

BEFORE THE WRITERS GUILD OF AMERICA, WEST, INC.
PRODUCERS ARBITRATION TRIBUNAL

**WRITERS GUILD OF AMERICA,
WEST, INC.,**

Complainant

and

Respondents.

**Relating to compensation for writing
services**

WGA Case Nos. 99-CO-037
99-CO-039
99-CO-040
99-CO-059

**ARBITRATION DECISION AND
AWARD**

[REDACTED]

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** Names of people, companies, and dates have been redacted from this document for legal purposes.

INTRODUCTION

In 1999, the Writers Guild of America, west, Inc. [the Guild] filed arbitration claims against _____, _____, and _____ [collectively the Companies or Studios]. The claims allege that writers on 42 theatrical motion picture projects were not paid for all of the compensable writing they performed. The Guild is the Grievant in these claims. The individual writers whose literary material is at issue did not initiate the grievances. Anita Christine Knowlton was selected by the parties to arbitrate the grievances.

The parties agreed that the 1995 Writers Guild of America - Alliance of Motion Picture & Television Producers [AMPTP] Theatrical and Television Basic Agreement effective May 2 through May 1, 1998, published by the AMPTP [MBA] governs this dispute.

Stipulated protective orders govern the confidentiality of documents in the record. The arbitration was divided into two phases, with the first phase addressing a limited number of test cases selected by the Arbitrator on June 15, 2000. The record in the first phase was limited to evidence regarding the test cases, bargaining history and industry practice. With respect to the individual cases, the arbitrator is to decide only whether the identified literary material is compensable. The question of damages, if any, was bifurcated from the proceedings on the merits. After approximately 35 days of hearing, eighteen claims are now ripe for decision on the question of liability.

CONTRACT LANGUAGE

ARTICLE 13. A. COMPENSATION - THEATRICAL

14. Payment of Compensation Under Deal Contract

Company will use its best efforts to pay writers employed to write on a deal basis not less than the applicable minimum within forty-eight (48) hours after the delivery of a completed story, treatment or original treatment, first draft screenplay or final draft screenplay, as the case may be, but in no event shall any such payment be made later than seven (7) days after delivery of such material. Payment shall not be contingent upon the acceptance or approval by the Company of the material so delivered. Company shall include in writer's deal memorandum or personal service contract: a) the place where and the name(s) or function of the person(s) to whom delivery of such material is to be made, and b) the name(s) of the person(s) authorized to request rewrites of said material. Company shall give writer written notice of any change in the name(s) of the person(s) authorized to request rewrites. [WJX-1, p. 73]¹.

ARTICLE 20.A. SPECULATIVE WRITING - THEATRICAL

¹ Exhibits are cited: WJX- Joint Exhibit, WCX- Company Exhibit, WGX-
Guild Exhibit, WTr- Transcript, with an F used for , U for , P for and M for Multi-Employer.
Exhibits may also contain a Bates stamp or page reference. The parties stipulated that the evidence developed in all
four cases could be relied upon in any case. [MTr. 1144].

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1. The Company and the Guild agree that there shall be no speculative writing, nor shall either party condone it as a practice. As used herein, the term 'speculative writing' has reference to any agreement covered hereunder which is entered into between the Company and any writer whereby the writer shall write material, payment for which is contingent upon the acceptance or approval of the Company or upon the occurrence of any other event such as obtaining financing, or whereby the writer shall, at the request of the Company, engage in rewriting or revising any material submitted under the terms of this Basic Agreement and compensation for the writer's services in connection with such material is contingent upon the acceptance or approval of the Company, or upon the occurrence of any other event such as obtaining financing. Company shall not request a writer to write and submit literary material, other than a submission contemplated by Article 3.B.2. [minimum compensation] of this Basic Agreement, unless the Company first makes commitment with the writer for the writing of at least a story or treatment. If the Company does so make a prohibited request, the writer shall not write and submit such material.

2. The Company and the Guild recognize that there is possibly an area wherein the proper and constructive exchange of ideas and criticism between a writer and a Company may be claimed by the Guild to be speculative writing. Whenever the Guild feels that speculative writing has occurred, the case will be referred to grievance and arbitration and the Company's intent as determined by the facts shall be an important factor in the consideration... [WJX-1, p. 247-248].

ISSUES

Whether the Companies breached Article 13.A of the MBA by failing to compensate writers for writing services performed at the instruction of the Companies and delivered to the Companies? If so, what is the appropriate remedy? [WJX-3; FJX-2; UGX-1; PGX-2].

FACTUAL SUMMARY

The Guild's claims and the collaborative process. The writing of a screenplay is a collaborative process involving the writer or writing team, the producer, studio creative executive, and director, among others. The methods used by the individuals involved in this collaboration are diverse, and reflect the relationships and work styles of the participants. Everyone who participates in the creative process of developing a screenplay shares the same goal: to have the project green-lit for production by the studio.

The process begins with an idea coming to the studio's attention, through a pitch meeting with the producer and a writer, an article or book, or other means. If the studio decides to develop the project, it employs a writer pursuant to a step contract and the MBA. Funding for the writer's compensation may come directly from the studio or indirectly from the producer's discretionary funds provided by the studio to finance projects it passes on.

Generally, a step contract calls for two or three guaranteed or "committed" steps, a first draft, a rewrite, and/or a polish, and some optional steps. According to Thomas Mount, an

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independent producer, former studio executive, and president of the Producer's Guild of America [PGA] with over 30 years of industry experience, a step deal outlines a series of stages that mark when a writer is to be paid and the project shifts to another stage of development." [Mount, MTr. 637-38, 642, 644-45]. The writer is usually paid one-half of each step payment upon commencement of the step and the remainder on delivery of the completed draft to the studio. The step contract also specifies the additional compensation to be paid if the project is green-lit.

Producers are not studio employees. A studio's relationship with a producer is spelled out in a term or "first look" deal or project-specific agreements. Producers usually receive a relatively small fixed fee for script development, with significant additional compensation if a project is green-lit. Among other things, the producer is responsible for supervising the writer in the development of the screenplay. While the producer's agreement sometimes mentions this responsibility, the specific duties of a producer are not negotiated or spelled out.

The PGA publication entitled, "What producers do," has a section on "Development/Preproduction," which contains a number of entries describing the producer's responsibilities for script development:

- Conceived of the underlying concept on which the production is based
- Selected the material upon which the production is based
- Selected the writer(s)
- Secured the necessary rights for development and production of material
- Supervised and oversaw the development process (i.e. overall process of how the concept was developed into the screenplay) [MCX-35].

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After the writer is retained, the writer, producer, and studio creative executive may meet to discuss how they will work together, and their take on the screenplay. They may also review specific aspects of the script such as what occurs in the three acts, plot points, and character development. At this stage, the writer sometimes prepares notes, an outline or a beat sheet to ensure there is a shared vision for the project before beginning to write.

The writer then commences work on the draft, working closely with the producer on revisions and refinements. The record establishes that the collaborative process commonly involves both the producer reviewing pages, acts, and full drafts, and providing comments to the writer, and the writer making changes before a completed draft is delivered to the studio. The studio creative executive or the director may also be involved in the revision process in the same manner as the producer. During this process, the writer and producer discuss how to execute the notes for the next step and what is needed to make a successful or green-lit script.

Writers may prepare any number of revisions or passes before a draft is “officially delivered” to the studio as a completed step. Indeed, the record establishes that writers rarely work in isolation and submit a draft to the studio for payment without making changes to incorporate the producer’s ideas. The object of the collaborative effort is to produce an official draft to be submitted to the studio and for the studio to approve further work on the project. According to a 35-year veteran producer, Howard “Hawk” Koch, Jr., “. . . there’s kind of an old adage in Hollywood: A studio executive only reads a script once. And that script better be as

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good as possible at that point, or you're not going to be able to move forward." [Koch, MTr.424]. Article 20.A.2. of the MBA, which prohibits speculative writing, implicitly recognizes the existence and legitimacy of this process. It states, "the proper and constructive exchange of ideas and criticism between a writer and a Company may be claimed by the Guild to be speculative writing."

Once a draft is completed and officially delivered to the studio for payment, a group of the studio's creative executives review read the draft on the "weekend read" and provide official notes of the changes to be executed in the next step. This process continues until the script is completed, the project is dropped, or the writer is released or replaced.

It is undisputed that, revisions requested by the producer, when voluntarily executed by the writer, do not require payment for a new step. The Guild concedes that the extent of voluntary rewriting can range from the "potchkeh," described by former Guild President Daniel Petrie, Jr. as a one-time revision the writer agrees with that can be completed in less than a week, to the numerous revisions in the record of . [MTr. 163; MCX-45A-R, 46A-O; MCX-43].

In , the writer collaborated directly with Lindsey Doran, the Paramount creative executive who is the former president of United Artists and an independent producer with almost 25 years of industry experience. The producer-member of the collaborative team was an experienced writer who was a member of the Guild's Board of Directors. When the literary material was offered into the record, Guild counsel stated:

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It does not appear to us to be other than a case of a writer voluntarily collaborating with a producer and a studio executive and, among other people, we understand his landlord and various other people who saw pages and parts of drafts and drafts. And we haven't made a claim on based on the parameters of free rewrites in the Contract as we interpret it. [MTr. 1070].

The grievances brought by the Guild in this case seek compensation for literary material that was not delivered to the Studios as fulfillment of a step in the writing contract. The Guild maintains that, the Studios owe compensation because the writers executed drafts involuntarily and presented them to the Studios or to producers, who the Guild maintains are agents of the Studios.

Industry Practice. Petrie, who is a well-regarded screenwriter with over 20 years of industry experience, acknowledged that writers normally submit literary material to the producer to get suggestions, and that doing this is not considered to be official delivery to the studio. [Petrie, PTr. 136-38]. He stated that he was always willing to execute producer notes requiring about a week of work before submitting a draft to the studio for payment. He called this work a “potchkeh” or “courtesy pass.” [Petrie, PTr. 127-28]. Petrie testified that he expected to receive comments from the producer before submitting a draft to the studio and described the courtesy pass as “genuinely voluntary.” [Petrie, PTr. 132]. Although the Guild considers the potschke to be a technical violation of the MBA, Petrie indicated this rewriting is an accepted part of the development process. [Petrie, PTr 123]. Petrie testified, that on every project he worked on as a

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writer, he made voluntary changes, where time permitted. [Petrie, PTr.122, 126-27]. Moreover, when Petrie produces projects, he expects to receive courtesy drafts from the writers. [Petrie, PTr.128-29].

Similarly, test case writer _____, who has approximately 20 years of industry experience, testified that, throughout her career, she has submitted drafts for notes and performed rewriting before officially submitting a draft to the studio. [_____, FTR. 475-76].

Writer, producer, agent, and studio executive witnesses uniformly agreed that only official delivery to the studio for payment and not submission to producers, directors or creative executives when they are collaborators, triggers compensation for a step. Generally, when a script is officially delivered, it is sent to the studio's Story Department, placed on the weekend read for studio creative executives, and invoiced by the writer's agent. A step is considered to be completed when a writer agrees with the producer that the draft should be delivered. If the writer and producer disagree on whether further changes should be made, the record establishes that a writer may deliver the draft to the studio for payment to signify that work has been completed on the step.

In this regard, Doran said, "it's the writer's choice" to officially deliver. [MTr. 1051]. Hutch Parker, the President of Twentieth Century Fox Film Production, said that a writer always has the right to go around the producer and deliver. [H. Parker, MTr. 875-76]. James Horowitz, senior vice president of business and legal affairs at Universal said, "Writers can say 'no' any

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time they want. . . . so a writer has the absolute ability to turn in a script any time they believe they've fulfilled the requirements of the contract.” Chip Diggins, a Senior Creative Executive at Paramount, commented that in rewriting a draft before delivery, “the outside limit is, to some extent, whatever the writer determines is the outside limit.” [Diggins, MTr. 624; see also Crabbe, MTr. 1024-26; Doran, MTr. 1052-53, 1062; Lombardini, MTr. 147; Koch, MTr. 428-30; Mount, MTr. 656; , WTr. 930-93; , FTr. 250; , UTr. 50-51].

Revision of a draft before delivery, even when the writer disagrees with the producer about the changes, does not necessarily mean that the writing was the result of coercion instead of collaboration. Disagreements between writers and their collaborators are not uncommon. Koch noted that he has had arguments with writers over notes. [Koch, MTr.478]. Guild witness Ronald Mardigian, a former William Morris writers' agent who has worked in the industry since 1958, said that, even when one of his clients believed a step had been completed, he did not always agree that further revisions suggested by a producer were separately compensable. [MTr. 1181-1183].

The writers in the test cases also understood that payment for a step is predicated on official delivery. For example, , part of the writing team for , said she understood that work had to be delivered to the studio to be paid. [, FTr. 353]. , part of the writing team, said, “we didn't expect to get paid for a draft unless it was turned in to the studio.” said the novice team's expectation was based on, “our whole understanding of

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the process, as well as just our reading of the contract. If the studio didn't get a draft, I didn't see how we were going to get paid." [, UTr. 365-366, see also , WTr.322; , WTr. 243; WTr.497; , FTr. 516; ; UTr. 110-11].

During negotiations in the 1990s, studio executives acknowledged that there were abuses in the system. A number of witnesses defined some of the circumstances that might be considered abusive. Petrie said that if a writer prepared more than six drafts, he would suspect free rewriting. [Petrie, PTr. 144-45]. Parker said that changing the genre of the project, for example from a romantic comedy to an action comedy, was not an acceptable change within a step. [H. Parker, MTr. 920-22]. Mark Gordon, a producer for approximately 20 years, said that a year is too long to work on a step, unless the writer is working on other projects simultaneously. [Gordon, PTr. 697-98].

Both Petrie and Mardigian thought that the determination of when a step is completed was a judgment call. [Mardigian, MTr. 1183; Petrie, PTr.151-152]. Koch said there is no typical number of passes or drafts in a step. [Koch, MTr. 422-23]. He estimated that projects he produced averaged about two to two and one-half passes to develop an official draft, and said he had never exceeded four or five passes in a step. [Koch, MTr.465-466; see also Gordon, PTr. 688].].

The Guild claims that many writers are reluctant to deliver a draft when the producer does not agree it is ready. Petrie testified that in "many cases" a writer does not have "power in

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the business” and may not be able to decide “what the voluntary portion is of [the] free rewrite and what . . . is too much.” [Petrie, PTr.132; see also Mardigian, MTr.1185-1186]. Petrie described the changes he observed between the time he started working in the industry in 1983 and the mid-1990s, when he became active on the Guild’s Board:

. . .[W]hen I started as a writer, there was an understanding in the business that if the writer had a relationship with a producer, and you turned in the script, and the producer had some notes with which you agreed, and it would take you a reasonable period of time, less than a week, to execute these notes, you would do this as a courtesy, a potchkeh, a little courtesy pass. [Petrie, PTr. 111-12].

In his June 1999 column in the Guild’s “Written by Member News,” Petrie said:

The free rewrite problem might be the perfect illustration of the truth that no favor goes unpunished. That’s how all this started, with a favor. When I joined the Guild, there was an unspoken understanding among many writers that after a script went to the producer but before it went to the studio or network, we’d do a short, courtesy pass as a favor to the producer - and as a favor to ourselves, since it was also understood that a writer didn’t make any changes he she didn’t agree with.

This tacit understand was - and is- a violation of the MBA, but it seemed innocent enough. Only now, writers are expected to do this free work - the idea of it being a favor got lost somehow - and in many case much more besides. The free rewrite is no longer limited as to the amount of work, and writers are expected to address notes they don’t agree with. There are sometimes multiple free rewrites; . . .

* * * * *

Nearly all writers have indicated that producers, and often directors, ask them to provide free rewrites. Writers characterized the practice as “common,” “universal” and “accepted” at virtually every Company. [WGX-1].

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Mardigian testified that he counseled writer-clients that to refuse to perform requested rewriting can damage a writer's career because the writer may develop a reputation for poor writing or uncooperativeness, or be removed from the project. [Mardigian, MT.1183-85]. He felt that more pressure is put on less established writers as "the whole hierarchy of the entertainment business is based on how big a gorilla you are." [Mardigian, MTr.1186].

While the Employers acknowledged the existence of abuses such as these during negotiations concerning the issues presented here, the record also contains examples of writers who remained on the project or received additional assignments after officially delivering a draft in the face of a producer's request for additional writing.

Two test case writers testified about situations where they delivered a draft and suffered no repercussions. [Redacted] asked for a [Redacted] draft to be submitted despite the producer's request for additional changes. The studio paid for the draft and [Redacted] was commenced for the next step of his contract. [Redacted], FTr. 250]. After completing his work at [Redacted], [Redacted] was hired for four other theatrical writing projects. [Redacted], FTr. 275, 279, 285-86].

In [Redacted], [Redacted] delivered a draft even though the producer thought further rewrites were necessary. [Redacted] was paid for the draft, commenced for the next step and, after a director was attached to the project, given a new writing contract. When [Redacted] had difficulty executing the director's vision and suggested another writer be retained to complete the project,

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both the creative executive and the producer were supportive and encouraging of [redacted]'s continued involvement in the project. [redacted], UTr. 50-51, 90].

In another test case, [redacted], [redacted] related that the writing team demanded through their agent that the writing process be expedited to get a draft completed for delivery and payment. Subsequently, [redacted] exercised one of the optional steps in the team's writing contract. [redacted], FTr. 92].

Doran testified about writers she worked with asking for official delivery and said she never produced a movie, as either a creative executive or a production executive, where the writer had been changed. [Doran, MTr. 1064]. Similarly, Lorenzo di Bonaventura, then President of Warner Bros.' Worldwide Theatrical Production, described an incident in which the writer delivered a draft of *Showtime* when he disagreed with the producer's ideas and continued to work on the project. The studio subsequently rehired the writer for another project, *The Replacements*. [di Bonaventura, WTr. 727-30].

John Tomko, senior vice president of production at Jerry Weintraub Productions, cited *The Flight of the Vin Fiz* as an example of a writer demanding a draft be delivered without the requested changes. In that circumstance, Tomko delivered the draft and the writer was compensated. The *Vin Fiz* remains in development and Tomko testified, that when a director is attached, the same writer is slated to do the revision. [Tomko WTr. 844-45, 876-77].

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Mount recounted an instance from his days as a studio executive involving a draft of *Melvin and Howard* which was “much too long and full of odd things” and turned in without the producer’s blessing. The writer was paid and did at least two subsequent revisions. [Mount, MTr. 677-679]. Mount said that, as a studio executive, he accepted drafts submitted for payment when the producer felt more work should be done about three or four times out of the one hundred projects submitted each year. [Mount, MTr. 680; see also, H. Parker, MTr. 877; di Bonaventura, WTr.783].

Jim Crabbe, a theatrical agent with William Morris for over 20 years, said that he officially delivered drafts for clients when the producer disagreed once or twice a year. He could not recall any instance of retaliation against a writer in these circumstances. [Crabbe, MTr. 985-86]. He recalled a situation in which the writer for a Mick Jagger project delivered a script after refusing to make changes suggested by the singer and was hired by the studio to do another movie. [Crabbe, MTr. 1033-34].

Several creative executives provided examples of situations where they heard of differences of opinion between the writer and producer and offered to accept delivery of the draft. Kevin McCormick, Warner Bros. Executive Vice President of Worldwide Production, testified about three examples. On *Escape from Libby Prison*, McCormick invited the writer to deliver the first draft if he had “done everything [he] can do.” The writer declined, stating he

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wanted to keep working with the producer. After the script was received, the writer was paid and continued to work on the project. [McCormick, WTr.1006-08, 1036-38].

On *Jellybeans*, McCormick was asked to review an official draft the producer did not believe was ready for delivery. Although McCormick identified several studio notes from the first draft that had not been executed, he offered to accept delivery because he felt completing these notes would be too much work. Subsequently, the writer was commenced on an optional step to complete the unexecuted notes. [McCormick, WTr. 1011-12, 1041-42].

On another project the writer had a creative difference with the producer, and McCormick offered to take delivery of the script if the writer was ready to submit it. The writer told McCormick that he wanted to do another pass on the ending and would deliver it in two weeks. The writer's work on this project led to a multi-picture deal with Miramax. [McCormick, WTr.1004-1006].

Bargaining History. The relevant provisions of the MBA have been substantially unchanged since at least 1977. In 1981, Article 13.A.14 was amended to add the sentence, "Company shall include in the writer's personal service contract the place where delivery of writing material is to be made." In 1985, this clause was broadened to require the writing contract to specify "the name or function of the person to whom" delivery was to be made, in addition to the place of delivery. Throughout most of the 1990's, the parties have addressed the issue of

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rewriting at the bargaining table and in other labor-management forums and their discussions are summarized below.

The Guidelines. Following a five-month strike in 1988, the parties formed the Committee on the Professional Status of Writers [CPSW] as an on-going forum to discuss credits and the creative participation of writers in the production process. [Lombardini, MTr.141; MGX-3, Article 48(F)]. The Guild appointed prominent and highly-compensated writers who are Guild executives or board members to this labor-management group. The Companies appointed major studio executives as their representatives. Except for a few early 1990s meetings, the chief negotiators for the parties have not participated in the CPSW. AMPTP and Guild staff members continue to attend CPSW meetings and take notes. The CPSW focuses on creative issues and is not authorized to adopt economic changes to the MBA.

In 1993, the CPSW published “Guidelines for Writers, Producers & Executives in the Making of Feature Films and Long-Form Television.” [MGX-4]. According to the introduction, the Guidelines “are voluntary, [and] express the sense of the Committee as to appropriate industry practice and are often written in mandatory terms to stress the strength with which the Committee offers them.” [MGX-4, p. 5]. Carol Lombardini, the AMPTP’s Senior Vice-President of Business and Legal Affairs, referred to the Guidelines as a set of “preferred practices.” [Lombardini, MTr. 143].

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The CPSW had separate, but similar, discussions of the Guidelines for theatrical motion pictures and for long-form television. The two CPSW groups had key members in common and, for these reasons, discussions of the Guidelines made in either forum are referred to here.

Guideline No. 1 was adopted from an early Guild proposal to dispel confusion about the writer's process for working with the producer and studio executive. [Lombardini, MTr. 145].

This Guideline states:

The writer shall meet with the producer(s) and the responsible studio or company executive(s), prior to the commencement of writing services, to discuss and agree on how they will work with each other. [MGX-4, p. 9; see also MCX-3, p. 1].

Among the issues raised by the Guild in the formulation of the Guidelines was the "free rewrite" problem. Guild representative George Kirgo raised the issue at an early CPSW meeting held on July 31, 1990. He complained that writers were often required to do three to six "first drafts" of a long form television script before it was officially delivered to the network.

[Lombardini, MTr. 148; MCX-2].

On March 21, 1991 the Guild submitted a proposal for Guideline No. 6, which stated:

Avoiding "Free" Rewrite Problems

8. The Committee is aware that instances have existed wherein producers and/or companies have requested changes to scripts by writers without wishing to compensate the writer for the services requested. The committee affirms and draws the industry's attention to the fact that the MBA requires writers to be paid for writing services and prohibits

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companies from requiring writers to rewrite or polish scripts without compensation.

9. It should be preferred industry practice to have clear and concise communication between the writer, the writer's agent and the producer and/or companies (See Guideline No. 1) so as to avoid such free rewrite issues by, for example, clearly identifying "first drafts" and "second drafts." [MCX-5].

According to Lombardini, the Companies found the proposal to be inflammatory, pejorative, and insulting. She summarized their response, as follows:

Hold on here. We have a collaborative process that we utilize for the development of scripts. And ...while you writers may be complaining that you have been asked to write multiple drafts of a script without being paid, you have to recognize that that's part of the process that has been utilized in this industry in order to develop the best scripts possible. And we don't want to do anything to harm that process.

And, in fact, there was some surprise on the part of some of the CEOs as to why wouldn't the writer want to do these rewrites. After all, they're partners with these producers, and why wouldn't they want to make changes that have been suggested by the producers, because that's the path that's going to lead that script to ultimately being submitted to the studio and ...hopefully being green-lit for production.

* * * * *

You writers have the ability to stop this process at any time. You can simple come in and deliver your script. So you must take the responsibility. If you feel that you are being abused, then it's up to you to say 'no' at certain point, deliver your script, and you will be paid for it. [Lombardini, MTr. 146-47].

The parties discussed rewriting again in a March 28, 1991 CPSW meeting. There, the Guild advanced an idea to pay writers on a "deal" basis as a solution to the problem. The idea

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was suggested by Stuart Mandel, Vice-President of Labor Relations for Universal at the time.

The Guild presented revised Guideline No. 6 containing the proposal in an April 2 1991

memorandum which added a Paragraph c. to the Guild's original proposal. It stated:

10. As a method for avoiding "free" rewrite problems the committee recommends consideration by companies and writers of a practice whereby, in significantly "overscale" situations, it would be initially agreed that the writer be paid a sum for all writing services on a project and wherein the writer will perform all writing services on a project. [Under no circumstances should such an arrangement result in writing services being provided below guild minimum, nor should MBA writing, waiting or reading periods be reduced. See, e.g. MBA Article 13.] [MCX-7].

The Guild summarized the conversation leading up to this proposal in the memorandum. It said:

[The Guild's proposal for Guideline No. 6] was discussed at length. There seemed to be some consensus that a reaffirmation of the MBA requirements, as contained in sub-section A, was a good thing although the rule as written was not approved, I believe it is fair to say that it was generally agreed that this would be revisited at the next meeting.

There was a lot of discussion about how to further address the problem of so-called "free" rewrites, to accommodate the needs of producers and Companies for change, and to avoid the awkwardness with which writers, producers and studios are faced in such circumstances, and some emphasis was placed by many, including Mr. Pollock, on the necessity of the first meeting (see Guideline No. 1) setting further working procedures, etc.

The discussion of this guideline included extensive colloquy on whether the studio/company ought to see all drafts written by the writer, as opposed to drafts rewritten after producer comments. There was no consensus on this, but there

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seemed to be a willingness to discuss it further in an attempt to come up with some suggestions or guidelines in this area. [MCX-7, p. 3].

At a May 29, 1991 CPSW meeting, John Furia, a former Guild officer and writer for more than 40 years, commented with respect to the rewriting issue, “Some new writers are intimidated and badly want to get their first credit.” [Lombardini, MTr.164; MCX-10, p. 5]. Jeffrey Katzenberg, then-head of Walt Disney Studios, responded that writers control the amount of rewriting because they can always officially deliver to the studio. He said, “I understand the negative side, that the writer thinks he’s going to get blackmailed. But you have the right to say, ‘no, thank you.’ We give you the right to protect yourself.” [Lombardini, MTr. 164; MCX-10, p. 5]. Brian Walton, the Guild’s Executive Director at the time, replied, “We don’t want people to be exploited by dealing with endless, meaningless notes. On the other hand, we do not want to impede the creative process.” [Lombardini, MTr. 164; MCX-10, p. 5].

Walton prepared a June 21, 1991 memorandum to AMPTP President Nicholas Counter summarizing his view of the CPSW discussions to that point. It said:

The Committee grappled with the difficult subject of multiple drafts and payment for multiple drafts. There seemed a general consensus that the MBA requirement of payment for every draft and the perceived need for several drafts clash. The network representatives stated a clear preference that the writer and the producer agree on a draft before it is turned into the network. While this states a clear preference, it was generally agreed it did not solve the problem of the number of drafts a writer should be paid to write.

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There was a general consensus that industry practice often did not mesh with MBA requirements, but there was no clear consensus reached as to what the solution should be. [MCX-11, p. 3].

At the hearing, Lombardini testified that the statement about the consensus in Walton's memorandum was inaccurate. [Lombardini, MTr. 170].

In the discussion of Guideline No. 6, Katzenberg emphasized that the Employers would not agree to anything that interfered with the collaborative process as it existed. In this regard, Katzenberg said at the June 27, 1991 CPSW meeting, "Anything that gets involved in making the process less collaborative, I automatically put my back up against." [Lombardini, MTr.177; MCX-13, pp. 3-4].

The Guild proposed several revisions of Guideline No. 6 as the discussion of this item proceeded. [See MCX-15, p. 6; MCX-16, p. 3; MCX-18, p. 10]. It argued that the MBA prohibited free rewrites and that there was a chronic problem of writers being asked to perform uncompensated work.

The Employers continued to maintain that writers had the ability to terminate the collaborative process by officially delivering the draft script to the studio for payment. Tom Pollock, then-president of Universal, suggested that during the initial meeting called for in Guideline No.1, the writer receive specific instruction that delivery to producer is not the same as delivery to the studio. [Lombardini, MTr. 198, MCX-17, p. 6].

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On February 21, 1992, the Companies submitted another version of Guideline No. 6 in the television discussions:

The Committee is aware that differences of opinion exist with respect to when a draft or set of revisions will be considered to have been “delivered” to the Company, for which payment is due under the terms of his/her deal memo or personal service contract. From the writer’s perspective, the submission is complete and payment is due when a draft or set of revisions is delivered in response to suggestions, notes or a request for changes from the Company. From the Company’s perspective the writer’s submission is not considered complete, and therefore payment is not due, until all changes requested by both the Company and the exhibitor have been made.

The Committee believes that the best way to avoid such disputes is for the writer and the Company, at the initial meeting, to arrive at a clear understanding as to when a draft or set of revisions will be considered to have been delivered. Their agreement should be clearly spelled out in a writer’s deal memorandum or personal service contract. [MCX-19].

In a written response dated February 21, 1992, Walton objected to the proposal and its statement that the parties had a difference of opinion about when a draft is to be considered delivered and compensable. [Lombardini, MTr.203; MCX-20]. He wrote:

Not close on this one. My problems here are that I don’t honestly believe that there are “difference[s] of opinion” as to when a draft is delivered, but rather a sense of entitlement by some that writers should not expect to be paid for certain “courtesy” or “producer” rewrites, etc. [MCX-20].

Ultimately, Guideline No.6 was omitted and the parties adopted Guideline No. 5, based on a Company proposal which stated:

It should be the preferred industry practice to have clear and concise communication between the writer, the writer’s agent and the Producer and/or

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Companies (see Guideline 1) as to when a draft of a script or a set of revisions will be considered to have been delivered. [MCX-16].

Guideline No. 5, as found in the final Guidelines promulgated in 1993, states:

Delivery & Payments for Scripts

It should be preferred industry practice for the writer, the writer's agent and the producer and/or company to reach an understanding at the Initial Meeting (see Guideline 1) as to when a draft of a script or a set of revisions will be considered to have been delivered. This will affirm that the MBA requires that writers be paid for writing services and prohibits companies from requiring writers to rewrite or polish scripts without compensation. [MGX-4, p. 13].

The Guidelines were published as a booklet in April 1993 and have not been modified since that time.

The Guild distributes the Guidelines at seminars and meetings, and includes a copy in the informational packet it provides to MBA signatories. [Reiner, MTr. 41-42]. The record contains no evidence, however, of any steps taken by the AMPTP to disseminate the Guidelines. When asked, producers who testified in this case said they had never heard of the Guidelines. [Koch, MTr. 453-55; Tomko, WTr. 909].

The 1995 MBA Negotiations. In mid-1994, the CPSW began meeting to discuss creative issues in connection with the negotiation of the 1995 MBA. Traditional economic issues were reserved for the Contract Adjustment Committee [CAC], which was created during the 1988 negotiations to "adjust" the MBA during its term without the threat of a strike deadline.

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[Lombardini, MTr. 209]. In the theatrical CPSW meetings, the Guild asserted that MBA violations stemming from rewriting were common practice.

At the June 10, 1994 CAC meeting, then-Guild President Frank Pierson raised the issue of free rewrites in conjunction with “late pay,” the failure to make commencement and other step payments on time. The minutes of this meeting contain the following comments from him on these issues:

. . . it appears to be an economic issue, but its really a creative issue. It happens to all writers. Free rewrites are endlessly taking place. Producers rewrites and commencement money are related, but really need to talk about producer rewrites. In the best case the exec will tell the writer what is wrong with the script and the writer will fix the script in a week, and the script will go to the studio and the writer will be paid. In the worst case, when you have a scared or young producer, the

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producer doesn't tell the studio that the script has been turned in and if they think it's a bad script, they'll want changes, and eight, ten, and twelve weeks of writing then ensues in which the studio doesn't even know that the script has been turned in. You're paying for something and not getting it. . . Frank suggested that there could be a form of delivery, for example, the agent delivers to the business department and, after receiving that, if you don't see the script in six to eight weeks, then you put pressure on the producer to get the script. [MGX-6, p. 11-12].

Sherry Lansing, President of Paramount, admitted that the existing system was “probably abused.” She said, “[t]he producer is just trying to get to the point where the script is good,” and added that the studio would not keep the writer if they “get a bad draft.” [MGX-6, p.12-13].

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Pollock also acknowledged the existence of abuses. He said, the “studio can’t force a writer to do anything. Situations where writers do this work, knowing they shouldn’t but trying to save their position, we don’t countenance it.” [MGX-6, p. 13]. Katzenberg identified the problem as having two parts: (a) getting paid for the draft and (b) what to do about abusive requests for rewriting. Katzenberg noted that the solution for the first problem was “not so difficult” as the writer could turn in the script and get paid. The second problem was more challenging. [MGX-6, p. 13].

At the CAC bargaining table on June 15, 1994, the Guild presented the AMPTP with a list of possible deal points which included the topic of “Unpaid Drafts/Free Rewrites.” [Reiner, MTr.47-50; MCX-22, p.5; MGX-5]. In this area, the Guild proposed:

Producer’s Rewrites & Late Payments

1. Studio must be notified that the writer’s initial draft has been delivered to the producer/creative executive by the producer/creative executive. This draft shall be known as the Producer’s draft.
2. Studio must pay upon receipt of the notice specified in 1., above, with the understanding that there will be no requirement that the studio/network receive the “Producer’s draft.” Producer/Creative Executive may request a “Producer’s rewrite,” which shall be delivered to the studio as the “First Draft.”
3. Add to MBA an optional “Producer’s rewrite” scale that shall be 10% of initial compensation.
4. Writer’s contract shall state if the producer/creative executive is not authorized to request the producer’s draft or other rewrites.
5. Company to issue strong bulletins announcing changes in MBA and ban requests for unpaid rewrites. [MCX-22, p. 5].

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At a CAC sidebar meeting on June 17, 1994, Walton presented the Guild's proposal. [MGX-8]. He explained it was intended to "institutionalize" a common abuse, the producer's draft, and "change the culture" by preventing repeated requests for free rewrites. Nicholas Counter, the AMPTP's president and chief negotiator, rejected the proposal. He pointed out that writers should "just say no" to free rewrites. In this discussion, Walton recognized the benefits of collaboration by saying, "it is difficult to find an across-the-board solution." Walton noted that "many writers believe ...there is some value to the producer's rewrite or polish." He commented about the Guild's objective, saying it "want[s] to change the way business is done." [Reiner, MTr. 60-61, 77, 81]. In subsequently discussing this proposal at a June 21, 1994 CPSW meeting, Katzenberg made it clear that the CPSW was not empowered to adopt an economic solution for rewrite problem. [MCX-24, p. 3].

At the June 23, 1994 CAC meeting, Counter responded that writers should "just say no" to "endless" rewriting. [Reiner, MTr. 72-73; MGX-9, p. 25]. In rejecting the Guild's proposal, he said he was opposed to 10% overscale payment for a "producer's rewrite" and stated, "this is the way business is done." [Reiner, MTr. 72-78]. John Furia, Jr., a Guild spokesman, commented that the way business is done results in "constant violations of the MBA and individual contracts." [Reiner, MTr 76-77].

In the July 13, 1994 CPSW meeting, Katzenberg said that the "notion of additional payments is not a problem solver for us," and suggested the individuals authorized to accept

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delivery and request rewrites be identified in the writer's contract. [MCX-25, p. 4]. In this regard, he said:

We'll say who is empowered and who is not.

On delivery of a draft or a rewrite to the authorized person, payment will be made within the time required by the MBA.

The writer who writes a set of revisions as requested will be paid not less than the rewrite or polish rate. That means there will be no bullshit side deals. If there is a rewrite or polish price, it is agreed on. It's not to be renegotiated.

We'll educate our people about these mechanisms. [MCX-25, p.4].

Carl Gottlieb, a writer representative for the Guild, suggested that the designated studio executive not be "too far up or too far down the food chain." [MCX-25, p. 4]. Pollock responded that the Companies did not want junior executives or independent producers having the authority to decide what was a compensable contractual step. [MCX-25, p. 4]. Katzenberg said the proposal told writers who they worked for and how to trigger payment. He said it offered "[r]eal clarity" on who was empowered to request writing that would constitute a new contractual step. [MGX-10, p. 7].

Furia expressed skepticism about the proposal's ability to address Guild concerns effectively. He stated, "[Y]our proposal doesn't strengthen our hand at all in saying 'no' to free rewrites. [Furia, MTr. 123-124; MCX-25, p. 5]. He repeatedly argued that the onus had to be placed on the person requesting rewriting, not on the writer. [Furia, MTr.123-24, 126-27].

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Pollock agreed, “There will be writers who’ll continue to do revisions out of fear,” and Katzenberg acknowledged, “There’s no way to prevent that from happening.” [MCX-25, p. 5].

The proposal to identify the person authorized to request rewrites and accept delivery in a writer’s contract was memorialized in a July 18, 1994 memorandum from the Guild to the AMPTP and adopted by the parties at a meeting held the next day. [MGX-11, p. 5]. Article 13.A.14. took its present form with the adoption of this amendment. [MCX-27, p. 41].

In May 1996, the AMPTP issued a bulletin to creative executives, business affairs executives and producers to announce the provisions of the newly-ratified MBA. The bulletin, which was drafted by the Guild, said:

Under the Guild MBA, the Company must include the following information in the writers deal memorandum or personal service contract:

- (1) the place where and the name(s) and function of the person(s) to whom delivery of literary material is to be made;
- (2) the name(s) of the person(s) authorized to request rewrites of said material.

Unless you have been so named, you may not request that revision be made. Company shall give the writer written notice of any change of the person(s) so designated. [MGX-12].

In a “summary” of the new contract distributed to its membership, the Guild wrote:

13. REWRITES

New provisions protect against demands for free rewrites and help ensure prompt payment whenever services begin or material is delivered.

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The Company must include in the writer's deal memo or contract:

- the name(s) of the person(s) authorized to request rewrites, and
- the name(s) of the person(s) to whom delivery is to be made.
- The Company also must give the writer written notice of any change in this information.

To enforce these provisions, each Company will instruct its producers, business affairs and creative executives not to request revisions unless authorized to do so. The Company will also instruct them regarding the information to be included in deal memos and contracts and the obligations for prompt payment of money upon commencement and delivery of material. [MGX-15, p. 22].

The amendment to Article 13.A.14 was also summarized in the Guild's Creative Rights Manual published in July 1995. It said:

New in 1995: Companies must include in a writer's deal memo or contract the name(s) of the person(s) authorized to request rewrites or receive delivery of drafts. The goal of this provision is to protect writers against demands for free rewrites and to insure prompt payment when literary material is delivered. [MCX-54, p. 23]

In a March 1996 "Writer/Agent Alert!," the Guild described how the 1995 MBA provision would apply:

If a person is not designated in the writer's contract to request or receive revisions, he or she may not so ask, and both the writer and the person requesting will know that. The writer will therefore know not to perform the services, or, if he or she does so, it is at the writer's own risk of not being paid. Writers and agents may use the information in the contract to their best advantage, citing the MBA as requiring the writer's refusal to perform additional (uncompensated) services or to deliver to anyone other than the person(s) listed in the writer's contract. [MCX-1].

John Wells, a former President and Vice-President of the Guild, testified about the Guild's decision to address free rewriting through arbitration. He said the Guild created a task

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force, and surveyed writers in 1997 about the pervasiveness and priority attached to this issue. More than two-thirds of the respondents said they had been requested to do free rewriting. Over 85% believed this was a priority issue. Because of the importance of relationships in obtaining work in the industry, the Guild decided to take the lead in the enforcement effort, and not rely on individual writers to assert claims. [Wells, WTr. 81-84, 86-87].

The 1998 MBA Negotiations. The CPSW met in conjunction with the 1998 negotiations. At an April 23, 1997 meeting, the Guild raised areas of noncompliance with the 1995 MBA and proposed finding “mutually acceptable ways of eliminating the continued confusion over when a draft is ‘delivered’.” [MCX-28]. At the outset of the meeting, Petrie stated that, despite the designation of the person authorized to accept delivery and approve additional writing, writers continued to perform uncompensated writing at the producer’s request. The Guild’s notes reflect Petrie’s comments on free rewrites:

We tried to deal with this in the last contract. We added that writer’s contracts will contain the place and names of the people who the writer must deliver to, and who is authorized to request revisions. What happens is that the writer is told to deliver to a producer who is not listed in the contract, so he can look at it, and add his notes. Meanwhile, the writer is not getting paid, and is being asked to do a rewrite for free. The Guild is dealing with a case right now, which they will resolve, in which the writer is told by a pair of powerful producers to deliver to them and not the place listed in the contract, and they haven’t gotten around to reading it, so 13 weeks have gone by, and the writer hasn’t been paid. And the writer is told that if he goes to the studio, he’ll be off the project. [MGX-16, p. 1; see also MCX-29, p. 4].

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Pierson commented:

This happened with Robert Towne, and Joan Didion and John Dunne, especially on commencement money. It's not getting better, it's getting worse. If the writer makes an appeal, he's fired off the picture. I don't want to use names, it's happened to everyone. There are two separate but related issues: 1- commencement money. . . 2 - free rewrites. [MGX-16, p.1; see also MCX-29, p.4].

Lansing stated:

I know the abuse is going on at my studio, I don't know how to stop it. Successful producers are working with the writer. I'll say to the development executive, "I heard the script came in." He'll say, "I heard that, too." We ask the producer and the producer says no. I want the script, and he or she says, "No, it's not in."

You never know unless you call the writer, and that's awkward. I want to support the producer. . . [MGX-16, p. 2; see also MCX-29, p. 5].

Guild representatives also expressed concern about writers alienating the producer by making official delivery. In this regard, test case writer and Guild representative to the CPSW said:

. . . I view us as the studio's partners. Producers come and go. I turned a draft in in November, I have not been paid; first I was told to put in the director's notes, then I was told to take them out. I did two extra drafts to help protect the producer's company. I want to deliver, but there is egregious abuse, and you just can't say hand it in anyway.

* * * * *

If I am recalcitrant, I am expendable down the line. I want to stay on the project, and writers get fired very easily. If I love the project, I want to hold on. [MGX-16, p. 3].

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Ideas such as establishing a central clearing house for officially delivering scripts and setting specific time frames for turning scripts into the studio were suggested, but not pursued.

[Lombardini, MTr. 241-42; MCX-29, p. 4]. Instead, the parties agreed to have a CPSW subcommittee continue to study the problem during the 1998 MBA. [MCX-29, p. 6]

The Guild membership initially voted down the 1998 MBA. An amended agreement was reached in May 1998 and ratified by the Guild membership about a month later. [Lombardini, MTr. 248-49]. The final agreement included a provision referring the issue to the new CPSW subcommittee. Sideletter 48.F stated, “[a] subcommittee of the Theatrical Committee [of the CPSW] will meet to discuss late payments and so-called ‘free’ rewrites and will report its findings and recommendations no later than nine (9) months after ratification.” [MGX-18, p. 79].

The parties never convened the subcommittee contemplated by the sideletter. [Lombardini, MTr. 247-48].

The 1998 MBA also required the AMPTP to send the following bulletin to all its member companies. The bulletin, which was issued on September 30, 1998, stated:

During the negotiations of the 1998 WGA Theatrical and Television basic Agreement (“MBA”), the Writers Guild brought to our attention the extensive concerns within the writing community about (1) late payments to writers, and (2) requests to writers to write without compensation required by the MBA.

The AMPTP urges each Company to work with the Guild to foster full compliance with MBA provisions regarding timely payment to writers and appropriate compensation to be paid for all MBA-covered writing services. [MGX-19; see also MX-18, p. 79].

ANALYSIS

The parties agree that the creation of a screenplay is a creative, collaborative process and that, whether and when a particular step is completed is a matter of judgment. [Guild Brief, p. 33; Reply, p. 1]. Pursuant to the MBA, it is ultimately the writer's judgment that determines when a step is completed. The parties agree that no compensation is due when the writer voluntarily provides material to a producer, creative executive, director, or other individual for the purpose of soliciting comments or creative input prior to delivery. There is also no dispute that payment for a contractual step is contingent upon official delivery of the literary material to the studio.

Here, the Guild argues that a draft may also be compensable when the writer subjectively believes that what has been requested has been completed and the draft is delivered to a producer, creative executive, or director. The Guild considers these individuals to be agents of the Studio whose receipt of a draft causes the studio to be liable for a new step payment. To support its agency claims, the Guild relies on the contractual definition of a writer, wage and hour law, and cases interpreting the National Labor Relations Act, 29 U.S. C. §151 et seq. The Guild has identified a number of criteria for establishing a writer's intent for the purpose of determining whether delivery to someone other than the contractual designee triggers payment. These factors include: physical delivery of requested material with an intent to deliver a completed step, any

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prior understanding regarding delivery of drafts, the nature of the relationship between the writer and the collaborator, and the response to delivery.

The Companies deny that producers are their agents for the purpose of receiving delivery of a script. In their view, official delivery to the studio is the only contractually recognized indication that a step has been completed and a step payment is due. When a writer revises literary material in collaboration with a producer, director or creative executive, the Companies argue, the draft continues to be a work in progress. Payment of a step is compensation for all of the writing needed to complete the step, whatever the number of drafts. Thus, no compensation is due for a draft that remains a work in progress.

The language of the MBA, bargaining history, past practice, and agency law support the Company's contractual interpretation and require rejection of the Guild's theories.

The language of the MBA. The MBA clearly defines when a request for revisions gives rise to a claim for compensation, as well as the procedure for establishing that a writer has completed a contractual step and is entitled to payment. Article 13.A.14. states that writers are to be paid “after the delivery of a completed story, treatment or original treatment, first draft screenplay or final draft screenplay, as the case may be. . . .” [WJX-1, p. 73]. Other provisions of the MBA and the terms of individual step contracts indicate that “delivery” is commonly understood to mean turning literary material into the Company for payment. [See, WJX-1, p. 70,

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Article 13.A.10, referring to a writer who “delivers the material to the Company,” and Article 13.A.8, discussing delivery deadlines in terms of delivery “to the Company.”]

Article 13.A.14 requires the writer’s deal memorandum to identify the individual(s) authorized to accept official delivery and request rewriting. [WJX-1, p. 73]. This provision implicitly recognizes that requests for changes or revisions by producers or others is not a sign that a step has been completed or a new, compensable step has been authorized. Pursuant to the clear language of Article 13.A.14, only studio designees identified in the writer’s contract can accept official delivery and authorize a new step.

This interpretation is consistent with Article 20 prohibiting speculative writing or making compensation contingent on the acceptance or approval of literary material. If the writer disagrees with the producer about a script’s readiness for delivery, Section 13.A.14 provides the writer with a mechanism for concluding the step and getting paid.

While studios often authorize a writer to be compensated for a step when delivery is made to someone other than the contractual designee, the existence of this practice does not waive its right to insist on official delivery in the event a claim is made. As Mardigian described, the contractual designee is the fall back “if there is a problem.” [Mardigian, MTr. 1178]. If the writer and producer have a disagreement, the writer has the recourse of delivering to the studio designee. [di Bonaventura, WTr. 783; H. Parker, MTr. 77; Tomko, WTr. 844].

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Negotiating history and past practice indicate that both parties recognize that voluntary rewriting can occur during the preparation of a draft for official delivery.

Bargaining history. Through almost a decade of negotiations, the Guild has repeatedly raised the issue of compensation for writing that has not been officially delivered to the studio. In each instance, the Employers have been unwilling to agree to any changes that would interfere with the existing collaborative process of exchanging drafts for comment and further revision before official delivery. In each round of discussion or negotiation, the Guild acquiesced to the Employers' position that no changes be made to the collaborative process or the agreed upon method for terminating it. The only MBA amendment on this issue was the addition of the requirement that studios designate who is authorized to accept delivery and to commence the next step.

Throughout the 1990s, the parties discussed how to curb abuses in the collaborative process. The Employers rejected all proposals that would make the script development process "less collaborative" or impose a financial obligation for input or direction provided by the producer to a writer. [Lombardini, MTr.177; MCX-13, pp. 4-5]. The Employers insisted that writers could avail themselves of the contractual right to say no to additional writing, and deliver the script to the studio for payment if they believed they completed a step or disagreed with the producer's suggestions. [MCX-10, pp. 5, 7; MCX-13, p. 5; Lombardini, MTr. 147, 163-64,

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178] The Guidelines ultimately adopted by the CPSW recognize that not every draft or revision given to the producer is “delivered” for purposes of receiving compensation. Guideline No. 5 suggests that the writer, agent, producer and studio reach “an understanding. . . as to when a draft of a script or a set of revisions will be considered to have been delivered.” In this way, the parties acknowledged that producers see and comment upon works in progress and that submission of those drafts is not considered to be delivery of a completed step. [MGX-4, p. 13].

In 1995, the Companies again resisted all Guild attempts to add language to the MBA that would authorize producers to request new, compensable drafts. The only change acceptable to the Employers was the addition of the language requiring writing contracts to specify who had the authority to initiate new steps. During the parties’ discussions, the Employers reconfirmed that only delivery to the studio would trigger compensation and made it clear that writers were free to deliver any time they believed they had completed a contractual step. [MGX-10, p. 6; MCX-25, pp. 4-5; Lombardini, MTr.225, 229-30].

The comments made by Lombardini at a breakfast meeting with Grace Reiner and Jane Nefeldt, the WGA Director of Contract Administration and Assistant Executive Director, respectively, do not alter these conclusions about the 1995 negotiations. Lombardini said that the amendment providing for the identification of the studio designee authorized to commence writing services was not intended to prevent a writer from commencing work upon instructions

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from someone else or to shield the studios from liability. Lombardini's statements are not an agreement among the representatives to the CPSW that the producers could be considered the studio's agents for the purpose of committing the studio to pay for additional writing.

In the 1998 negotiations, the parties concurred that there are situations "when the process breaks down, where the writer does not exercise the right to deliver and be paid," but no contractual changes were adopted to address this problem. [MGX-16, pp. 1-3; MTr. 92; MCX-29, pp. 3-6; Lombardini, 239-247]. Instead of adopting amendments to the MBA, the parties referred the issue to a subcommittee.

Industry practice. The record of industry practice establishes a binding past practice that work performed before official delivery to the studio is not separately compensable. The evidence shows a clear, longstanding and well-known practice of collaboration in which writers give literary material to producers and make revisions based on the producers' notes without exposing the studio to liability. In its opening brief, the Guild admitted "There can be no doubt that free rewrites have gone on in Hollywood for a long time, perhaps forever." [Guild Opening Brief, p. 62].

Agent Jim Crabbe spelled out what he understood to be the common practice of script development. He said:

The studios made it very clear that until - - it's turned in to the studio. . . you're not going to get paid. . . . [A]nyone around knows that. . . and you as an agent

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would, if you had a newer writer, would let you writer know that. . . . [A] collaborative process is going on. When you make a deal for a writer, the writer agrees that, . . they're going to do it . . . under the supervision of a particular producer. . .

And so the writer would . . . write his draft [and] give it to the producer, looking for feedback. And that process . . . would go on for however long. . . and when you turned it in to the studio, then you would get paid. [Crabbe, MTr. 979-980].

The practices at issue predate the Guild's "free rewrite" campaign, which began in the 1990s. A significant number of witnesses testified that these practice have existed throughout their lengthy careers. For example, Koch, a producer for more than 24 years, said that he always gave notes when a draft was submitted. [Koch, MTr. 419, 21, 463]. Petrie acknowledged the existence of these practices in the 1980s. He testified that he provided a free pass or potchkeh since the beginning of his screenwriting career in 1983. He described the traditional writing process as one in which the exchange of ideas and redrafting is customary with the illustration that, a screenwriter and producer are "[w]orking closely in collaboration, and you're trading pages back and forth, and then it's finally assembled into a complete draft the collaborators are sending on. . ." [PTr. 165].

Given the duration of the practice of paying writers a flat fee for all of the work involved in creating an official draft, the Guild's argument, that it has not waived its rights or acquiesced to the practice of collaboration, is not persuasive. Moreover, estoppel applies to this situation because for years, well before the onset of the Guild's rewrite campaign, the parties have

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negotiated writing contracts and step payments for the completion of work created through the existing system of collaboration.

The failure of the employers to vigorously publicize the requirements of Article 13.A.14. or to monitor compliance efforts does not undermine or alter the contractual requirements. The evidence shows that, despite the lack of educational and enforcement effort on the part of the Employers, individuals working in all aspects of the industry understand the contractual requirement that a draft be officially delivered to the studio for payment and that additional writing be authorized by the studio.

Producers are not agents of the Studios. Producers, and others who receive literary material before it is officially delivered, are not agents of the studio for the purpose of committing the studio financially. Under California law, an agency relationship is either actual or ostensible. Actual authority exists when “a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care allows the agent to believe himself to possess.” Ostensible authority only exists to the extent “a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.” Ostensible authority can only be created by the conduct of the principal; never by the conduct of the purported agent. [Cal. Civil Code §§ 2298, 2317; 2 B.E. Witkin, *Summary of California Law*, Agency §40 (9th ed 1987)]. Moreover, there can be no ostensible or apparent agency when there has been an express restriction on the

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authority of the agent by the principal and that has been communicated to the other party. [Cal. Civil Code §2318; *Terminix Co. v. Contractors' State License Board of Dep't of Professional & Vocational Standards*, 84 Cal. App. 2d 167, 171 (1948)].

Most delegations of authority to agents, including those here, are limited. A delegation of authority for one purpose, such as creatively supervising writers, is not a delegation for another purpose like committing the studio financially. The agent's delegated authority consists of only those powers actually or ostensibly conferred by the principal. [Cal. Civ. Code §2315; *Turner v. Citizens Nat'l Bank*, 206 Cal. App. 2d 193, 202 (1962); *Grasslands Water Ass'n v. Lucky Leven Land & Cattle Co.*, 112 Cal. App. 2d 776, 779 (1952)].

The studios have not given actual or ostensible authority to others because the authority to commission a new contractual step or to authorize compensation has been expressly restricted in the MBA and communicated in writing to the Guild and its members. Article 13.A.14 was amended in 1995 to require writers' contracts to specify the studio executive authorized to accept delivery and commission additional writing.

During negotiations, the Employers were emphatic that only designated individuals, not producers or junior executives, have the authority to approve new writing or additional compensation. [Lombardini, MTr. 229-230; MGX-10, p. 6]. The official delivery requirement met the parties' stated goals of protecting the studios in running the financial side of their business, preventing writers from being forced to perform work for which they want additional

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compensation, and preserving the status quo of the collaborative process. Article 13 places writers on notice that they cannot expect additional payment unless the studio designee representative authorizes it. Through the mechanism of official delivery, the MBA gives writers the ability to stop further work on a step and trigger payment through official delivery despite requests for rewriting.

The Guild publicized this express restriction on the authority of producers to its members. The March 1996 “Writer/Agent Alert!” for example, states, “If a person is not designated in the writer’s contract to request or receive revisions, he or she may not so ask, and both the writer and the person requesting will know that. The writer will therefore know not to perform the services, or, if he or she does so, it is at the writer’s risk of not being paid.” [MEX-1]. In the 1995 Creative Rights Manual, the Guild wrote that the “goal of this provision is to protect writers against demands for free rewrites and to ensure prompt payment when literary material is delivered.” [MCX-54, p. 23].

No authority to financially bind the Companies was intentionally conferred by the Studios on the Producers in this case. The record establishes that a producer’s supervision of the writer is creative only and does not extend to accepting delivery for compensation purposes or authorizing a new step. Agreements between studios and producers do not permit a producer to bind the studio economically. [MTr. 880; MTr. 418]. Producers’ agreements that describe their

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duties are limited to the regular functions of a producer in the industry, including supervision of the writing process. [See e.g., FGX-6AA, ¶3(a)].

Individual step agreements offered in the test cases also confirm that no authority has been delegated to producers to commence a new step or accept official delivery, and that this has been communicated to writers. Consistent with Article 13.A.14, step contracts typically provide that payment is contingent on delivery to a studio designee. [See e.g., WGX-2A, ¶1, p. 1; FGX-7A; UGX-7F; PGX-8, p. 3].

The Studios have not led producers or writers to believe that producers have been given these agency powers. No producer or studio executive held the belief that producers have the authority accept official delivery on behalf of the studio or to approve additional writing. [Connolly, MTr. 935; Doran, MTr. 1044; H. Parker, MTr. 880; Koch, MTr. 418; Sanger, PTr. 755]. Writers who testified also uniformly understood that producers did not have authority to accept delivery on behalf of the studio. This is most evident in the test case testimony recounting conversations with producers and agents about when or whether to officially deliver a draft to the Studio. [, PTr. 349, 351; , PTr. 193-95; , PTr. 717-18].

The Guild's argument that an "economic reality" standard should be applied in determining the agency issue is not persuasive. In this regard, the Guild maintains that the definition of a writer, found in Article 1.B.1 of the MBA promotes the use of the economic reality analysis because it gives "textual recognition" to its agency theory. It states:

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1. A “writer” is a person who is:

* * * * *

- (1) employed by Company, who performs services (at Company’s direction or with its consent) in writing or preparing such literary material or making revisions, modifications, or changes in such literary material regardless of whether such services are described or required in his/her contract of employment; . . .

The Guild argues the “consent” standard for agency mentioned in the MBA’s definition of a writer requires an analysis similar to that used in National Labor Relations Act cases to hold the employer responsible for the acts of supervisors and in wage and hour cases to find a joint employer. These statutory tests assess whether the agent has the power to hire, fire, supervise and set the employment conditions for an employee.

The Guild argues that these statutory schemes provide relevant analysis because, like the MBA, they concern the enforcement of minimum standards and are remedial provisions directed at particular abuses in the employment relationship. This reasoning is not convincing for a number of reasons. The definition of a writer found in the MBA, read in context, is a jurisdictional statement. It does not suggest that producers or others who give direction to writers are agents who can bind the studio financially in the circumstances presented by this case.

Additionally, the Guild’s reliance on specialized governmental regulatory law, instead of traditional agency doctrines, is misplaced. These doctrines are used to determine whether a supervisor’s actions bind the company and whether an outside entity is a joint employer with

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financial liability for its actions. While these schemes concern the enforcement of minimum standards, they operate in circumstances quite dissimilar to those presented here. The statutory schemes involve employees who are paid hourly wages. Here, writers are paid a flat sum for a completed draft. The question presented in the statutory cases is how much employees should be paid per hour, not what work is included in the flat rate. The wage and hour joint employer theory also fails to persuade because producers do not exercise economic control over writers. While the record shows that producers have input, they do not make the ultimate decisions on hiring, firing, or compensating writers. They also do not negotiate or enter into employment contracts with them, and do not keep their employment records. [See, Horowitz, MTr. 314-316; cf. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)].

Only official delivery ends the collaborative process and triggers payment. In its brief, the Guild asserts that the intent to deliver for compensation must be determined by “the writer’s subjective belief that he has completed what was requested of him, including the execution of the notes given to him before the date of delivery.” Guild Opening Brief, pp. 78-79]. In its brief, the Guild advanced a number of factors for inferring the writer’s intent with respect to a draft presented to a producer. It argued that the appearance and completeness of a submission could be relevant in determining intent to delivery, as well as evidence of prior understandings regarding

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script delivery, the relationship between the writer and the collaborator, and the nature of the response to the writer's submission.

The record shows that the parties never discussed, or adopted, a compensability standard based on the writer's subjective belief, or any of the factors referred to by the Guild. To adopt one here would violate the MBA's express limitation on the arbitrator's authority. This limitation is expressed in Article 10.B.2:

Neither the grievance committee nor the arbitrator shall have the power or jurisdiction to reform, amend or extend the express terms and provisions of this Basic Agreement or of any employment agreement, loan-out agreement or purchase agreement. [WJX-1, p. 45].

The collaborative process of script development is unique to the individuals involved. A contractual step of a writing contract may be satisfied by delivery of a draft without any revisions or a draft resulting from a significant amount of collaboration and rewriting. Because the writer has the right to deliver literary material and receive payment, the writer has the ultimate power to determine when a step is completed. Under the MBA and long-standing industry practice, the parties have agreed that the completion of a step is demonstrated by official delivery to the studio. This protects the writer by providing a mechanism for getting paid when the writer believes the current step has been completed or the collaborative process is no

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longer productive. This also protects the studio because it knows where it stands on its obligations to the writer and the steps of the writing agreement.

When the Guild raised concerns about abuses of the process during the 1995 negotiations, the only solution acceptable to the Employers was an amendment to Article 13 requiring identification of the authorized studio designee in writing contracts. In these discussions, the Employers made it clear that it was the writer's responsibility to deliver a draft when the writer deemed it to be completed. While the Employers did not dispute the existence of abuses to the collaborative process, they did not agree to alter the way a step is fulfilled or the standard for determining that a writer has completed work on a step. Instead, the parties established a subcommittee to explore other solutions to the problem.

Most of the Guild's standards of compensability are unworkable and shed little light on whether a writer intends a draft to be official. Adoption of them in this arbitration would create an untenable situation that could not be fairly administered. Producers and creative executives would not know whether a writer who agrees to make suggested revisions did so voluntarily or whether to expect a later demand for payment based on the writer's unexpressed disagreement with the producer's notes.

In virtually all the test cases in which the writer now asserts changes were made involuntarily, the writer failed to disclose the disagreement about further rewriting to the producer or the studio. In a significant number of cases, the writer specifically intended the draft

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claimed by the Guild to be the subject of collaboration and further revision, or decided after receiving an agent's advice to engage in further rewriting before official delivery. In each of these instances, no script was submitted to the studio for payment. To adopt the subjective factors suggested by the Guild would disrupt the traditional collaborative process and undermine the studios' ability to retain financial control over the script development process. In the absence of delivery or a disagreement about delivery coming to the studio's attention, the studio has no way of knowing the intention of the writer.

The positions taken by the Guild in some of the test cases illustrates these problems. In _____, the Guild claims payment for a draft of the first revision, even though the writer testified that he did not intend his draft to be delivered for payment. This is also true with respect to the "producer's pass" in _____ and a _____ draft, where the express intent of the writers was disregarded in the Guild's claim. Furthermore, in _____, there is no discernable distinction between several drafts the Guild has claims on and those it does not. Under the Guild's standards, the studio has no way of knowing when it is obligated to pay for a draft and when it is not. If a draft is not officially delivered, it is unlikely the studio would know that the writer believed the step to be completed and payment for the step is due.

Relying on the Guidelines, the Guild contends that the failure to reach an advance understanding of what is to be considered a work in progress and what is a completed draft "should weigh against the studios." This argument ignores the clear contract language. There is

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an advance understanding, expressed in the MBA, that to be compensable a completed draft must be delivered to the studio. While the Guidelines are a set of preferred practices, the suggestion that a meeting be held at the outset of the writing process to discuss and agree upon methods of work is not contractually required. There should be no uncertainty about the delivery of completed material, because the place and/or person for delivery is to be listed in writers contract. This has been communicated to writers in Guild publications.

The nature of the relationship between the writer and the collaborator is another entirely subjective standard suggested by the Guild for determining compensability. Evidence from the test cases shows the impracticality of this factor. The Guild suggests that unequal levels of power and experience, such as a veteran producer paired with a neophyte writer, may be evidence that the writing process is hierarchical, rather than voluntary. [Guild Brief, p. 80]. The record demonstrates this is not a reliable determinant of the writer's intent. In *_____*, _____ demanded that Joe Singer, a seasoned producer, deliver a particular draft for payment. [Cohn, UTr.50-51]. _____ was paid for the draft, wrote additional compensable steps, and was later supported by Singer and the Company as the writer to finish the job. [_____, UTr. 90; UGX-5F, 5U, pp. 20-21]. Similarly, first-time feature writer _____ said "no" to di Bonaventura when he requested additional time to consider her pitch and he acceded to her demand for an immediate answer. [_____, WTr. 223-25]. Di Bonaventura was listed in _____'s contract as the one who

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could authorize requests for additional writing. [WGA-6A]. Clearly, [redacted] was not afraid to take a stand with those with control over her employment.

Furthermore, contributing to the uncertainty that would prevail if the Guild's standards were adopted, the Guild's argument that the existence of a prior relationship between the writer and producer suggests voluntary collaboration, was frequently disregarded in the analysis of the test cases. For example, [redacted] and creative executive Lori Lakin were personal friends and had previously worked together as writers' assistants, yet the Guild characterizes their working relationship on [redacted] as involuntary collaboration. [redacted], FTr. 117-18, 485; Guild Opening Brief, p. 176]. Before working on [redacted], [redacted] had worked well with producer Denise DiNovi. [redacted], WTr. 557-58; DiNovi, WTr. 1058-59]. But, in its claim, the Guild argues that DiNovi improperly pressured [redacted] into performing uncompensated writing. [Guild Opening Brief, p. 117].

Finally, the Guild's contention that the response to delivery should also be considered in determining the compensability of a draft contradicts its view that delivery is determined by the subjective intent of the writer at the time of delivery. This last standard takes into account, among other things, the nature and style of the notes provided, the number of contributors, and whether the writer agrees. Nothing in the record supports a finding that the type of notes presented, or the writer's reaction to them, should be a substitute for actual delivery in determining when a draft is compensable.

THE TEST CASES

* * *

[pp 51-90 REDACTED]

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AWARD

The Companies did not breach Article 13.A of the MBA by failing to compensate writers for writing services performed at the instruction of the Companies and delivered to the Companies. The grievance is denied in its entirety.

San Francisco, California
January 31, 2004

Anita Christine Knowlton
Arbitrator