Copyright, Employment, and Creative Labour / Matt Stahl, UWO

“the work site is where we often experience the most immediate, unambiguous, and tangible relations of power that most of us will encounter on a daily basis.”¹

Introduction

As institutions that exclude and hierarchize, copyright and employment are social problems; where they intersect, complications multiply. Copyright allocates property-like rights to some persons and dispossesses or excludes others; employment assigns rights to command to some persons and finds in others a duty to obey; neither, however, is unmixed. Each of these institutions constructs boundaries and hierarchies; each depends on state enforcement of stratum and status differences, on state regulation of transactions between strata, and on cultural discourse for the legitimation of the different statuses it (re)produces. Because they are the products of historical contests among employers, employees, trade associations, lawmakers, and other interested parties, these boundaries change over time, continually readjusting power relationships, realigning and re-dividing actors, redistributing political resources among them.

This essay explores the intersection of these problematic institutions in the relations of creative work in the cultural industries, firms whose primary activities have to do with the production and marketing of media texts.² It focuses on flashpoints in the history of talent relations: struggles over labor law as it regulates individual star employment and contract negotiations between cultural industries employers and unionized creative labor. These histories provide lines of critical questioning appropriate to unfolding tensions in the commercial production of culture. As the digitalization of the entertainment industries proceeds, longstanding scarcity-based business models lose relevance and pride of place. As revenues from unit sales of royalty-generating products like CDs and DVDs stall or dwindle, entertainment industry firms increasingly perceive the basis of profitability in control of rights and licenses, rather than in individual unit sales. One effect of these new emphases is firms’ increasing demands for comprehensive labor and property rights assignments by their employed and contracted producers of creative works. These two business tendencies—toward increased control of workers and of (intellectual) property rights—promise ongoing and future contests, as the Writers Guild strike of 2007-08 shows.

Today, scholars from numerous disciplines take increasing interest in cultural production; their differing approaches illuminate contrasting questions and priorities. Critical legal studies of media and cultural production have long approached copyright as a problem, identifying ways in which it intervenes in the production and circulation of media texts.³

Media studies and communication scholars have contributed much to this tradition⁴; lately, these scholars have begun to focus more on creative labour, examining the unusual social relations of creative workplaces and the occupational identities of writers, singers, artists, journalists, musicians, television producers and other such workers.⁵ Here too, legal and legal-historical research is making significant contributions.⁶

However, with few exceptions⁷, employment rarely receives the kind of critical attention given intellectual property. Exemplary research has targeted exploitive “bad work,” sometimes invoking the “liberal-democratic”⁸ context of such work, understood to set limits on such work’s exploitive badness. While these analyses are rich and rigorous, they tend to downplay challenges posed by political theorists⁹ or by critical political economists¹⁰, who suggest that exploitation does not analytically exhaust the politics of work. This essay draws on all these perspectives, accepting that creative work often does offer opportunities for autonomous, self-actualizing, and solidaristic work.¹² In the examples explored below, this essay approaches employment as a site not only of routinely exploitive “bad work,” but of outright domination and dispossession, into which copyright matters introduce unusual complications.

The intersection of copyright and employment raises the stakes and highlights problematic aspects of both authorship and work. The main principle here is “work for hire”—copyright’s operationalization of a Lockean conception of labor power’s

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⁴ E.g., Kembrew McLeod, Owni
⁷ E.g., Fisk ibid, Greenfield & Osborn ibid.
¹² See Banks 2007 and Hesmondhalgh and Baker 2010, generally.
alienability. Into the realm of cultural creation, work for hire installs the logic of Locke’s famous assertion that “the Grass my Horse has bit; the Turfs my Servant has cut become my Property…. The labour that was mine…hath fixed my Property in them.”

The labour of his horse and his servant are equally the employer’s; the two beings are instruments through which he has acted; they are non-responsible conduits through which he has fixed his property in that grass and those turfs; they are members of a body politic who enjoy no democratic rights.

The introduction of intellectual property into employment also admits contrasting logics into that scene, providing rhetorical resources and sometimes opportunities for workplace resistance to the logics and imperatives of employment. In the cultural industries in particular, longstanding Romantic conceptions of authorial autonomy and proprietorship present obstacles (or at least friction) to employers’ maximization of rights over creative labor and property. Employers routinely allow creative employees more discretion, autonomy, and flexibility in their work, even while making extraordinary demands on productivity. As Fisk shows, some employed creative workers have been able to counter and limit the alienating effects of work for hire through their exceptional collective bargaining achievement of private intellectual property rights. Routinely in some fields, work for hire’s dispossessive effect is symbolically ameliorated through employers’ acknowledgement of creative workers factual if not legal authorship, often demonstrated in employers’ support for awards ceremonies like the Oscars and the Annies (the animation industry’s award ceremony).

In the conclusion I draw on the sociology of labor to argue that these special features present creative work as a limit case that highlights core elements of work in market society. Where workers’ particular and personalized contributions to commercially successful popular cultural texts are legible, and especially where they appear to contribute to that success, the dispossession of those workers appears to require more explicit justification and regulation than that of workers in more mundane circumstances requires. This principle is common to both kinds of example, as well as to work of more mundane character, and it reveals creative work’s politics of control and property in sociological terms.

Contracts

Cultural industry firms demand copyrights so that their licenses have maximum value and minimal competition. Control over copyright, in turn, requires control over labor and workplace creation: star creators are subject to long-term, restrictive, exclusive contracts; other creators to regimes of work-for-hire or market-based pressures toward maximal

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13 Fisk 2003; 2009.
15 Ryan (1992 at 40) and Banks (2007) refer here to the contradictions of the art-capital relationship.
16 Hesmondhalgh 2007 at 6.
18 Fisk 2011.
Employers achieve control of labor and property through the intersecting instruments of employment, independent contracting, and copyright, which are themselves continually adjusted by lobbying and regulatory capture, and mediated by the market power of the different players. These forces interact at the point of the contract for creative labor, with very different outcomes at the levels of individual and collective bargaining. Individuals’ bargaining power, even that of stars, is rarely great enough to overcome norms of dispossession; collective bargaining power supports surprisingly strong claims of non-star employed creators.

The contract performs the work of commodifying and instrumentalizing labour along Lockean lines, but it does more than that: it creates regimes of private rule. In the disciplines of labour studies, critical political economy and democratic political theory, the idea that employment contracts dissolve democratic rights is less controversial than in the social sciences. Political theorist Carole Pateman writes that “a form of government that is seen in democratic countries as ‘intolerable’ in governing the state is seen as desirable in enterprises.” She maintains that “The enterprise, like the state, is a political system where power is exercised over the governed”\(^{20}\); indeed, typical capitalist workplaces are distinctly autocratic systems. From this perspective, the degrees of worker participation characteristic of creative work in the cultural industries are extraordinary. Practices, experiences, and rhetorics of vernacular authorship in cultural industry creative labor relations contribute to tensions that highlight problems of governance and the relations of property that go with them. The virtue of democratic-theoretical perspectives for the study of copyright and employment is that they render workers’ surrendering of rights to control and ownership—and the socio-political implications thereof—more legible and controversial than do the more hegemonic social-scientific approaches to cultural creation. These perspectives help connect the concerns of critical scholars of copyright to broader themes of work, dispossession, and subordination in contemporary society.

The examples that follow suggest that the heightened role of copyright in creative cultural-industry employment affects the social and political relations of work at different sites in very different ways.\(^{21}\) On the one hand, cultural industry firms maximize their control of the creation and exploitation of the intellectual properties to which stars’ names and appearances give market value. A different set of issues face rank-and-file creative workers such as musicians, actors, writers, directors and others who do not enjoy name recognition outside the confines of their industrial ecology, whose individual

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21 The social-psychological and emotional or “affective” implications are also of great significance in that they reflect people’s experiences of creative cultural industry work, and these experiences and their representation in turn have a lot to do with people’s motivations and expectations regarding these forms of labor. See e.g., David Hesmondhalgh and Sarah Baker, “Creative Work and Emotional Labour in the Television Industry,” *Theory, Culture & Society* 25(7–8): 97–118.
reputations are not great enough to lift them much above union minimums. The unions controlling much of this kind of employment in major cities like New York and Los Angeles have been able to achieve unusual levels of worker participation in firm governance and revenues. For one stratum of creative workers, the logics and imperatives of entertainment industry intellectual property relations has highly restrictive implications; for another, the situation is almost reversed.

Jane Gaines writes that “It is the transferability of rights that is the basis of the mass marketing of the human image and the human voice in the communication industries.” The questions this line of ongoing research poses include: On what terms will those rights be transferred? What kinds of circumstances shape the differing resources available to parties to those transfers? Who benefits and who loses in the determination of those terms? What roles do historical conditions play in individual and collective negotiations over terms?

1: **Stars’ contracts with cultural industries firms.**

Star contracts in the film and recording industries demonstrate, among other things, how important it is for copyright-dependent entertainment industries to secure control over the labor of creative workers on a long-term, potentially interminable basis. The star contracts of Hollywood’s 1930s-40s “studio system” era offer an ur-example of how a firm dependent on steady flows of potentially valuable new copyright materials may seek to cement its power over the labor of its most valuable star workers. Stars present an articulation of cultural and economic value, a “marketing strategy,” to cite a significant contribution to this line of analysis. The long-term option contract, which predominated during this period, enables the employer to secure the services of a new or rising actor at a low initial rate and is constructed such that, at any of a series of predetermined points, the employer may either exercise the option or terminate the contract. These contracts are typically written so that only the employer has an option; these are “take-it-or-leave-it” deals in which the only option available to employees is to work as directed or be in violation of the contract.

**Movie star contracts**

The laws of the state of California, home to the Hollywood studio system and to much entertainment industry activity, have come into play in the establishment of norms of entertainment industry contracting; arguments over some of those laws bring some of the imperatives of entertainment industry employment relations into focus. The so-called “seven year rule”—a section of the labor code dating back to the late 19th century—limits the enforcement of employment contracts to that eponymous statutory maximum. This rule was at the center of a court battle between the film star Olivia De Havilland and her

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25 CA Labor Code section 2855
employing studio, Warner Bros. Pictures. Her contract, like most during this period, had a clause providing that time spent “under suspension” during the life of the contract could be tacked on to the end of the contract’s term. Over the course of her seven year option contract, De Havilland had spent 25 weeks under suspension, some by her choice, some by the studio’s. When the studio attempted to enforce the contract beyond its seventh anniversary in order to claim the 25 weeks’ labor they considered they were owed, De Havilland and her lawyer sued under the seven year rule.

The published ruling of the Appellate court decision is striking in its “absolute” reading of the statute and its explicit conceptualization of employment as an object of public policy. However, the unpublished ruling of Los Angeles Superior Court Justice Charles S. Burnell in favor of De Havilland penetrates the option contract in a startling way that is not reflected directly in the Appellate decision. Burnell J dilates on the threat embedded in Warner Bros. Pictures’ claim on seven years of actual service (i.e., seven years’ worth of work days, as opposed to an end of their rights to the star’s labor on the seventh anniversary of the contract). He finds that the studio’s construction of the seven year rule could “easily result” in a contract like De Havilland’s “being indefinitely extended, even to the point of constituting life bondage for the employee.” Under the terms of such a contract,

Roles might be assigned to an artist which she could not conscientiously portray. It would even be possible, if an artist should incur the ill will of a producer, to require her to portray roles which would entirely destroy her popularity and value as an artist, and because of her refusal to demean herself, suspensions and elections to extend the term of the contract would prevent her from ever seeking other employment. She might suffer long periods of illness and the life of the contract might at the option of the producer be extended, as has been said, indefinitely, thus precluding her from ever working for any other employer. It was to prevent such a condition of peonage or serfdom that the statute was enacted.

Justice Burnell’s declaratory judgment and opinion focus closely on the relations of domination and subordination into which employers and employees contractually place themselves. Burnell J’s stark understanding of the disability of the employee under contract sensitizes him to the need for the exercise of the “police powers of the state” in protecting the rights of employees against the private power of employers, and to the potentially perverse results of unlimited freedom of contract between manifestly unequal parties. My argument is that the benefits attaching to employer (or “corporate”) authorship shape a business logic that manifests in employers’ powerful impetus to

28 Ibid at 668.
29 Judge Charles S. Burnell, Opinion (Civil Case number 487685, 1944, Los Angeles County Archive) at 7–8.
30 Ibid. 14.
31 Ibid. 7.
control the labor of those workers whose names and faces confer value on copyright works.

The seven year rule was codified during a period when employment’s allocation of rights and obligations was quite different and when conditions of labor shortage predominated in California, and must have been understood as a reasonable protection for workers whose employers had significant incentives to hold them under contract for long periods. 32 In a context where economic growth outpaces population growth, contractually assured rights in people’s labor and to their obedience are very valuable. While the relationship of economy and population in California had changed markedly by the 1930s, the Hollywood film studios shared something with the state’s early employers: they depended heavily on and were in competition for the labor of a scarce population, in this case bankable stars—a small number of actors whose names and likenesses constitute much of the value of the firms’ intellectual property.

Today, few workers have to worry about being held to overlong contracts. Yet some copyright-dependent entertainment industries still rely on their capacity to capture the labor and output of creative workers through long-term contracts. The recording industry of the late 20th and early 21st century poses particularly striking examples.

**Recording contracts**

Four decades after the unambiguous resolution of the De Havilland suit, another group of Hollywood employers was surprised by a similar lawsuit, this time by Grammy-winning singer Olivia Newton-John, seeking release from her contract with MCA Records. The Appellate court ruling here was as decisive, if not as lyrical, as those of the De Havilland courts: it reaffirmed the right of employees to freedom from contract at seven years. 33 This 1979 decision inspired numerous other artists to pursue their own freedom under the seven year rule, provoking panic on the part of record companies. 34 Seeking at the time to recover from a precipitous decline in profits, the industry was reorganizing itself around a new blockbuster model that would intensify companies’ dependence on the new releases and back catalog of shrinking numbers of bigger stars. In this context, the ability to hold such artists to effectively interminable contracts was of paramount importance, and the Recording Industry Association of America (RIAA) lobbied the California legislature to carve out recording artists from the seven year rule’s protection. 35 They were concerned that they would be unable to reap “full benefits” from stars’ existing and potential intellectual property. The RIAA’s 1985 position paper argued that

> current law in California has been used as a weapon by prominent, highly successful recording artists to force their record company employer/financiers.

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34 Stahl forthcoming.

35 From a distance, recording artists appear as independent contractors. Indeed, federal copyright law appears to treat them as such. Yet their numerous struggles with record companies in courts and before legislators show that they are employees under state law (Stahl, forthcoming).
into renegotiating contracts under circumstances in which the record company is not even sure it will get the benefit of the new bargain; and yet the alternative to renegotiation is that the artist will sit out the balance of his contract term with impunity. The artist is usually able to do this economically because he can and does earn substantial sums from ‘live’ entertainment tours and personal concert appearances. The record company, which has made substantial investments in building the artist’s career and enhancing his fame and reputation, is deprived of the full benefits of its bargain just at a point where the investment seems about to payoff.\(^{36}\)

In 1987, after two years of deliberation, and despite opposition from labor unions, prominent artist attorneys and artists, and many lawmakers, the bill proposed and sponsored by the trade association became law. Because the industry is so heavily concentrated in California, that state’s law radiates into other jurisdictions; ever since the carve out, North American recording artists have been subject to contracts that are only effectively terminable by the employer.\(^{37}\)

The struggles over contract duration in the film and recording industries in the 20\(^{th}\) century support the argument that the business logics and imperatives of intellectual property ramify on contact with star employment. The intersection and interaction of these two institutions in particular contracts at particular moments in the development of copyright-dependent entertainment industries produces intensifications and complications that are dramatically heightened relative to other employment relationships, even while they do not depart in any essential or qualitative way from the lineaments of employment as a modern liberal institution.

2: Collective bargaining and employees’ quasi-proprietary rights.

A second type of intersection of employment and intellectual property is evident in the development and evolution of the profit-sharing systems achieved by Hollywood entertainment unions. Starting in the early 1940s, these unions achieved rights to extra-salary residual (or re-use) payments for their members, related to the market performance of the media products to which they contributed. Today “residuals are foundational to the Hollywood labor market.”\(^{38}\) Whereas stars are subject to extremely restrictive, rights-obliterating contractual terms, strata of highly skilled, highly organized, and highly motivated actors, musicians, and writers—Hollywood’s “creative craftsmen”\(^{39}\)—have achieved significant rights of control over and property in their work. These gains have advanced the democratization of work in these fields, giving these employees not only voice but agency, meaningful participation in the governance of, and disposition of the property resultant from, their work. First pursued by radio voice talent and musicians as a

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\(^{36}\) Gang, Tyre, and Brown and JLA Advocates, “Background Paper in Support of Senate Bill 469 (Dills)” (Industrial Relations Committee Bill File SB 469, California State Archive) at 4.

\(^{37}\) See Stahl, forthcoming, for more thorough discussion.


means of stemming workers’ technological displacement, these regimes were soon understood rather to be based on creative workers’ de facto authorship. This section sketches the emergence of these regimes in the American broadcasting industry, prior to their (re)conceptualization as rooted in creative workers’ factual authorship.

Technological displacement in media work

The incremental but significant and durable democratization of their work by Hollywood’s creative craftsmen developed out of experiences of occupational peril and alienation. Early instances of such traumas include the introduction and adoption first of sound film and then of network radio broadcasting technologies. Exhibitors’ and broadcasters’ rapid implementation of recording and playback technology steeply reduced the need for new musical and dramatic performances (new employment, in other words), producing immediate imbalances in markets for actors’, singers’, and musicians’ labor. Sound film’s proliferation in the late 1920s, for example, reduced North American musicians’ employment by around 80 per cent.40 Less studied (in connection with technological displacement) but also significant is the adoption of recording technologies by newly expanding radio networks in the 1930s, which further eroded musicians’ employment, as well as that of radio actors and singers. Transformations such as these provided context, impetus, and conceptual frameworks for creative workers’ mobilization and solidarity around innovative tactics such as the residual right.

Immediately on the heels of sound film’s devastation of the market for musicians’ labour, network broadcasting threatened the employment of musicians still enjoying employment in many of America’s radio stations. This form of broadcasting, whereby signals generated in one region could be distributed to radio stations around the country, enabled the centralization of production and reduced the dependence of local stations on living musical and voice performers. Perceiving that employers were technologically ratcheting up the productivity of their labor in unfair and perilous ways, the American Federation of Musicians grew alarmed anew. In 1933 union leaders asserted that

Records, electrical transcriptions, remote control and chain hook-ups have all contributed toward the complete elimination of the musician or the causing of each man employed to replace hundreds of men, just as in the case of the sound picture…. The possibilities of destruction of employment in all industries where sound reproduction is involved [are] simply appalling[;] a single station may one day service the entire country.41

From the perspective of the AFM, in other words, the application of new recording and broadcast technologies increased the productivity of musicians’ labor with the effect of eroding opportunity, and increased the value of musicians’ labor without passing on the benefits of that increase to the musicians who did manage to stay employed. As the demand for labor dwindles, so also does the power of workers to exercise or demand rights against their employers. In political terms, the field of professional musical performance was becoming rapidly de-democratized. However, despite the union’s

41 Kraft, *Stage to Studio* at 82-83.
eventual adoption in the early 1930s of this analysis and critique of technological displacement, it would not be until the 1940s, under the leadership of a new and much more pugnacious president, that the AFM would put this analysis into operation, undertaking major labor actions as a tactic in arresting or slowing their loss of employment and labor market and workplace power.\textsuperscript{42}

It was instead radio actors and singers who would first assert and achieve rights to control and benefit from the production and use of recordings of their performances, under the selfsame threat outlined above by the AFM. The American Federation of Radio Artists (AFRA, to become AFTRA upon their organization of television performers) was formed in 1937, quickly becoming the “autonomous union of all radio talent except for musicians.”\textsuperscript{43} The first AFRA contract was ratified that December; it covered talent at Chicago’s WCFL (a station owned by the Chicago Federation of Labor), putting strict limits on working hours and instituting a 29% raise.\textsuperscript{44} Negotiations with broadcasters that were not owned by labor groups began almost immediately, and transcriptions were one of the central issues in the nearly four years it took for the union and industry to agree on a unified contract for all broadcasting in the United States.

A transcription is a recorded radio program distributed in disc form to radio stations. In the late 1920s, independent transcription producers had begun to supply recorded programming to radio stations in areas of the country not well served by the networks. Advertisers embraced transcriptions, which enabled them to target local and regional markets, supplementing their national network campaigns. So also did smaller radio stations, whose audiences often preferred pre-recorded to live programming, and, “[b]y the end of 1930 [approximately] 75 percent of the nation’s radio stations used transcriptions,”\textsuperscript{45} mainly produced and distributed by independent companies. A number of factors propelled the networks themselves to get into the transcription business in the ensuing years, and by the late 1930s AFRA had become convinced that transcriptions posed a dire threat to the employment of radio talent.\textsuperscript{46}

AFRA responded to this threat with demands for additional compensation for the use of transcriptions. In the early 1930s, network programming took two forms: sustaining (the bulk of network programming at the time), and sponsored (or commercial) programs. The former were prestigious programs aimed at satisfying the public service mandate of private US broadcasters, and did not directly produce revenue for affiliated stations; the latter involved higher-waged talent, and were often produced with or even by advertisers; these programs provided income directly to stations. Until 1941, when AFRA pushed for a single radio contract, these two areas of activity were negotiated separately. The union tackled the less-complicated field of sustaining programs first, achieving a contract in

\begin{footnotesize}
\begin{enumerate}
\item Robert A. Gorman, \textit{The Recording Musician and Union Power: A Case Study of the American Federation of Musicians}, 37 SOUTHWESTERN L.J. 697 (1983); Kraft \textit{ibid}.
\item “Single Union to Embrace Radio Talent is Organized; Actors Equity Withdraws,” \textit{Broadcasting}, August 1, 1937, at 12.
\item \textit{Ibid}.
\item Alexander Russo, “Defensive Transcriptions: Radio Networks, Sound-on-Disc Recording, and the Meaning of Live Broadcasting” \textit{The Velvet Light Trap} 54 (2004), 4-17 at 8.
\item Russo 2004.
\end{enumerate}
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August of 1938 that required additional compensation for the broadcast of transcriptions.⁴⁷

AFRA then turned its attention to commercial programs, which would be much more complicated and take considerably longer because they involved bigger amounts of money and a group of employers that included not only the networks but also the transcription companies and some of the country’s biggest advertising agencies. Taking an aggressive position from the January, 1939 start of the commercial contract negotiations, the union made it clear that the “[t]hreat of a nationwide strike of radio talent that might conceivably throw every commercial network program off the air” was a real possibility. AFRA was in a powerful position: shutting down commercial program production would most likely result in increased production of sustaining programs, providing more work for striking commercial talent. Moreover, Actors Equity and the Screen Actors Guild promised not to work struck programs.⁴⁸ With this threat looming, the networks conceded, and within a month virtually all sustaining and commercial network programming was covered by another two-year contract.

**Transcription code.**

Although contracts covering both sustaining and sponsored program production had been achieved in 1938 and 1939, it was not until May of 1941 that the union and employers arrived at an acceptable set of terms regarding the general use of transcriptions. Negotiations were complex not only because there were several kinds of employers at the table but also because of the union’s intention to cover sustaining and commercial broadcasting under one contract. AFRA aimed to peg sustaining wage scales at the higher commercial baseline and sought to enable the “withdrawal of all [radio] talent save musicians,”⁴⁹ posing an even more potent strike threat to employers. The first four months of 1941 involved numerous meetings of AFRA and the various employers of talent; finally, in mid-May, all parties agreed on contractual language covering residual payments for the re-use of transcriptions, known from that moment on as the Transcription Code.

According to the Code, transcriptions used by stations of greater than 1000 watts are defined as Class A transcriptions, “[c]ustom-built transcriptions used by one sponsor only once in each town or city, for any product of the sponsor or an affiliated company.” The Code requires that “In the event [a] sponsor repeats the use of the same [Class A] recording, the artist shall receive for each repeated use, a fee equal to the compensation paid for the original performance.…” Class B includes “[o]pen-end transcriptions which may be used on any number of stations not over 1,000 watts in power”; re-use payment obligations are not triggered by such uses. However, should such an open-end transcription be used by a station of greater than 1,000 watts, it would be reclassified as Class A. In such cases the artists were to receive additional compensation to make up the difference between the Class B wages originally paid and those required for artists.

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⁴⁹ “AFRA Contract Covers Broad Scope” *Broadcasting* November 1, 1940 at 28.
involved in the production of Class A transcriptions, as well as Class A payments for repeated uses.

As do many other collective bargaining agreements, the 1941 AFRA contract codified significant degrees of union control over the terms and conditions of members’ conveyance of labor to their employers. Any increase in worker control represents an instance of democratization, an incremental contribution to the ongoing modern project of “reducing subordination and creating a more democratic society” in private and public realms. 50 However, what appears as a turning point in American labor relations was the union’s achievement of rights to additional compensation based on the subsequent use of their recorded performances which would impose limits on, and defray the social costs of, technological displacement of workers.

In the mid-1940s, by means of extraordinary and well-studied labor actions, the American Federation of Musicians would themselves achieve a thoroughgoing regime of residual rights in the re-use of their recorded performances. 51 Over the subsequent two decades so too would the Screen Actors Guild, the Writers Guild of America, the Directors Guild, and the numerous guilds affiliated with the International Alliance of Theatrical Stage Employees (IATSE) gain residual rights (although the rights of the IATSE guilds would take a different form 52). It is in large part these very systems of profit sharing (and the regimes of attribution that ground them 53) that have enabled Hollywood’s talent guilds to remain so effective and relevant in an era of widespread union decline. 54

In contrast, for example, to the later efforts of screen writers, 55 the early efforts of radio voice talent and then organized musicians toward residuals schemes were not driven by or expressed in terms of authorship or intellectual property. They were driven by those workers’ desire to protect their employment, social mobility, bargaining power, and social status in the context of rapid and widespread technological displacement. These efforts were very successful. I have briefly outlined the achievements of AFRA; with respect to the AFM, Kraft points out that in accepting contracts that gave the union the right to set conditions on the use of recordings, “recording companies had acquiesced in, even if they did not positively agree with, the principle that technological change imposed social costs that employers had a responsibility to share.” 56 Both AFRA and the AFM had acted against the technological evisceration of their occupational power and

50 (Pateman 2002, 22, quoted in Stahl, forthcoming)
53 Fisk 2011.
54 Paul and Kleingartner 1994; Fisk 2011. A broader account of the development of the residual right in Hollywood is an anticipated outcome of this research project.
55 Fisk, 2011.
56 Kraft, Stage to Studio, 160.
had achieved unprecedented degrees of participation in the governance and remuneration of their work.

Yet very quickly ideas of authorship and copyright—particularly conceptions of the nature of royalties—began to colonize what had begun as an effort of solidaristic resistance. While this is a topic of ongoing and future research, initial findings suggest that authorial ideologies—if not epistemologies—flow very easily into areas of social practice that could be and sometimes were otherwise conceived. Since the 1950s, understandings of residuals serving labor market functions or securing workplace rights have been effectively banished from Hollywood creative labor discourse.

**Conclusion**

The intersection of intellectual property and employment in the social relations of creative labour highlights, complicates, and intensifies problems of workplace autonomy and property that are familiar to most working people. The creative worker in the cultural industries thus poses a limit case of work in general, in whose struggles with employers and contractors can be seen tensions and dynamics that are characteristic of but obscured or less controversial in the run of routine labor.

This perspective is supported by an important insight from the sociology of labor. In theorizing findings from his ethnographic and comparative analyses of factory labor, Michael Burawoy writes that “capitalist control [demands] the simultaneous obscuring and securing of surplus….”57 The successful capitalist secures a surplus over input costs in the form of profits gained in markets. But, Burawoy argues, the successful governance of workers requires that the fact and/or nature of the surplus must be obscured. For maximally legitimate and effective control, workers’ direct understanding of how their labor participates in the production of surplus should be minimal. In most capitalist enterprise, Burawoy observes, the separation of conception from execution—the separation of planning, invention, design, and so on, from the often menial work of production or service—inhibits workers’ direct understanding. The role of a fast-food server may appear to its inhabitant to be only distantly related to the profits of the enterprise. This obscurity facilitates governance; perceiving little or no responsibility for the success of the enterprise, such workers likewise see little or no basis for participation in workplace decision making. However, Burawoy continues, “[t]oo little separation” of conception and execution “threatens to make surplus transparent”; it threatens to expose the contradiction between worker responsibility and the denial of worker participation, thus throwing traditional capitalist governance into question.58 In other words, where workers are able to see or hear their personal contributions as distinctive features of highly profitable—even long-circulating—copyright works, their consent to capitalist governance and property rights may be perturbed. Where there is too little separation of creative, authorial contributions from the work of production—where actors, singers, musicians, writers and others can perceive their contributions as defining elements of resulting cultural products—workers are less likely to accept managerial prerogative and

the duty to obey (as they are called in English and American law) as a fact of nature. That
is, they are more likely to seek to democratize their work by gaining increased control
over their labor and its products and participating in shaping enterprise activity.

This essay has suggested that bringing insights from other disciplines into dialogue with
those of critical legal and media studies can help expand our understanding and
appreciation of the social relations of commercial media production in market society.
These disciplinary frames challenge us to perceive employment as well as copyright as a
socially problematic institution that cannot operate in isolation from other such
institutions, and to see how social problems multiply and ramify where these institutions
intersect. Creative workers of the kind discussed here bring heightened, authorial
consciousness of the value of their work and its place in the systems that employ them, to
points of production characterized by employers’ contradictory requirements of control of
labor and ownership of intellectual property (on the one hand) and accentuated employee
creative autonomy (on the other). Creative workers in different positions find themselves
differently able to participate in the governance of and revenues associated with their
work; thus far, my research suggests that workers’ capacity to claim participation and
exercise control and ownership (or at least quasi-ownership) is not something easily
achieved through individual bargaining, that workers’ claims of rights of authority and
property are best supported by a credible and serious strike threat.