

1-1-2012

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Adriane Porcin

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Recommended Citation

Adriane Porcin, *Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry*, 35 HASTINGS COMM. & ENT. L.J. 1 (2012).

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol35/iss1/1

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Of Guilds and Men:

Copyright Workarounds in the Cinematographic Industry

by
ADRIANE PORCIN*

The motion picture industry utilizes a varied collection of more or less formal mechanisms for dealing with the collective nature of audiovisual works, ranging from collective bargaining to legal presumptions. What these instances of copyright workarounds have in common is that they are all about circumventing traditional notions of authorship (the right to be deemed the author of a work) and ownership (the right to exert control over a work). When considered from an international perspective, the cinematographic industry is fertile ground for an exploration of such mechanisms.

After a recitation of the Berne Convention, this paper will proceed to discuss countries where the Berne Convention has been applied to audiovisual works with drastically different results: France and the United States. From there it will retrace the history of the so-called Foreign Levies Agreement. This agreement illustrates the collision of the French and American copyright workarounds. It was born from, *inter alia*, a dispute between the Directors' Guild of America (DGA), the Writers' Guild of America (WGA) and several movie producers upon the collection and distribution of foreign levies to American authors. This study will then discuss the contractual

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agreements between collective management organizations and guilds, and delineate underlying issues of collective action in this context.

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“So when people ask why we writers call ourselves ‘labor,’ the easiest answer is that we don’t—the companies do. They demand that we be employees so that they can reap the full benefits of copyright exploitation, and that’s fine. Honestly.”¹

Our tale will start at the end of the story.

More precisely, our tale will start with the credits. TV series, documentaries, motion pictures, and animations all share one characteristic: after a long litany of names, they close with a statement regarding copyright. Such statements can take many forms and

1. Craig Mazin, *Who strikes? ‘Labor’ Because Studios Say So*, L.A. TIMES (Dec. 10, 2007), <http://www.latimes.com/business/la-op-dustup10dec10,0,4285139.story>.

shapes, but boil down to one main principle: whoever invested in the movie intends to obtain protection of their investment.

Julie Cohen contends that copyright “creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production.”² The story we will unfold will prove her both right and wrong. It is true that predictability is a sought-after side effect of copyright. However, it is also true that the structure of the international copyright system can defeat the best prepared. The parties concerned will, in turn, seek solutions around and outside copyright to devise sound and foreseeable legal constructs.

The motion picture industry, when considered from an international perspective, is fertile ground for an exploration of such copyright workarounds. From collective bargaining to legal presumptions, it presents a varied collection of more or less formal mechanisms dealing with the collective nature of audiovisual works. What these instances of copyright workarounds have in common is that they are all about circumventing traditional notions of authorship (the right to be deemed the author of a work) and ownership (the right to exert control over a work).

I. A (Not so Brief) Introduction

This introduction will open with a reminder of the Berne Convention and proceed to countries where the Berne Convention has been applied to audiovisual works with drastically different results: France and the United States. Part II will then retrace the history of the so-called Foreign Levies Agreement born from, *inter alia*, the discrepancies between the French and American copyright laws. From there, Part III will delineate underlying issues of collective action in this context.

A. The Berne Convention

Article 5 of the Berne Convention for the Protection of Literary and Artistic Works³ ensures that a foreign author based in a signatory

2. Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143 (2011).

3. Berne Convention for the Protection of Literary and Artistic Works art 5, Sept. 9, 1886, 1161 U.N.T.S. 30 (*Paris Act of July 24, 1971*, as amended on September 28, 1979) [hereinafter *Berne Convention*]. Article 5 provides that:

country can claim the same copyright protection as local authors, whether or not he enjoys protection in his own country. For example, since both the United States and France signed the Berne Convention,⁴ an American right-holder whose works are exploited in France can claim the same rights as French right-holders in France.

In addition to granting protection to foreign authors, the Berne Convention provides for minimum protection standards.⁵ Consequently, signatory countries are free to increase copyright protection through any mechanism of their liking. Therefore, the protection regimes for a given right can drastically vary from one State to another. This is precisely the case for ownership in motion pictures. Article 14 *bis* (2)(a) of the Berne Convention states that “ownership of copyright in a cinematographic work shall be a matter

“(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors (...).”

4. France signed the Berne Convention on September 9, 1886 and ratified it on September 5, 1887. The treaty entered into force on December 5, 1887. The United States joined the *Berne Convention* on November 16, 1988. The treaty came into force on March 1, 1989. For an up-to-date list of signatory countries of the *Berne Convention*, see *Contracting Parties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sept. 27, 2012).

5. *Berne Convention*, *supra* note 3, at 19: “The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.” *See also id.* at 20: “The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.”

for legislation in the country where protection is claimed.”⁶ Furthermore, the Berne Convention does not contain provisions regarding employers and employees. In short, signatory countries are free to craft specific authorship rules for motion pictures, and to assign ownership to whomever they see fit.⁷

B. Implementation of the Berne Convention

G rard Lyon-Caen notes there are two dominant conceptions of authorship in cinematographic works, which in turn impact the determination of ownership.⁸ On one side, some countries prefer a creator-based approach.⁹ On the other side, other countries emphasize the economic aspects of cinematographic production and vest copyright in the producer.¹⁰ This paper will limit its illustration to one example of each school of thought, starting with French copyright law as an example of the physical-person centered *droit d’auteur* system¹¹, and continuing with the American example of a producer-oriented copyright system.

6. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 128 (2d ed. 2006), stating that “[t]he inclusion of cinematographic works under the umbrella of the Berne Convention had long been the cause of considerable difficulty, both from a doctrinal and a practical point of view... Accordingly, there were many national differences in the treatment of cinematographical works, particularly in relation to the questions of authorship and ownership...The result was the adoption of a new conventional regime governing cinematographic works. This was embodied in article 14, which dealt with the rights of authors with respect to cinematographic reproduction and adaptations of their works, and a new article 14 *bis*, which dealt with rights in the cinematographic works themselves and the exploitation of these rights.” About the 1967 Stockholm Revision Conference, *see generally id.* at 120.

7. *Id.* at 7.32.

8. G rard Lyon-Caen, *Le cin ma dans la Convention de Berne* (Bureau international pour la protection des oeuvres litt raires et artistiques, 1960) at 9. *See also* RICKETSON & GINSBURG, *supra* note 6, at 365.

9. Lyon-Caen, *supra* note 8, at 11.

10. *Id.* at 10 (noting that this approach is not limited to copyright countries).

11. For a thorough study of the French framework for audiovisual works, *see* CHRISTINE HUGON, *LE R GIME DE L’OEUVRE AUDIOVISUELLE* (Litec, 1993).

1. *The French System: Presumptions as a Workaround*

a. Attribution of Authorship

Article 14 of the French *Loi n°57-298 du 11 mars 1957 sur la propriété littéraire et artistique*¹² (hereafter *Loi du 11 mars 1957*) introduced a presumption of authorship benefiting a list of physical persons involved in the making of the audiovisual work,¹³ now codified in article L. 113-7 C.P.I..¹⁴ It specifies that the physical person who directed the work is regarded as its author, and that the author of the script, the author of the adaptation, the author of the dialogue, the author of the soundtrack composed for the work, and the director are to be considered as authors in the absence of proof to the contrary.¹⁵

This position is consistent with article 14 *bis* (2) of the Berne Convention as well as with the European legal environment.¹⁶

12. *Loi n°57-298 du 11 mars 1957 sur la propriété littéraire et artistique*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE, [J.O.], 14 March 1957, p. 2723 [hereinafter *Loi du 11 mars 1957*].

13. For a detailed analysis of the presumption mechanism, see HENRI DESBOIS, LE DROIT D'AUTEUR EN FRANCE 147-61 (Dalloz, 3d ed. 1978).

14. *Loi n° 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE, [J.O.] 3 July 1992, p. 8801 [hereinafter *Loi du 1er juillet 1992*].

15. L. 113-7 C.P.I. :“Ont la qualité d’auteur d’une oeuvre audiovisuelle la ou les personnes physiques qui réalisent la création intellectuelle de cette oeuvre.

Sont présumés, sauf preuve contraire, coauteurs d’une oeuvre audiovisuelle réalisée en collaboration : 1° L’auteur du scénario ; 2° L’auteur de l’adaptation ; 3° L’auteur du texte parlé ; 4° L’auteur des compositions musicales avec ou sans paroles spécialement réalisées pour l’oeuvre ; 5° Le réalisateur.

Lorsque l’oeuvre audiovisuelle est tirée d’une oeuvre ou d’un scénario préexistants encore protégés, les auteurs de l’oeuvre originaire sont assimilés aux auteurs de l’oeuvre nouvelle” (emphasis added).

For a discussion of the choice of authors, see HUGON, *supra* note 12, at 97-103. For an empirical study of authors’ remuneration for TV broadcasting in France, see Françoise Benhamou and Stéphanie Peltier, *Le droit d’auteur, incitation à la création ou frein à la diffusion ? Une analyse empirique du cas de la création télévisuelle* 135:3 REVUE D’ÉCONOMIE INDUSTRIELLE 47, 51, 58 (2011).

16. The WIPO Copyright Treaty, 20 December 1996, 36 I.L.M. 65, was approved by the European Community, see Council Decision of 16 March 2000 on the Approval, on Behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty 2000/278/EC, 2000 O.J. (L 89) 6. Article 1(4) of the WIPO Copyright Treaty provides that contracting parties are to comply with articles 1 to 21 of the Berne Convention.

Indeed, in its recent *Luksan* decision,¹⁷ the European Court of Justice restated the European Community position on this question. In 1992, article 2(2) of *Directive 92/100/EEC on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property* provided that, “for the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.”¹⁸ This principle has been reaffirmed in subsequent pieces of legislation.¹⁹

b. Attribution of Ownership

In addition to article 14 provisions regarding authorship, article 17 of the *Loi du 11 mars 1957*,²⁰ now article L. 132-24 C.P.I.,²¹ framed the exploitation of cinematographic works. According to this article, any agreement between the authors and the producer automatically transfers to the producer all exclusive exploitation rights, meaning full control save a few exceptions.²² For example, the director’s rights are

17. *Martin Luksan v. Petrus van der Let*, Case C-277/10, Feb. 9, 2012, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119322&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=415563> (last visited Oct 15, 2012).

18. Now replaced by article 2(2) of EC, *Directive 2006/115/EC of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property*, 2006 O.J. L 376/28.

19. *Directive 93/83 of the Council of the European Communities of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission*, 1993 O.J. (L248) 1(5). See also *Directive 2006/116/EC of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights*, 2006 O.J. (L372) 2(1).

20. *Loi du 11 mars 1957*, *supra* note 12. For a detailed analysis of article 17, see DESBOIS, *supra* note 13 at 672-78. Article 17 was consolidated in article 63-1 by the *Loi n°85-660 du 3 juillet 1985 relative aux droits d’auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] 4 July 1985, p. 7495 [hereinafter *Loi du 3 juillet 1985*], see ANDRÉ LUCAS ET HENRI-JACQUES LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 726-31 (LexisNexis, 3d. ed. 2006).

21. *Loi du 1er juillet 1992*, *supra* note 14.

22. L. 132-24 C.P.I.: “Le contrat qui lie le producteur aux auteurs d’une oeuvre audiovisuelle, autres que l’auteur de la composition musicale avec ou sans paroles, emporte, sauf clause contraire et sans préjudice des droits reconnus à l’auteur par les dispositions des articles L. 111-3, L. 121-4, L. 121-5, L. 122-1 à L. 122-7, L. 123-7, L. 131-2 à L. 131-7, L. 132-4 et L. 132-7, cession au profit du producteur des droits exclusifs d’exploitation de l’oeuvre audiovisuelle.

Le contrat de production audiovisuelle n’emporte pas cession au producteur des droits graphiques et théâtraux sur l’oeuvre.

automatically transferred to the producer by contract, provided the agreement contains no clause to the contrary. In any case, the contract must determine compensation for the authors, based on each and every use of the work,²³ and has to specify, precisely and in writing, which elements are granted and which elements are withheld.²⁴

Henri Desbois reports that the initial wording of the provision presented by the French Parliament was very broad. Over the course of parliamentary debates, it was reduced to the rights necessary for the cinematographic exploitation of the audiovisual work.²⁵ According to Desbois, the default rule in the original 1957 law only allowed for a very restrictive use.²⁶ Nevertheless, the *Loi n° 85-660 du 3 juillet 1985 relative aux droits d'auteur et aux droits des artistes-interprètes, des producteurs de phonogrammes et de vidéogrammes et des entreprises de communication audiovisuelle*²⁷ (hereafter *Loi du 3 juillet 1985*) replaced the *droit exclusif d'exploitation cinématographique*, arguably limited to exploitation in movie theatres, by the *droits exclusifs d'exploitation de l'oeuvre audiovisuelle*, including all possible ways to make the movie available—television, cable, sale of videotapes.²⁸

Thus, the producer, albeit not deemed the author of the work under French law, is able to exert full control of all the rights necessary for a normal exploitation of the audiovisual work. The

Ce contrat prévoit la liste des éléments ayant servi à la réalisation de l'oeuvre qui sont conservés ainsi que les modalités de cette conservation.”

Article L. 132-24 CPI wording is, at best, confusing, see LUCAS & LUCAS, *supra* note 20 at 726, speaking of *malfaçon législative* (defective legislative work). For an illustration, see Cass. soc., 3 mars 2004, D. 2004.2494 (Annot. Jean-Luc Piotraut and Pierre-Jean Dechristé), R.T.D. Com. 2004 p. 726 (Annot. Frédéric Pollaud-Dulian).

23. L 132-25 C.P.I., formerly articles 26 and 35 of the *Loi du 11 mars 1957*, *supra* note 12, consolidated in article 63-2 by the *Loi du 3 juillet 1985*, *supra* note 20. See HUGON, *supra* note 11 at 436-63. On the redundant nature of the provision, see PIERRE-YVES GAUTIER, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 601, 607 (Presses Universitaires de France, 7th ed. 2010).

24. HUGON, *supra* note 11, at 426-35. Such a mechanism is consistent with article 14bis (2) and (3) of the *Berne Convention*, *supra* note 3. See GAUTIER, *supra* note 23 at 600, 610. See also RICKETSON & GINSBURG, *supra* note 6 at 386.

25. DESBOIS, *supra* note 13, at 674.

26. *Id.*, adding in note 1: “seuls, les droits dont l'exercice est nécessaire à l'exploitation normale, sont présumés avoir été cédés (...).”

27. *Loi du 3 juillet 1985*, *supra* note 20.

28. See LUCAS & LUCAS, *supra* note 20, at 728; HUGON, *supra* note 11, at 428.

problem is some of the relevant rights are subject to specific rules restricting the authors' ability to dispose of their rights.²⁹

c. Mandatory Collective Management

The compensation regimen for private copying of analog media is an example of these specific rules. With the arrival of VCR, consumers were able to create copies at home, infringing authors' exclusive right of reproduction. The economic damages resulting from private copying were taken into account by article 31 of the *Loi du 3 juillet 1985*, later codified in article L. 311-1 C.P.I.³⁰ Basically, the law balanced authors' inability to properly exert their exclusive right³¹ by granting them a non-exclusive right to remuneration. This compensation took the form of a fixed-rate levy on the sales of video tapes and other media.³² To manage the levy, the law imposed a mandatory system of collective management for private copying of videos on blank media.

In practice, the private copying levies' basis and rate are determined by the *Commission sur la rémunération pour copie privée*, an administrative tariff-setting body,³³ and paid by blank media producers and importers.³⁴ A copyright collective, the *Société des auteurs et compositeurs dramatiques*³⁵ (hereafter SACD), acts as an

29. On the opacity of the remuneration system in the French motion picture industry, see Joëlle Farchy, Caroline Rainette & Sébastien Poulain, *Économies des droits d'auteur. II - Le cinéma*, 2007:5 CULTURE ÉTUDES 1, 16 (2007). For an equivalent study for TV industry see Françoise Benhamou and Stéphanie Peltier, *Économies des droits d'auteur. III - La télévision* 2007:6 CULTURE ÉTUDES 1, 6-7(2007).

30. L. 311-1 C.P.I., formerly article 31 of the *Loi du 3 juillet 1985*, *supra* note 20. Despite its unclear wording, article L. 311-2 C.P.I. is to be understood as covering foreign right-holders as they are deemed to be French authors, see GAUTIER, *supra* note 23, at 280 and 288; LUCAS & LUCAS, *supra* note 20, at 1147.

31. Literally, a right to exclude, a *jus prohibendi*. The code recognizes the impossibility of determining a proper basis for proportional compensation, see article L 131-4 C.P.I., formerly article 35 of the *Loi du 11 mars 1957*, *supra* note 13, and article 49 of the *Loi du 3 juillet 1985*, *supra* note 20.

32. L. 311-3 C.P.I., formerly article 32 of the *Loi du 3 juillet 1985*, *supra* note 20.

33. *Id.* at L. 311-5 C.P.I., formerly article 34.

34. *Id.* at L. 311-4 C.P.I., formerly article 33, aiming at "supports d'enregistrement utilisables pour la reproduction à usage privé d'oeuvres fixées sur des phonogrammes ou des vidéogrammes."

35. SACD, <http://www.sacd.fr/A-society-for-and-by-authors.750.0.html> (last visited Sept. 28, 2012). SACD statutes provides that: "[t]he object of the Society is: 1) The protection of the rights of its members with respect to all users and, in general, the protection of the moral and material interests of the members of the Society and that of the author's profession; ... 3) Exercise and management in all countries of all the rights involved in performance or reproduction, in any form whatsoever, of the works of its

intermediary between *Copie-France*,³⁶ the organization in charge of collecting all private copying levies related to audiovisual works, and the directors, screen writers, and writers.³⁷ Interestingly, it is not a voluntary collective management system. Authors do not have to be members of the SACD to benefit from its collecting, clearing, and distributing services.

The provision imposing collective management for private copying presents a few noteworthy characteristics. First, article L. 311-1 C.P.I. specifically mentions authors, whereas other mandatory collective management schemes, such as cable retransmission,³⁸ aim at right-holders at large. Second, this article creates a non-exclusive right to compensation, as discussed above, which by nature differs from the exclusive right covered by article L. 132-24 C.P.I.³⁹ Thus, it is not covered by the presumption of transfer. Third, article L. 311-7 C.P.I.⁴⁰ specifies that, for audiovisual works, the distribution key for the levies is of one third for authors, one third for producers and one third for interpreters, thereby limiting producers' share to one third.⁴¹ For all these reasons, the presumption of transfer created by article L. 132-24 C.P.I. does not cover the remuneration for private copying. Consequently, American

members, notably the collection and distribution of the royalties derived from the exercise of the above rights, including within the framework of article L. 122-9 of the Code of Intellectual Property; 4) Pooling of part of the collected royalties...," *Statutes and General Regulations*, SACD, 5, http://www.sacd.fr/uploads/tx_sacdresources/statuts_eng_02.pdf. See also, generally, Sophie Poinsot under supervision of Hubert Tilliet, *Fasc. 1570 Sociétés de perception et de répartition des droits - Société des auteurs et compositeurs dramatiques (SACD)* JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE (2010).

36. COPIE FRANCE, <http://www.copiefrance.fr/> (last visited Sept. 28, 2012). Copie-France is an umbrella collective gathering several copyright collectives, see COPIE-FRANCE, *Organization Chart*, http://www.copiefrance.fr/l_quisommesnous_2b.htm (last visited Sept. 18, 2012).

37. L. 311-6 C.P.I., formerly article 35 of the *Loi du 3 juillet 1985*, *supra* note 20.

38. L. 132-20-1 C.P.I., introduced by the *Loi n°97-283 du 27 mars 1997 portant transposition dans le code de la propriété intellectuelle des directives du Conseil des Communautés européennes nos 93/83 du 27 septembre 1993 et 93/98 du 29 octobre 1993*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] 28 March 1997, p.4831.

39. It is considered as an "amputation" of the exclusive right, see GAUTIER, *supra* note 23, at 279.

40. L. 311-7 C.P.I., formerly article 36 of the *Loi du 3 juillet 1985*, *supra* note 20.

41. Gautier considers that article 14 *bis* 2 b) of the Berne Convention would allow an American producer to benefit from the third allotted to producers, but not the third allotted to authors. see GAUTIER, *supra* note 23, at 280.

producers cannot claim the levies collected in France for American motion pictures' authors.⁴²

Altogether, these elements demonstrate the French legislator's intent to ensure the creator a fair share of the economic value of his work by placing the creative individual at the heart of the compensation regime.⁴³

d. Summary

In summary, the default system works as follows:

<i>France</i>	<i>Author</i>	<i>Owner</i>
Exclusive exploitation rights for the audiovisual work	The physical person who authored the work	The producer (unless provided otherwise in writing)
Other exclusive rights (adaptation, translation. . .)	(presumed authors: the author of the script, the author of the adaptation, the author of the dialogues, the author of the soundtrack	The physical person who authored the work (unless provided otherwise in writing)
Right to remuneration (private copying)	composed for the work and the director)	The physical person who authored the work

2. *The American System: Collective Bargaining as a Workaround*

Contrary to the French system, the American copyright system is producer-centered. The idea of employer's copyright ownership was first introduced in common law *circa* 1900,⁴⁴ and became a statutory provision with the 1909 Copyright Act.⁴⁵

42. Neither can they use the work for hire doctrine (*infra* note 47) since the Berne Convention imposes French law when the protection is claimed in France.

43. HUGON, *supra* note 11, at 202.

44. Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine* 15 YALE J.L. & HUMAN. 1, 59 (2003).

45. *Id.* at 62. She goes on: "The decision to label the employer an 'author,' rather than create a default rule of implied automatic assignment, appears to have been based on three considerations. First, it was a matter of ease in statutory drafting ('author' is a term of art used throughout the statute). Second, it avoided constitutional doubts about a default rule of employer ownership stemming from the constitutional provision that

a. Authorship, Ownership and Works Made for Hire

Section 101 of the United States Copyright Act of 1976 states that a work made for hire is:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . .⁴⁶

As pinpointed by Catherine Fisk, “[a]ttribution of authorship is a matter of proof, not a process of cultural attribution, and when corporations are deemed authors, it is because they have hired people who created works.”⁴⁷ Furthermore, § 201(b) adds that:

In the case of a work made for hire, the employer, or other person for whom the work was prepared, is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁴⁸

In the U.S. film industry, most of all copyrightable contributions to a movie fall in the work made for hire category, “with the hiring party, usually the producer/financier, deemed both the author and the initial owner of the copyright in the contributions.”⁴⁹ Consequently, “[t]he owner of any copyrighted work that is created as a work for hire has all the rights of copyright owners, including the right to decide whether to produce [the work] into a film for theatrical release, directly for DVD, for television, or not to produce it at all.”⁵⁰

Congress may give ‘authors’ a copyright. Third, and most importantly, the drafters of the revision wanted to be sure that the employer would be the initial copyright owner rather than an assignee, because only the initial owner is entitled to obtain a renewal.” *Id.*

46. 17 U.S.C. § 101 (2006).

47. Fisk, *Authors at Work*, *supra* note 44, at 4.

48. 17 U.S.C. § 201 (b) (2006).

49. F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 228 (2002). For a discussion of authorship in several kinds of contributions to motion pictures, *see id.* at 282-316.

50. Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 BERKELEY J. EMP. & LAB. L. 215, 217 (2011).

b. Collective Bargaining in the Motion Picture Industry

But there is a second contractual layer of copyright attribution superimposed on the statutory rules regarding works made for hire. Indeed, to counteract the very integrated Hollywood studio system,⁵¹ artists unionized in the 1930s⁵² to negotiate a legal framework regulating economic relationships between movie producers and creators, in order “to protect the status and creative control of writers.”⁵³

Why were independent contractors and professionals such as screen-writers were allowed to unionize in the first place? In 1938, the American National Labor Relations Board recognized “the power of producers to dictate the content of writers’ work, to assign parts of stories, to stipulate where writers were to write.”⁵⁴ This recognition allowed screen-writers to bargain collectively on labor issues. From this point, the Writers Guild of America⁵⁵ (hereafter WGA) concluded agreements with the Alliance of Motion Picture and Television Producers⁵⁶ regarding work conditions and, most

51. Kevin Lee, ‘*The Little State Department: Hollywood and the MPAA’s Influence on U.S. Trade Relations*, 28 NW. J. INT’L L. & BUS. 371, 373 (2008). “Under the studio system, a film studio controlled all stages of a movie’s economic life, from the birth of the screenplay written by a studio-employed writer to film production to final distribution in a studio-owned theater. ...At the height of the studio system era, Hollywood produced an average of 400 films each year between 1930 and 1950, with a peak of 504 films approximately one film per week for each studio-in 1941.” *Id.*

52. For a history of the development of the guilds, see HUGH LOVELL AND TASILE CARTER, *COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY: A STRUGGLE FOR STABILITY* 34-38 (Institute of Industrial Relations at UC Berkeley ed., 1955).

53. Fisk, *Screen Credit*, *supra* note 50 at 266.

54. *Id.* at 228, referring to *Metro-Goldwyn-Mayer Studios and al.*, 7 NLRB 662 (1938). See Chester C. Ward, *Discrimination under the National Labor Relations Act*, 48 YALE L. J. 1152, 1185 n.265 (1939) (the Board “rejected the argument that the Act was intended to protect only wage earner in the lower income brackets and hence does not apply to creative and professional workers payed [sic] as much as 2,000\$ a week”).

55. Actually, the first collective agreement was signed in 1940 by the Screen Writers Guild. Several unions, including the Screen Writers Guild, merged into WGA East and West in 1954. see WGA, *Timeline*, <http://www.wgaw.org/history/timeline.html> (last visited Sept. 28, 2012). For technical reasons of no relevance for this article, WGA is actually composed of two unions, Writers Guild of America West, <http://www.wga.org> (last visited Sept. 28, 2012) and Writers Guild of America East, <https://www.wgaeast.org> (last visited Sept. 28, 2012). On the development of a national bargaining unit for writers, see LOVELL & CARTER, *supra* note 52 at 51.

56. “The AMPTP, the entertainment industry’s official collective bargaining representative, negotiates 80 industry-wide collective bargaining agreements on behalf of over 350 motion picture and television producers (member companies include the production entities of the studios, broadcast networks, certain cable networks and

importantly, regulating screen credits. Today, the WGA represents TV and film writers and “determine[s] who is credited for writing. Credit determinations, in turn, affect what writers get paid...”⁵⁷

As further explained by Catherine Fisk:

Screen credit supports a system of revenue-sharing (residuals) and of unbundling the rights encompassed in a copyright (separated rights) that compensates writers during periods of slack employment, thus keeping their human capital in the industry. The Guild has thus used the power it has under labor law as the exclusive representative of writers in collective negotiations with production companies to modify the effects of the work for hire doctrine in copyright law and to create a system of moral rights.⁵⁸

Indeed, the WGA developed a system of authorship attribution by credit that has no equivalent in other intellectual property fields.⁵⁹ “Apart from the very great reputational significance of being seen as a credited writer, and its impact on the job prospects of the writer, screen credit determines the writer’s share of the copyright’s value in the form of separated rights and residual payments.”⁶⁰

independent producers.)” ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, <http://www.amtp.org/> (last visited Sept. 28, 2012).

57. Fisk, *Screen credit*, *supra* note 50 at 216. For the origin of the right to manage credits, see WGA, *2008 Writers Guild of America-Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement*, 29, <http://www.wga.org/content/default.aspx?id=1610> (last visited Sept. 28, 2012) (Credits for Screen Authorship (General)) and Schedules A and B. The website mentions that: “[t]he 2011 MBA is now in effect. The Memorandum of Agreement (MOA) may be downloaded below, along with the 2008 MBA which the MOA amends. The full text of the 2011 MBA will be published and posted in the near future.” *Id.*

58. Fisk, *supra* note 50, at 219. For a comparison between moral rights and screen credits, see Bayard F. Berman & Sol Rosenthal, *Screen Credit and the Law*, 9 UCLA L. REV. 156, 158 (1962).

59. Fisk, *supra* note 50, at 247-48: “[t]he elaborate legal process surrounding credit determinations distinguish the WGA and Hollywood from any other area of cultural production, and are unique in the law. They bring the ideas of the rule of law--uniform rules, fairly applied, based on evidence and reasoned argument--to the question of what it means to be the author of a story. Unlike other places in both law and culture where authorship is taken as a (relatively) easily discernible fact, credit arbitrations treat authorship as contestable and as something that can be determined only through a process designed and administered by and for Guild writers. Everyone in Hollywood knows that credited authorship is, in some sense, a fiction when multiple writers have worked on a film, but it is important to writers that it be a legal fiction.”

60. Fisk, *id.* at 258.

The Writers Guild of America-Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement,⁶¹ usually referred to as the Minimum Basic Agreement (hereafter MBA), covers separated rights and residual payments, which are based on screen credits. Article 13 of the MBA sets the minimal compensation (“flat deal”) to be received by a writer for his employment, depending on the extent of his contribution and the nature of the audiovisual work.

Article 16 deals with separation of rights. If a writer is qualified for separation of rights (meaning that he wrote an original story)⁶² and receives a “Story by,” “Written by,” or “Screen Story by” credit, he is entitled to separated rights. As such, article 16 actually bypasses the work made for hire doctrine. Even though the producer is deemed the sole author and owner of the rights, under certain conditions detailed in the MBA, the writers can benefit from rights such as the right to publish a movie script in whole or in substantial part.⁶³

The protection of residuals is another way to circumvent the work for hire doctrine. Residuals are “additional payments to workers for the exhibition of an entertainment product in media other than the one for which it was originally created, or for its reuse within the same medium subsequent to the initial exhibition. They are sometimes called ‘re-use fees’ or ‘supplemental contributions.’”⁶⁴ As stated by Robert Gilbert, residuals represent extra compensation, in addition to basic wages, salaries, or fees.⁶⁵

61. MBA, *supra* note 57.

62. *Id.* at 16.A.2, 16.B.1.

63. *Id.* at 16.A.3.a. Other examples include the right to a production intended to exploit the dramatic rights in the story, screenplay or motion picture, under certain conditions (theatrical motion pictures) or other rights (“reserved rights”) including, but not limited to, dramatic, theatrical motion picture, publication, merchandising rights, radio rights, live television rights, interactive rights and television sequel rights (television). *Id.* at 16.A.3.a., 16.B.3.

64. Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 663, 669 (1994). See also Robert W. Gilbert, ‘Residual Rights’ Established by Collective Bargaining in Television and Radio, 23 LAW & CONTEMP. PROBS. 102, 102 (1958): “Various talent guild agreements governing the use of recorded or filmed material in radio and television normally permit an initial use or cycle of uses in return for basic wages, salaries, or fees by participating talent employees, but call for additional compensation as a condition precedent to subsequent re-use on successive broadcasts or telecasts.”

65. Gilbert, *supra* note 64 at 103, adding they can vary according to “their source (i.e., whether paid by the original producer of the recording or film, who is the direct employer,

Residuals are “more economically significant for most writers than are separated rights.”⁶⁶ “Almost all residuals due on made-for-theatrical motion pictures are revenue based...The writer is entitled to a percentage of the money the project generated from uses other than any theatrical exploitation... Residuals due for made-for-television projects can be both fixed and revenue based.”⁶⁷ “Over time, residuals became an established feature of the industry and are perennially important in collective negotiations.”⁶⁸ For example, the principal issue leading to the 2007-2008 writers strike was the question of residuals for new media.⁶⁹

c. Summary

In summary, the default system works as follows:

<i>United States</i>	<i>Author</i>	<i>Owner</i>
Exclusive copyright for the audiovisual work		The producer
Contract-based right to use and rights to remuneration covered by collective agreements	The producer (works made for hire)	The physical person who authored the work (based on screen credits, under certain conditions) (not a copyright)

or by a subsequent purchaser or user who stands in his place) or the time of payment (i.e., whether paid in advance, shortly after the talent employee actually performs his services, or at a later date, following the specified re-broadcasts or re-uses).” There exist similar mechanisms for screen actors and directors. *Id.* at 107-109.

66. Fisk, *Screen Credit*, *supra* note 50 at 262-63.

67. WGA, *Residuals Survival Guide*, 10, http://www.wga.org/uploadedFiles/writers_resources/residuals/residualssurvival05.pdf (last visited Sept. 28, 2012).

68. Fisk, *Screen Credit*, *supra* note 50, at 262-63.

69. On the 2007-2008 WGA strike, see Carole E. Handler, James D. Nguyen & Marina Depietri, *The WGA Strike : Picketing for a Bigger Piece of the New Media Pie*, 25 ENT. & SPORTS LAW. 2 (2008); Bernadette A. Safrath, *How Improvements in Technology have Affected the Entertainment Industry: Writers and Actors Fight for Compensation*, 26 TOURO L. REV. 115 (2011).

C. A (Really Brief) Conclusion to the Introduction

The American producer of an audiovisual work benefits, in the United States, from the work made for hire doctrine. This doctrine automatically transfers initial authorship and ownership from writers and other creative individuals to producers. By contrast, France only grants producers a presumption of transfer. In accordance with article 14 *bis* of the Berne Convention, this mechanism transfers ownership of certain rights to the producer, even though the creative individuals are deemed the initial authors.

The Berne Convention, which treats foreign authors as national authors, also adds that where audiovisual works are concerned, the law determining authorship and ownership is the law of the country where protection is claimed. Thus, we concluded that an American producer claiming protection in France would not be able to use the work made for hire doctrine in that country. Since there is no such mechanism in French law, the producer would only benefit from a presumption of transfer of ownership for certain rights.

However, the wording of the presumption of transfer is very specific and does not cover all exploitation rights. Furthermore, some of the rights related to audiovisual works aim specifically at creative individuals, thereby excluding producers. These rights tend to be managed through blanket licensing and mandatory collective management.

Finally, we examined the labor environment in the motion picture industry to uncover a contractual system of quasi-copyright management through guilds. The guilds use a sophisticated system of authorship attribution by screen credits to redistribute compensation collectively negotiated for each re-use of audiovisual works.

II. Anatomy of the Foreign Levies Problem: When Workarounds Collide

The French private copying system we discussed earlier is one example among many others of a national copyright law granting rights to the creator and excluding the producer. Due to discrepancies in copyright laws around the world, it is not uncommon for non-American copyright collectives to collect copyright levies on behalf of American creators.

According to article 5 of the Berne Convention on national treatment, foreign owners of rights and national authors are treated in the same way. “This principle is upheld by collective management

organizations which, under reciprocal representation agreements, administer foreign repertoires on their national territory, exchange information, and pay royalties to foreign owners of rights.”⁷⁰

Usually, copyright collectives deal with foreign levies through reciprocal bilateral agreements: each society represents the others on its own territory, thus offering a blanket license for an international repertoire within a single national territory. In the meantime, the other sister-societies license the same repertoire on behalf of the others in their respective territories. For example, music performance rights are managed in the United States by ASCAP and BMI and in France by SACEM. SACEM will collect levies for American right-holders in France, ASCAP and BMI will collect levies for French right-holders in the United States. Then, the societies will transfer royalties from one country to the other through a compensation mechanism.⁷¹

Unfortunately, such a system cannot function for motion pictures, as there is no American copyright collective dealing with audiovisual works. Therefore, non-American copyright collectives started to collect and pile up levies for the creators of audiovisual works without being able to transfer the levies to an American counterpart.

A. The Foreign Levies Agreement

It appears that, soon after the United States entered the Berne Convention, American film and TV producers claimed authors' foreign levies. The guilds challenged the studios' claim, “arguing that writers and directors were “authors” under foreign law and thus entitled to the authors' share of the foreign levies.”⁷² The rest is explained by journalist Dennis McDougall:

Guild vice president Carl Gottlieb, in a posting to a popular WGA members' blog called Writer Action, says the foreign-levies diversion scheme was originally hatched in 1990 by two studio lawyers and then-WGA executive director Brian Walton. According to Gottlieb — and later confirmed by

70. *Collective Management of Copyright and Related Right*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/about-ip/en/about_collective_mngt.html (last visited Sept. 28, 2012).

71. Mihály Ficsor, *Collective Management of Copyright and Related Rights*, 17-22 (Geneva: WIPO, 2002).

72. WRITERS GUILD OF AMERICA, WEST, *Foreign Levies Program: Program History*, <http://www.wga.org/content/default.aspx?id=4264> (last visited Oct. 12, 2012).

WGA general counsel Tony Segall — attorney Jay Roth (who later became DGA executive director and was paid over \$1 million last year) and MCA/Universal general counsel Robert Hadl (now on annual WGA retainer at \$150,000, plus \$300 an hour and expenses) came to Walton with a proposition: If they could persuade foreign collecting societies to turn over their revenue to the WGA, this promising new income stream for writers could be shared with the guilds and studios, including Hadl's. The alternative to the deal was to leave the money offshore while fighting a protracted global legal battle with an uncertain outcome, which included strong arguments on all sides over which contract and national law was applicable," Gottlieb argued.⁷³

The guilds were facing two options. They could either claim the levies by battling through a long, costly and unpredictable lawsuit covering several foreign copyright laws, or team up with the producers by granting them the lion's share of the levies in exchange for their not interfering with the collection of levies. The WGA and the Directors' Guild of America⁷⁴ (hereafter DGA) chose the second option and approached non-American copyright collectives, "proposing that the guilds disburse that money on behalf of U.S. Authors."⁷⁵ This proposition was soon accepted and both guilds entered the so-called Foreign Levies Agreement.

1. *Origin of the Agreement*

The first five-year agreement gathered the DGA and the WGA on one side and Columbia Pictures, CPT Holdings, Metro-Goldwyn-Mayer Pictures, MGM/United Artists Television Productions, Paramount Pictures, Twentieth Century Fox, United Artists Pictures, Universal City Studios, Walt Disney Pictures & Television and Warner Bros (hereafter the Producers) on the other side.⁷⁶ It covered

73. Dennis McDougal, *Double-Cross at the WGA : If you write for TV or film in Hollywood, your check might never be in the mail*, L.A. WEEKLY (May 3, 2007) [hereinafter *Double-Cross*], <http://www.laweekly.com/content/printVersion/58658/>.

74. DGA, <http://www.dga.org/> (last visited Sept. 28, 2012). For a history of the creation of the DGA, see Steve Pond, *Before the Guild*, DGA, <http://www.dga.org/Craft/DGAQ/All-Articles/1004-Winter-2010-11/Features-Before-the-Guild.aspx> (last visited Sept. 28, 2012).

75. McDougal, *Double Cross*, *supra* note 74.

76. Foreign Levies Agreement (Jun. 1, 1990) (on file with author).

rights from “a dozen nations.”⁷⁷ The problem is the agreement was completely unbalanced and favored producers: “In fact, the arithmetic wasn’t all that hard, even for a writer, to grasp. The powerful trio divided the booty three ways: 85 percent for the studios, 7.5 percent for the DGA and 7.5 percent for the WGA...”⁷⁸

The agreement was accompanied by a set of provisions requiring the DGA and the WGA to waive their rights to contest the amount of their share (art. 6), and specifying that the guilds would act as collecting agencies for the Producers (art. 4 and 6).⁷⁹ It added that if a contract between a Producer and an author was to set a different distribution ratio for the royalties, such a contract would either be superseded (art. 9) or result in a compensation with previously collected levies (art. 7).⁸⁰ At the same time, the Producers would undertake not to include in their standard agreements clauses waiving directors’ and/or writer claims to video levies and video rentals (art. 10).⁸¹

The Foreign Levies Agreement has been renegotiated several times in subsequent years. Its latest installment was signed in 2005, gathering almost the same players.⁸² The main difference now is the distribution key. Whereas the DGA and the WGA could only keep 15% of the Author’s share in 1990, they managed to negotiate 50% of the video levies and video levies rentals from 2005 on, to be divided between the WGA and the DGA equally.⁸³

2. *Non-Members Included*

But the leonine distribution key is not the only element of concern of this agreement. In addition to transferring a disproportionate amount of the royalties to the Producers, both guilds

77. Dennis McDougal, *For Hollywood Writers, a Whiff of Unclaimed Foreign Gold*, THE N.Y. TIMES (September 19, 2005) [hereinafter *Unclaimed Gold*], http://www.nytimes.com/2005/09/19/business/media/19guild.html?_r=0. In 1998, most of the sums came from Germany and France, see WGA, *1998 WGA Annual Report to Writers*, 11 (June 30, 2008) http://www.wga.org/uploadedFiles/who_we_are/annual_reports/Annual%20Report%2098.pdf [hereinafter *1998 Annual Report*].

78. McDougal, *Double-Cross*, *supra* note 73.

79. 1990 Foreign Levies Agreement (Jun. 1, 1990) (on file with author).

80. *Id.*

81. *Id.*

82. With the addition of Warner Bros. Television Production.

83. 2005 Foreign Levies Agreement (Sept. 1, 2005) (one file with author). This agreement will expire at the end of 2014.

accepted responsibility for the levies of all American creators, regardless of their status *vis-a-vis* the guilds:

Part of the “detail” that the WGA board... apparently wanted to spare writers in 1990 was a prescient indemnification clause, which foreign collecting societies forced the WGA to include with each pact. The clause held the guild liable in the event that any author due foreign levies decided to sue one of the three entities over the deal Roth, Hadl and Walton had cut.⁸⁴

A quick glance at the guilds jurisdiction could be useful at this point. Programs such as independent movies (by definition), animation,⁸⁵ or reality TV shows⁸⁶ – even the very profitable adult-entertainment film industry⁸⁷ – are not covered by WGA or DGA collective agreements. This, however, did not prevent the guilds from collecting levies ultimately pertaining to non-members. In practice, foreign levies were treated as residuals.⁸⁸ Furthermore, the WGA imposed a fee of 5% of the gross amount of residuals paid to all non-members,⁸⁹ and collected \$863,749 in administrative fees in 2011 to

84. McDougal, *Double-Cross*, *supra* note 73.

85. ANIMATION GUILD, <http://animationguild.org/> (last visited Sept. 28, 2012). For a history of the Animation Guild, see ANIMATION GUILD, *Guild History*, <http://animationguild.org/guild-history/> (last visited Sept. 28, 2012).

86. Daniel J. Blau, *The WGA already lost Round 1: A survivor of a little-noticed 2006 guild strike has seen this script before*, L.A. TIMES (November 20, 2007), <http://articles.latimes.com/2007/nov/20/news/OE-BLAU20>; Dave McNary, *WGA gives up on nonscripted effort: Guild won't move forward in reality rumble*, VARIETY (October 23, 2007), <http://www.variety.com/article/VR1117974582?refCatId=10>.

87. On the lack of collective agreements in the adult entertainment industry, see Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U.J. GENDER SOC. POL'Y & L. 465, 466 (1998): “Not only are adult entertainers appropriate for union organization, but they want to be organized. Nevertheless, organized labor has all but turned its back to the exotic dancers and pornographic movie actors seeking assistance in securing minimum wages, benefits and job security.” It is worth mentioning that the Screen Actors Guild, which does not include performers in adult movies, concluded an agreement similar to the Foreign Levies Agreement covering performers’ neighbouring rights. The Screen Actors Guild was sued by actor Ken Osmond and proceeded to settle in 2011, just as the WGA and the DGA did.

88. *Residuals Survivor Guide*, WRITERS GUILD OF AMERICA, 48 (2005), http://www.wga.org/subpage_writersresources.aspx?id=133.

89. *Id.* at 52: “The Guild administers the residuals provisions of the MBA not only on behalf of its members, but also for the benefit of non-members and the beneficiaries of deceased writers. The Guild’s enforcement efforts are multi-faceted and include processing of residuals checks, pursuing claims for unpaid residuals, processing documentation necessary for beneficiaries to receive the residual payments, monitoring the status of probate matters, and, in some cases, acting as the beneficiary representative by receiving the residuals and issuing checks to multiple beneficiaries.”

offset the expenses of negotiating and administering the foreign levies program.⁹⁰

Levies were distributed to some of the non members at least from 2005 on.⁹¹ In 2007, the WGA was holding \$20.6 million in trust, pending identification of the writers.⁹² To get a better sense of the extent of the services rendered to non members, a quick search of the DGA website is helpful. Apparently, the DGA is unable to locate people like 1999 Academy Award winner Roberto Benigni (*Life is Beautiful*).⁹³ A visit to the WGA website also revealed that they were unable to locate 2010 Palme d'Or Nominee Jacques Audiard (*A Prophet*).⁹⁴

3. *On the Guilds' Decision Process*

The last but not least troubling element is that the Guilds' members were kept completely out of the negotiation of the Foreign Levies Agreement. Once again, in the words of Dennis McDougal:

According to Gottlieb and Segall, Walton informed the WGA board what he had done — but there was never a board vote on the matter. Nor were the pacts that the WGA negotiated with each foreign collecting society and the Hollywood studios

90. *Annual Financial Report*, WRITERS GUILD OF AMERICA, WEST, INC., 11 (2011), <http://www.wga.org/content/default.aspx?id=4877>. The WGA collected \$977,390 in 2010, *see Annual Financial Report*, WRITERS GUILD OF AMERICA, WEST, INC., 11 (2010), <http://www.wga.org/content/default.aspx?id=4651>, \$539,934 in 2009, *see Annual Financial Report*, WRITERS GUILD OF AMERICA, WEST, INC., 11 (2009), http://www.wga.org/uploadedFiles/who_we_are/annual_reports/annreport09.pdf, and \$950,624 in 2008, *see Annual Financial Report*, WRITERS GUILD OF AMERICA, WEST, INC., 12 (2008), http://www.wga.org/subpage_whoare.aspx?id=3716.

91. *2006 WGA Annual Report to Writers*, WRITERS GUILD OF AMERICA, WEST, INC., (June 10, 2006), http://www.wga.org/subpage_whoare.aspx?id=2394: “For a second year, we distributed almost \$8 million in foreign levies to our member writers (East and West), heirs and beneficiaries of deceased members, and non-member writers of animation and nonfiction. Undeliverable funds reached \$7.2 million by the end of the fiscal year. This money is in two main categories—residuals and clip payments due to writers who cannot be located; and foreign levies monies held for more than seven years.” The 1998 annual report mentions that foreign levies were distributed before 1998, without precising whether non-members were included in the distribution. *see 1998 WGA Annual Report to Writers*, WRITERS GUILD OF AMERICA, WEST, INC., 11 (1998), http://www.wga.org/subpage_whoare.aspx?id=336, *supra* note 77.

92. *2007 WGA Annual Report to Writers*, WRITERS GUILD OF AMERICA, WEST, INC., 20 (2007), http://www.wga.org/uploadedFiles/who_we_are/annual_reports/marketplace07.pdf.

93. *Foreign Levies / Non-Member Directors*, DIRECTORS GUILD OF AMERICA, <http://www.dga.org/ForeignLevies/NonMemberDirectors.aspx> (last visited May 2012).

94. *Foreign Levies Program, Search by Writers Name*, WRITERS GUILD OF AMERICA, WEST, <https://my.wgaw.org/flslookup/SearchbyName.aspx> (last visited May 2012).

ever submitted to guild members. Further, no one among the WGA hierarchy explained to member writers — or nonmembers — what they had done.⁹⁵

It appears that most guilds' members were unaware of the existence of the foreign levies. Here, the guilds seem to have failed in their duty to keep their members informed. Considering that residuals are a significant source of income for guild members, it is astonishing they failed to consult their members on such an important issue. All the more, they lacked legitimacy to deal with nonmembers' royalties—we will come back to this point later in this article.

B. The Class-Action Suits

Predictably, the situation turned sour after several years. As the foreign levies were closely intertwined with the complex residuals system, it is not surprising that the first people to notice there was a problem were non-guild members. In contrast to guild members, who could receive residual checks including foreign levies, non-guild members were not receiving any compensations from abroad. Upon learning that he was owed royalties by the WGA, non-WGA member William Richert “filed suit against the guild in Superior Court in Los Angeles, seeking class-action status and contending, among other things, that the union had fraudulently collected and kept money intended for others.”⁹⁶ His example was soon followed by non-DGA member William Webb, who sued the DGA.

1. The WGA and DGA Class-Actions

When the guilds asked for both cases to be transferred to a federal court, they were treated jointly.⁹⁷ Interestingly, Richert and Webb did not claim that the WGA and the DGA had failed their obligation to redistribute levies collected through the Foreign Levies Agreement. They instead argued that the Guilds had no right to collect the levies in the first place.⁹⁸

95. McDougal, *Double-Cross*, *supra* note 73.

96. McDougal, *Unclaimed Gold*, *supra* note 77.

97. *Webb v. Dirs. Guild of Am., Inc.*, No. CV05-08257, 2007 U.S. Dist. LEXIS 96633, at *1 (C.D. Cal. Apr. 11, 2007).

98. *Id.* at *18, *21-22.

On the contrary, the WGA and the DGA relied on the labor dimension of the dispute.⁹⁹ The WGA and DGA argued that the plaintiff's right to compensation was created by the Foreign Levies Agreement and not by foreign copyright laws.¹⁰⁰ In their view, the Foreign Levies Agreement is a collective contract triggering the application of labor law rules and the jurisdiction of Federal courts.¹⁰¹ But the judge considered that "...the existence, nature, and scope of the right asserted by plaintiffs is independent of the Foreign Levy Agreement."¹⁰² The court then noted that "state law claims are not preempted if they are based on rights that exist independent of a labor contract,"¹⁰³ to conclude that the California court maintained jurisdiction over the matter.

Then, the Court proceeded to determine whether the Foreign Levies Agreement restricted in any ways the plaintiff's rights and noted that "[b]y providing that the Guilds would receive less than 100 percent of the author's share, the Agreement clearly limited plaintiffs' right to receive their full share of the foreign levies."¹⁰⁴ The court therefore concluded that the Agreement contained "clear and unmistakable language circumscribing plaintiffs' rights."¹⁰⁵ The case was therefore remanded to the Los Angeles Superior Court.¹⁰⁶

2. *The Settlements*

Upon the granting of the plaintiff's motion to remand the case, the DGA and William Webb decided to negotiate a settlement and filed a motion for approval, which was granted on September 10, 2008.¹⁰⁷ The final settlement class only encompasses non-DGA directors.¹⁰⁸ The DGA undertook to conduct an annual review of its foreign levies program from 2006 on, under certain conditions.¹⁰⁹ The guild also undertook to publish a notice of class-action settlement

99. *Id.* at *10-11.

100. *Id.* at *20.

101. *Id.* at *10-11.

102. *Id.* at *23.

103. *Id.* at *23.

104. *Id.* at *30.

105. *Id.* at *30.

106. *Id.* at *53.

107. Order and J. Granting Joint Appl. Final Approval Class Action Settlement at 1 Webb v. Dirs. Guild of Am., Inc., No. BC35262, (2006).

108. *Id.* at 6.

109. *Id.* at 1.

through its website and several publications.¹¹⁰ The DGA was allowed to charge a maximum fee of ten percent to be collected on interests generated by the sums owed to non-members, and supplementary fees if necessary.¹¹¹ In addition to this fee, the DGA was able to retain the interests generated by the sums in custody.¹¹² If the DGA's efforts proved to be unsuccessful, funds for non-members that could not be distributed within two years would be transferred to a charity, the Motion Picture & Television fund.¹¹³

Soon afterwards, the WGA and William Richert negotiated a settlement and filed a motion for approval, which was granted on June 2, 2010.¹¹⁴ The settlement class encompasses all writers, WGA and non-WGA members alike, whose works earned funds paid to the WGA by foreign collection societies.¹¹⁵ The WGA agreed to have its Foreign Levies Program audited from its inception and evaluated each year from now on.¹¹⁶ The guild also undertook to publish a notice of class-action settlement through its website and several publications.¹¹⁷ It was able to continue to administrate foreign levies and allowed to charge a maximum fee of ten percent, to be collected on interests generated by the sums and administrative fees.¹¹⁸ However, the reasonableness of the amount of the fee will be assessed in comparison with similar organizations, including the Canadian Screenwriters Collection Society, ASCAP, and BMI.¹¹⁹

III. Accountability for Intermediaries in Collective Copyright Issues

Both settlements are the result of a collision. They are the judicial by-products of a clash between an industry-negotiated copyright workaround and a legislative tweak to an otherwise

110. *Id.* at 8. *See also Foreign Levies*, DIRECTORS GUILD OF AMERICA, <http://www.dga.org/ForeignLevies.aspx>, (last visited Oct. 5, 2012).

111. Order and J. Granting Joint Appl., *supra* note 107, at 4-5.

112. *Id.* at 4.

113. *Id.* at 8.

114. J. and Order Granting Final Approval of Class Action Settlement at 1, *Richert v. Writers Guild of Am. West*, No. BC339972 (C.D. Cal. June 2, 2010).

115. *Id.* at Exhibit A at 2.

116. *Id.* at Exhibit A at 2-4.

117. Notice of Final Settlement, WRITERS GUILD OF AMERICA, WEST, http://www.wga.org/uploadedfiles/foreign_levies/WGAForeignLevies.pdf.

118. WGA Settlement Approval, *supra* note 114 at Exhibit A at 6.

119. *Id.*

unworkable *droit d'auteur* system. They express a desperate need for a more practical approach to copyright.

As an answer, Cohen, who developed a research agenda on copyright as post-industrial property,¹²⁰ calls for a change in the most current theoretical assumptions of copyright's purpose. To counteract what she calls the "incentives-for-authors rationale,"¹²¹ she proposes to compare copyright with corporate property.¹²² More precisely, she suggests to quit the property-based approach of solving problems through entitlement limitations and to consider copyright in more "explicitly regulatory and relational" ways.¹²³

She is of the opinion that we should treat "copyright as a distinct, post-industrial modality of property governance."¹²⁴ In other words, considering copyright's relational aspects could help us overcome both the "copyright as property" rhetoric and debate. From there, we could focus on the stake-holders' relationships in copyright-based industries. More specifically, we could take copyright as a governance framework enabling interactions among different sets of stake-holders—authors, producers and collective intermediaries. The remainder of this paper will use her theoretical work as a framework for a reflection on collective intermediaries' place in the cinematographic industry.

A. Compensation Systems: Workarounds and Copyright Governance

1. Residuals and Private Copying as Rewards for Creative Capital

Let's go back to the Foreign Levies Agreement for a moment. This agreement is a bridge between two systems that undermine the fundamentals of copyright law. On the one side, the French system breaks down copyright's exclusive nature to compensate authors. Practically, the private copying mechanism turns copyright into something that looks closely like a quasi-neighboring right for authors. On the other side of the Atlantic, industry-wide collective agreements construct a contractual right to compensation for

120. Cohen, *supra* note 2, at 149.

121. *Id.* at 142.

122. *Id.* at 144.

123. *Id.*

124. *Id.* at 156.

copyright reuse. Here again, the right granted to guilds' members looks closely like performers' neighboring rights.¹²⁵

As noticed by Cohen, “[n]eighboring rights laws respond to the reality of capital-intensive creative industries by enabling those industries to acquire the rights they need to plan and sustain their operations.”¹²⁶ The French private copying compensation¹²⁷ and the American residuals system are an answer to the needs of the cinematographic industry. But they have one more purpose: both article L. 311-1 C.P.I. on private copying and the WGA’s MBA specifically encompass physical persons. Both insist on rewarding human and creative resources.

As such, they are an important part of a copyright governance system that considers creative capital owners as important stakeholders. In fact, both private copying and residuals are a way to separate right to compensation from control, along lines similar to those separating corporate ownership from corporate control. As Cohen puts it: “[T]he existence of complex regimes of neighboring rights in authors’ rights regimes reinforces the notion that a regime of copyright/authors’ rights does not concern solely the rights of authors or of intermediaries, but rather the nature of the relationship between authors and intermediaries.”¹²⁸

Copyright as a governance system highlights the nature of the relationship between financial capital and creative capital. Instead of insisting on the nature and scope of authors’ rights, copyright and workaround mechanisms ensure an adequate compensation for the creation of immaterial property. By stepping in, copyright intermediaries level the playing field and enable a negotiation at arm’s length between two categories of stake-holders: authors and producers.

2. *Copyright Intermediaries as Stake-Holders*

But authors as stake-holders have a somewhat hybrid status. Their individual relationships within cultural industries often present

125. Craig Mazin, *Residual rumble: We’re standing up for all rank-and-file*, L.A. TIMES, December 12, 2007, <http://www.latimes.com/business/la-op-dustup12dec12,0,5202647.story>, speaking of the residuals: “They are our version of royalties, and they are an integral byproduct of our authorship.”

126. Cohen, *supra* note 2, at 155.

127. It may be useful to remember here that the French private copying system, namely article L 311-7 C.P.I. also grants producers one third of all private copying levies.

128. Cohen, *supra* note 2, at 156.

many of the characteristics of a labor relationship. Such a situation supports American artists' choice to unionize and French authors' decision to create copyright collectives. But their collective action presents a very different aspect. Both the SACD and the WGA negotiate large scale deals granting access to a pool of creative resources. SACD does so directly by granting repertoire licenses on creative content. The WGA does so by framing producers' access to creators. In that respect, unions and copyright collectives act as capital owners, trying to get the best out of their assets. In this context, authors consequently "perform a role analogous to the shareholders' role."¹²⁹

The Foreign Levies Agreement illustrates the shortcomings of this situation. When negotiating with the producers, the guilds privileged their functions as capital managers. The same can be said of the foreign copyright collectives who ditched foreign right-holders' levies to the guilds without much concern about their ability or willingness to fulfill the task. The interest of the structures took over their members' interest.

Thomas Paris considers that collective management of copyright revolves around three different logics¹³⁰ and his findings can be extended to the American artists unions. His belief is that there are three groups of interest at play within collective copyright intermediaries: an administrative structure, an institutional structure, and a right-holders' structure.¹³¹

The administrative structure will act to maintain its own existence, by increasing the number of employees, the volume of activities, and the amount of the fees.¹³² The institutional structure will make of the collective an inescapable intermediary, for example by extending the collective's jurisdiction, lobbying around, and starting costly

129. *Id.* at 160.

130. Thomas Paris, *L'organisation de la gestion collective des droits d'auteur : entre rationalisation et logique d'institution* [*The Organization of Collective Management of Copyright: From Rationalization and Logic Institution*] 16:88 RÉSEAUX 123, 132 (1998).

131. *Id.* at 132. See also Fabrice Rochelandet, *Are Copyright Collecting Societies Efficient Organisations? An Evaluation of Collective Administration of Copyright in Europe*, in *THE ECONOMICS OF COPYRIGHT: DEVELOPMENTS IN RESEARCH AND ANALYSIS*, 178-181 (Wendy J. Gordon & Richard Watt, eds. 2003).

132. For example, the WGA created a 5% management fee on residuals to non-members in 2006, while maintaining a 1.5% fee for members, see Writers Guild of America, *Residuals Guide*, *supra* note 88, at 52.

lawsuits.¹³³ Finally, the right-holders' structure will try to maximize their profits by closely monitoring the amount of the fees, negotiating more leeway for contracting out of the system, and discussing the scope of social programs.¹³⁴

The Foreign Levies Agreement can be understood as a meeting of both administrative and institutional structures, to the detriment of the right-holders' structure. The WGA's administrative structure of the time decided not to jeopardize its current position by entering long-term, costly, highly risky litigation, which would not bear fruit during its mandate. The SACD's institutional structure thought it best to forge a new bilateral agreement to channel out foreign levies. That way, it could boast about its efficiency while strengthening its position as an essential intermediary.

B. Settlements Blurring the Accountability Line

Thus, collective copyright intermediaries are prone to favor their own interests over those of authors and "this tendency requires appropriate structural correction."¹³⁵ But such structural remedies cannot be found in copyright law. Instead, in this case, the parties spontaneously solved their dispute outside court.

This is yet another instance of the seemingly increasing use of class-action settlements to deal with thorny copyright issues.¹³⁶ Where laws have a chilling effect, parties seek an escape through litigation. One can wonder to which extent the solution is worse than the problem. Class-actions typically generate coordination issues among the class-members, and in the case of the Guilds, leave very little wiggle room for uninformed non-guild members. They are, at best, a "better than none" solution.¹³⁷ In fact, the use of settlement as a regulation tool is problematic on several levels.

133. WGA's attempt to unionize reality TV writers in order to enhance the effects of its 2007 strike is a good example of that logic, *see* Blau, *supra* note 86 and McNary, *supra* note 86. Had the guild been successful, the producers would have run short of any fresh content in a very short while after the beginning of the strike. *See also The show will resume : Striking writers go back to their desks*, THE ECONOMIST, 12 February 2008, <http://www.economist.com/node/10677757> precisising: "[t]hey also gave up trying to get reality television and animation covered by union terms. That is important: being able to fill holes with reality shows protected the media companies financially during the strike."

134. Paris, *supra* note 130, at 132.

135. *Id.* at 161.

136. C. Scott Hemphill, *Collusive and Exclusive Settlements of Intellectual Property Litigation*, 2010 COLUM. BUS. L. REV. 685, 688 (2010).

137. *Id.* at 695.

1. *Settlement v. Escheat*

A closer look at the DGA settlement tells us that the DGA will keep undeliverable money for two years only, keep the interest generated by the funds in custody, charge a management fee in addition to keeping the interests, and transfer undeliverable funds to a charity after two years. The WGA settlement provides that the guild will keep the money until declared undeliverable, discuss in good faith the definition and fate of undeliverable funds, transfer levies whose owner cannot be located to the State of California, and transfer levies whose owner cannot be identified to a charity.¹³⁸

But an examination of California's *Unclaimed Property Law*¹³⁹ tells us that the guilds are business associations¹⁴⁰ who hold residuals in a fiduciary capacity,¹⁴¹ consequently falling under its scope. This act provides that any property held by a third-party for more than seven years should revert to the State, to be kept until its rightful owner claims it. The *Unclaimed Property Act* is a law established for public policy reasons: the right to escheat cannot be waived by private agreement.¹⁴² Consequently, no Screen Actors Guild by-laws can prevent residuals held for more than seven years to escheat to the State of California, as stated by *Screen Actors Guild, Inc. v. Cory*.¹⁴³ In this decision, the court confirmed that funds retained by a guild for more than seven years should escheat to the State of California, even though the Screen Actors Guild by-law stated that residuals unclaimed for at least six years would revert to the guild for the benefit of all of its members.

Both settlements are problematic in several regards. First, the DGA settlement stipulates that undeliverable funds will be transferred to a charity after two years. It circumvents escheat by incorporating provisions that would be prohibited in a guild by-law.

138. See *infra*, II. B. 2.

139. Cal. Civ. Pro. Code §§ 1500-1599 (2012).

140. *Id.* §1501 (c).

141. *Id.* §1518 (a).

142. Cal. Civ. Code §3513 (2012): "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Guilds' by-laws are considered as private agreements.

143. *Screen Actors Guild, Inc. v. Cory*, 91 Cal. App. 3d 111, 154 (Cal. App. 2d Dist. 1979). The Screen Actors Guild appealed from a declaratory judgment decreeing that residuals held by it on behalf of its members and pursuant to a specific by-law were subject to escheat to the State of California after seven years. The judgment under appeal was affirmed. *Id.*

Furthermore, considering that the levies have been held since the early 1990s, two years is a very short delay for directors to track their dues. Second, when the money escheat to the State, it remains under the State Controller's custody,¹⁴⁴ who is entitled to retain the interest,¹⁴⁵ but cannot charge any fee.¹⁴⁶ On the contrary, both guilds are allowed to retain a ten percent fee on foreign levies.¹⁴⁷ Thus, authors whose levies have been held for more than seven years already are in a worse situation than if the settlements had not taken place. Third, the State of California built an online searchable database that allows anyone to look for unclaimed property and to determine the exact amount held in custody and the origin of the amount.¹⁴⁸ On the contrary, both DGA and WGA websites do not provide the amounts held in custody. Currently, the DGA distinguishes between people owed \$25 to \$49.99 and people owed more than \$50.¹⁴⁹ The WGA does not provide any information regarding the amounts.¹⁵⁰ The settlements actually make it more difficult for authors to know the exact amounts they are entitled to receive.

In *Screen Actors Guild, Inc. v. Cory*,¹⁵¹ the court made two interesting comments:

In this respect [the Screen Actors Guild] may do a better job than the state because its search for such persons is more industry-oriented and more prolonged. It also appears that plaintiff provides a better interest return on these residuals than the state does.¹⁵²

144. Cal. Code Civ. Proc. §1560(a).

145. *Id.* §1562. The interest is transferred to the State's General Fund.

146. *Id.* §1522: "No service, handling, maintenance or other charge or fee of any kind which is imposed because of the inactive or unclaimed status contemplated by this chapter, may be deducted or withheld from any property subject to escheat under this chapter, unless specifically permitted by this chapter."

147. For the DGA fee collected in addition to interests, *see infra* note 149. For the WGA fee, *see infra* note 150.

148. *Unclaimed Property Search*, CALIFORNIA STATE CONTROLLER'S OFFICE (Sept. 24, 2012), <http://scoweb.sco.ca.gov/UCP/Default.aspx>.

149. *Non Members Directors*, DIRECTORS GUILD OF AMERICA, <http://www.dga.org/ForeignLevies/NonMemberDirectors.aspx> (last visited on Oct. 5, 2012).

150. *WGAW Foreign Levies Program*, WGA, <http://www.wga.org/content/default.aspx?id=4262> (last visited on Oct. 5, 2012).

151. *Cory*, *supra* note 143, at 113.

152. *Id.* at 116 n.5.

[The Screen Actors Guild] undoubtedly does occupy a different relationship to its members and they to each other than ordinarily obtains between and among holders and owners of unclaimed property. The Legislature may wish to make this circumstance the basis for a special exemption of the unclaimed residuals at issue, but in our view it has not accomplished this exemption in the present wording of the statute.¹⁵³

In sum, neither the guild's by-laws, nor their supposed efficiency should prevent the money held in custody to escheat, as long as guilds fall under the scope of the Unclaimed Property Law.¹⁵⁴ By granting the settlements, the Los Angeles' courts have achieved a "quasi-legislative" outcome regarding unclaimed levies.

2. *A Quasi-Legislative Outcome*

Pamela Samuelson recently used the expression "quasi-legislative"¹⁵⁵ to qualify a copyright settlement which, "if approved, would have accomplished changes that would be tantamount to legislative reform."¹⁵⁶ Such settlements address problems that theoretically should not be solved by courts: "[w]hile a legislative solution to some of these problems might be possible...it may be unlikely to occur for various reasons, including because rights allocations are generally matters of contract interpretation."¹⁵⁷

At last, even though the class obtained compensation for the levies that were unduly collected by the guilds, both settlements created a de facto mandatory system of collective management for audiovisual works. Non-members are now stuck in a system of collection over which they have no control. They have no way to participate in the guilds' decision process and the external control is left in the hands of accounting firms in charge of the yearly audits.

In fact, by creating a mutual collection scheme, the WGA-DGA settlements "change some substantive default rules of copyright law and [have] substantial spillover effects for third parties not represented in the settlement negotiations."¹⁵⁸ This outcome is similar

153. *Id.* at 116 n.6.

154. Civ. Proc. §§1500-1599.

155. Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 479 (2011).

156. *Id.* at 515.

157. *Id.* at 501.

158. *Id.* at 515.

the tentative Google Book Settlement in many regards. In both cases, the litigation and settlement project were prompted by unclear ownership on certain rights¹⁵⁹ and a guild more inclined to settle than to continue a “full-dress” suit,¹⁶⁰ and both are akin to copyright reform.

Worse, the WGA-DGA settlements do not even address the question of ownership of the foreign levies which brought up the class-actions in the first place. The rights will remain unclear. Furthermore, the settlements ensure the continued existence of a distribution key for foreign levies that no one is even sure is right. If they bring predictability, it is at the cost of fairness.

Finally, the settlements are no answer to the larger problem of the accountability of copyright intermediaries. They impact the nature and management of copyright, but they do not question the behaviour or internal governance mechanisms for guilds and copyright collectives. The only concession made to transparency is the annual intervention of exterior accounting firms, which may, or may not, enable members and non-members to challenge the practices of guilds and copyright collectives. That way, settlements cannot be considered as a relevant tool for copyright governance.

IV. Conclusion

Whether of contractual or legislative origin, copyright workarounds aim at ensuring direct compensation for creative people. They specifically target physical persons, by granting them a fair share of profits. They reward creative input, sometimes outside of the copyright field. Unfortunately, copyright workarounds are devised at the national level. Accordingly, they are submitted to the interference of international copyright conventions. Thus, when workarounds based on drastically different national laws collide, turmoil in international exploitation is inevitable. Agreements such as the Foreign Levies Agreement embody the Berne Convention’s systemic failure to harmonize the protection regimens for audiovisual works. They are proof that one workaround system can be the demise of another. They illustrate the limits of copyright intermediation in capital intensive domains such as the cinematographic industry.

159. *Id.* at 498-502.

160. *Id.* at 512-14, specifically at 513.

Developed in the absence of other structural remedies, national settlements are a less than ideal tool to solve the problem. The situation now calls for an inquiry into potential sources of accountability for copyright intermediaries.