

# LIGHTS, CAMERA, CONTRACT!

## Entertainment, Film, and TV Contracts: Be Ready for Your Client's Close-up

By Ethan Bordman



### Fast Facts:

Film producer Samuel Goldwyn famously declared: “A verbal contract isn’t worth the paper it’s written on”—though unwritten does not mean unenforceable.

Tight production timelines and demand can force studios to “lock down” a script or an actor’s services before a formal contract can be drafted.

Oscar winner Charlton Heston, who appeared in more than 60 films, claimed he never signed a complete contract before production began.

### “Do Less Lunch, Do More Contracts”

“Moviemakers do lunch, not contracts.”<sup>1</sup> This was the court’s summary of director Larry Cohen’s reason for the absence of a written contract regarding ownership of film footage in the horror movie *The Stuff*, starring actor Paul Sorvino. Cohen hired Effects Associates, a special-effects company, to enhance certain scenes in the film. An oral agreement was reached regarding services without discussion of copyright ownership in the footage. Suit was later filed for breach of contract. During the trial, Cohen contended that moviemakers are too absorbed in developing creative endeavors to “focus upon the legal niceties....”<sup>2</sup> He asked the court to hold the absence of a written agreement inapplicable as “it [i]s customary in the motion picture industry...not to have

written licenses.”<sup>3</sup> The United States Court of Appeals for the Ninth Circuit ruled that Effects Associates had, by implication, been granted a nonexclusive copyright license—though Cohen could retain the right to sue for breach of contract in state court. Several months later, Judge Alex Kozinski, author of the *Effects* opinion, addressed an audience of entertainment industry professionals and attorneys. During a discussion of the case, the moderator of the panel summarized the lesson learned from the case: “Do less lunch, do more contracts.”<sup>4</sup>

### Unwritten Does Not Necessarily Mean Unenforceable

Film producer and studio founder Samuel Goldwyn famously declared, “A verbal contract isn’t worth the paper it’s written on.”<sup>5</sup>

In the entertainment industry, tight production timelines and demand can force movie studios to quickly “lock down” a script or an actor’s services. Moreover, with the large number of contracts that need to be drafted and signed to facilitate a production, by the time everyone’s contracts are executed, the production may be days or weeks behind schedule. As a result, formal written contracts are often never executed. Oscar winner Charlton Heston, who appeared in more than 60 films, claimed he never signed a complete contract before production began.<sup>6</sup>

Though a formal contract may not be completed until after principal photography begins on a film, an unsigned contract does not always mean it’s unenforceable. In *Main Line Pictures, Inc v Basinger*,<sup>7</sup> actress Kim Basinger agreed to play the starring role in the film *Boxing Helena*. Basinger later changed her mind before filming began and the production company brought suit for breach of an oral and written contract. Basinger’s attorneys argued that the “long form,” or formal contract—the Acting Service Agreement—was never executed. In its analysis, the court noted: “[b]ecause timing is critical, film industry contracts are frequently oral agreements based on unsigned ‘deal memos.’”<sup>8</sup> In this case, a “deal memo” had been drafted between Basinger’s attorney and Main Line’s attorneys; it set forth terms that created the Acting Service Agreement and was agreed upon by both parties, though, as noted, it was not executed. The court further stated: “[t]he absence of an executed agreement does not mean there is no legally binding agreement.”<sup>9</sup> It was reiterated that Basinger had signed only two executed written agreements among her last 12 films. The jury concluded that Basinger had entered into both an oral and written contract and caused damages to Main Line. The case was later settled.

*Coppola v Warner Bros*<sup>10</sup> shows entertainment contract enforcement from a different perspective. Oscar-winning director Francis

Ford Coppola won a suit against Warner Brothers in which he alleged the film studio interfered with his attempts to take his film *Pinocchio*—a live-action version of the animated film—to another studio. The judge granted summary judgment and ruled there was no contract because the long-form agreement was never signed. Warner Brothers pointed to a “certificate of employment” signed by Coppola regarding his creative input. According to the certificate, “all ideas, suggestions, plots, themes, stories...” relating to the film would be owned by the studio.<sup>11</sup> The court concluded that the certificate was unenforceable as a result of its vague language and failure to identify the subject matter of the agreement; it also failed to specify which rights were being transferred and the related compensation. According to the court, its decision was reinforced since other contracts detailing Mr. Coppola’s compensation for services as a writer, producer, and director for the film were never signed.

### Essential Terms Make the Difference

There are several ways plaintiffs have successfully proven that an entertainment-related contract existed without a formal writing. Verbal contracts, deal memos, confirming letters, and short-form agreements have been found sufficient if they contain essential or material terms showing the intent of the parties. Courts have traditionally found essential terms to include the parties, time and place of employment, compensation, and type of employment. A “meeting of the minds” exists if it can be proven that no further negotiation or discussion was needed on any of the essential terms, even if other provisions are open for later negotiation. Defenses such as vagueness or indefiniteness of terms can be used, though the court’s determination of whether a material term is contained or missing has largely depended on the facts

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and circumstances before the court. This was illustrated in *Main Line* in favor of the production company and *Coppola* in favor of the talent.

When negotiating with a studio or production company, the key is to document every phone call or meeting with a written record reiterating what was discussed and agreed upon. A written letter and e-mail (both dated and time-stamped) stating, “Per our conversation, we agreed that...” can be helpful in avoiding problems as a project progresses. It is also important to make non-negotiable terms clear as soon as possible in your initial meeting. If your client is emphatic about directing the screenplay he wrote, there is no benefit to a studio in purchasing the script if the studio has someone else in mind to direct. Clarifying nonnegotiable terms up front not only saves time and money but also helps avoid future embarrassment for all involved by making sure everyone is on the same page at the start of a project. Along with nonnegotiable terms, it is imperative that terms used in the agreement are made clear. There may be multiple meanings and uses of basic terms; for example, “gross” includes “gross receipts,” “piece of the gross,” “gross profit participation,” “adjusted gross participation,” and “modified adjusted gross participation.”

### “But I’m Just a Kid!”— Entertainment Contracts for Minors

In 1919, six-year-old Jackie Coogan was discovered by Charlie Chaplin; he went on to star in films such as *The Kid*, *Oliver Twist*, and *Tom Sawyer*. Coogan earned an estimated \$3–\$4 million in the 1920s,<sup>12</sup> or approximately \$40–\$50 million in 2012 dollars.<sup>13</sup> On his 21st birthday, Coogan learned that his parents had squandered his earnings on furs, diamonds, and expensive cars; at the time, minors’ earnings belonged solely to their parents. Coogan sued his parents but recovered only \$126,000.<sup>14</sup> As a result of the incident, California passed what became known as the Coogan Law<sup>15</sup> and New York passed the Child Performer Education and Trust Act,<sup>16</sup> under which entertainment contracts require 15 percent of a child actor’s earnings to be placed in a blocked trust account until the performer reaches age 18.

Because of the Coogan Law and the fact that minors have the right to disaffirm a contract under the infancy law doctrine, California and New York have taken steps to ensure that entertainment companies do not suffer—creatively or financially—if a mi-

nor chooses not to fulfill his or her agreement. New York’s Arts and Cultural Affairs Law, § 35.03, and California’s Family Code § 6751 both authorize courts to approve or disapprove a minor’s entertainment contract—before the performance begins—in the state where the minor is to provide creative services. Under these laws, the minor appears before a judge, who reviews the contract’s terms, explains the professional obligations, and determines whether the minor’s decision to perform is made without duress. The judge will also explain the personal sacrifices the minor will have to make because of his or her work obligations; these may include having less or no free time for personal activities or visits with friends. If the judge is satisfied with the terms of the contract and the minor understands the commitment, the agreement will be confirmed—after which any action by the minor that violates the contract is treated as a breach by an adult.

Terms of minors’ contracts in Michigan are specified in the Youth Employment Standards Act 90 of 1978.<sup>17</sup> An Application for Performing Arts Authorization must be filed with the state *before* any work, rehearsal, or performance begins. Court approval of the contract is not required, though the act specifies other requirements including adult supervision at all times, a doctor’s note certifying that the demands of performing are not detrimental to the health of an actor younger than age six, and specific hours and working conditions for the minor, which vary based on age.<sup>18</sup>

### Entertainment Union Contracts— Talent is Unique and So Are the Contracts

One of the most important decisions to make regarding talent contracts is whether the production will hire members of entertainment unions, such as directors (Directors Guild of America), costume designers (Costume Designers Guild), writers (Writers Guild of America), or actors (Screen Actors Guild (SAG) and American Federation of TV and Radio Artists (AFTRA)). One of the biggest misconceptions about union contracts is that the decision to use union talent is all or none. All unions, with the exception of the performers’ unions, are independent of one another. At times, a first-time filmmaker (not yet a member of the Writers Guild of America) who wrote a screenplay and intends to direct (not yet a member of the Directors Guild of America) will wish to use union (SAG) actors in the film, which is acceptable under union rules.

The performers' exception states that under agreements of the Associated Actors and Artistes of America (the 4 As), members of one performers' union may not appear in nonunion productions under the jurisdiction of any other performers' union.<sup>19</sup> The 4 As reciprocal agreement also establishes the rule that a member of one performers' union should be treated as a member of the union under which the applicable work is carried out. For example, a member of SAG, which has jurisdiction over motion picture productions, is hired to act in a live performance, which is under the jurisdiction of the Actors' Equity Association (AEA). Under the agreement between the performers' unions (SAG, AFTRA, AEA, the American Guild of Musical Artists, and the American Guild of Variety Artists), the SAG actor must work under a union contract and is entitled to all the benefits, rules, and regulations of the live performance contract even though he or she is not an AEA member.

If a production company decides to use a particular union, each of the respective unions has contracts it uses to employ its members. The contents of the contracts have been negotiated and agreed upon by signatories, representing the interests of employers such as studios and production companies, and union delegates, who are elected by members to represent the union's interests. The contracts state the rights and obligations of the member and employing producer and cover areas such as minimum payment for the member's services (there is no maximum compensation), acceptable working conditions, and guidelines to follow in the event of a breach by either party. Under general union rules, nothing can be eliminated from the contracts (a clause waiver can be requested); however, clauses and conditions can be added in a supplemental contract if they don't contradict conditions in the union agreements. This is where an attorney's creative skills may be used—often in the area of perks for the talent. Actors, for example, may wish to keep the wardrobe they wear in the film or request services performed by a preferred makeup artist or hairstylist.

If the production company chooses to employ nonunion individuals, the attorney will draft an original agreement between the individual performer and the company. The decision to use union or nonunion members in a production is typically financially driven. Union contracts require minimum rates of compensation for members in addition to residual payments for future earnings of the production and a specified amount to be disbursed by the production into the member's union retirement fund. In contrast, compensation of nonunion talent is negotiable and often a one-time payment for services between the production company and an individual.

## Conclusion: There is No Standard Contract in Entertainment

There is no standard agreement in the entertainment business. However, individuals are often told the opposite when they ask if they should have an attorney review a proposed contract. "Standard" is what two parties are willing to accept as fair and equitable. Productions are often fast-paced; although not every step

requires a formal written contract, the role of the attorney as counselor is especially important to the entertainment client since work in one role is critical to finding the next. Oral contracts may be enforceable in certain circumstances, but it is not advisable to take a chance with your client's future. Production time moves quickly, so it is best to have a formal contract executed *before* production begins.

Producer Robert Evans (*The Godfather*, *Chinatown*) stated, "There are three sides to every story: yours...mine...and the truth. No one is lying. Memories shared serve each differently."<sup>20</sup> To ensure everyone has the same memory of the details, make certain the contract is put in writing. Now you are ready for your client's close-up, so remember—lights, camera, *contract!* ■



*Ethan Bordman is a former chair of the SBM Arts, Communications, Entertainment and Sports Section. He earned an LLM in entertainment law from the University of Westminster in London, England; a JD from the University of Detroit; and an MBA from Wayne State University. He practices entertainment law in Michigan and New York representing directors, producers, screenwriters, and actors in bringing their dreams to the screen.*

## FOOTNOTES

1. *Effects Associates, Inc v Cohen*, 908 F2d 555, 556 (CA 9, 1990).
2. *Id.* at 557.
3. *Id.*
4. Professor Eric Goldman, Remarks at the Santa Clara University School of Law Cyberspace Law Seminar (March 4, 2011).
5. Internet Movie Database, *Biography for Samuel Goldwyn* <<http://www.imdb.com/name/nm0326418/bio>>. All websites cited in this article were accessed August 6, 2012.
6. Heston, *Of trust, manners and how Hollywood works*, Los Angeles Times, April 12, 1993, p F5, available at <[http://articles.latimes.com/1993-04-12/entertainment/ca-21971\\_1\\_hollywood-works](http://articles.latimes.com/1993-04-12/entertainment/ca-21971_1_hollywood-works)>.
7. *Main Line Pictures, Inc v Basinger*, unpublished opinion of the Court of Appeals for the Second District of California, issued September 22, 1994 (No. B077509).
8. *Id.* at 3.
9. See *id.*
10. *Coppola v Warner Bros*, unpublished opinion of the Court of Appeals for the Second District of California, issued March 26, 2001 (No. B126903).
11. See *id.*
12. Katy Coli, *Movies 101: Terminology—Coogan's Law* <<http://www.examiner.com/article/movies-101-terminology-coogans-law>>.
13. U.S. Inflation Calculator <<http://www.usinflationcalculator.com/>>.
14. *Coogan Gets Back \$126,000 of Earnings*, Milwaukee Sentinel, August 17, 1939, p 1, available at <<http://www.jsonline.com/historicarchive/search/?searchBy=word&searchText=jackie+coogan&dat=&fromDate=&nid=jvrRlaHg2sAC&s.x=0&s.y=0>>.
15. Cal Fam Code § 7-7.1.
16. NY Est Pow & Trst § 6753.
17. MCL 409 *et seq.*
18. See *id.*
19. Screen Actors Guild Constitution and Bylaws 2011, art XXI, Rule 9. Although SAG and AFTRA have since merged, many of the policies and rules from both unions, such as Rule 9 and both unions' membership with the 4 As, still exist. See SAG-AFTRA Merger Agreement 2012, art XV, § B, available at <<http://www.sagaftra.org/files/sag/documents/Merger%20Agreement%20Final%20Approved%20120131a.pdf>>.
20. Evans, *The Kid Stays in the Picture* (First New Millennium Press edition, 2002), Preface.