in line with California’s existing law. Such a change might at first seem radical, but as discussed above, it would be a simple solution that would solve the problems arising from the handshake deal in Hollywood.

Not only should the California legislature work to alleviate the informalities of Hollywood contract deals, but the Screen Actors Guild should take steps to alleviate the problems that arise when using oral agreements, similar to what it has done with respect to nudity.²¹⁹ To do so, it could require its members to have signed, written contracts in order to bring a claim of action against a producer or studio. Such a requirement would still allow performers to be employed without a written contract, but they would do so at their own risk, and would not be protected should a dispute over the existence or terms of the agreement arise.

Since this would still leave its members expose to risk, however, SAG could in the alternative require all of its performers’ contracts to be in writing *unless there were extenuating circumstances*. This would allow for exceptions where a written contract truly was not possible due to time constraints or other logistical problems. Finally, the Guild could amend its rules to require all SAG-franchised agents to obtain written, executed deal memos prior to indicating assent on behalf of their clients. Each of these steps would likely go a long way toward ending Hollywood’s addiction to the use of handshake deals, at least with respect to artists.

VII. THAT’S A WRAP!

Although they may be firmly entrenched in the business of making movies, oral agreements can be problematic to all of the parties involved. The disparity in numbers between actors and those who hire them creates an environment that allows studios to view artists as “replaceable.” The studios then use this disparity to impose handshake deals upon artists who have few or no other sources of employment. These handshake deals favor the studio over the artists who, due to a lack of alternatives, have no power

217. *Rivers v. Beadle*, 7 Cal. Rptr. 170, 172 (Ct. App. 1960).

218. *See supra* Part IV (discussing the motion picture industry’s volatile, changing nature).

219. *See supra* Part IV (discussing SAG’s requirements for roles involving nudity).

to demand a written agreement. In addition, handshake deals place a particular burden on the frustrated courts that are forced to sort them out later. Thus, Hollywood presents a classic case in which employers use unequal bargaining power to impose an unfavorable term, the use of a handshake deal, upon employees who have no choice but to accept it.

For these reasons, industry lawyers should adopt a practice of requiring signed, written contracts between artists and producers. To further this end, the Screen Actors Guild should adopt a rule that all performer contracts must be made in a written memorandum. Most importantly, the California legislature should work to make handshake deals a thing of the past by placing them within the existing Statute of Frauds. Until these changes are made, the wave of resentment over handshake deals is only likely to grow. Perhaps the world outside Hollywood will soon join in with the voice of Judge John Zebrowski, who so famously rebuked the movie industry lawyers from his bench.²²⁰ As Judge Zebrowski exclaimed at the Hollywood attorneys: "Aren't you people ever going to come in front of me with a signed contract?!"²²¹

*Rick Smith**

220. Schleimer, *supra* note 188.

221. *Id.* (emphasis added).

* This Comment is dedicated to the good Lord, my Mom, my Dad, my brother Tad, my cousin Chris, the Eastsiders, Jessica, and everyone at Rehash Records LLC. You know who you are. Special thanks to Professor Sean M. Scott for her unbounded knowledge of contracts at 8:00 a.m. (not 8:01) in the morning! This Comment also goes out to those who face stumbling blocks in pursuit of their dreams, but who persevere and remain faithful until the end.

