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Cover Page Footnote

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WARNER BROS. V. NELSON: A PRELUDE TO THE DE HAVILLAND LAW

John M. Broderick[*]

In 1944, the California Court of Appeals handed down its landmark decision in *De Haviland v. Warner Bros* ending the practice of studios extending personal service contracts beyond the statutory limit of seven years by adding suspension periods incurred during the contract term. "Suspension/extension" could double the term of an actor's contract. The *De Haviland* case has justly received much attention, but an earlier case, *Warner Bros. v. Nelson*, in which Bette Davis also challenged the practice of suspension/extension, merits more attention than it has received.

In *Warner Bros. Nelson*, Davis argued that her studio contract should not be enforced on several grounds including that the suspension/extension clauses were inequitable. During the trial, the studio waived its powerful rights to suspension/extension for reasons previously unknown. Not until now has that waiver been properly contextualized with the help of archival research of studio records. Furthermore, archival research has uncovered that the studio explored revising and limiting its power of suspension/extension as a result of Davis's arguments.

This Article reveals that Davis achieved much more than was previously understood. It discusses how these cases, in particular *De Haviland*, still resonate today in the sports and entertainment industries. It also suggests that the recent dispute between the Writers Guild of America and the Association of Talent Agents can be viewed as a consequence of these cases.

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I. INTRODUCTION

In Hollywood's classic studio era,[1] stars were held under the thumb of the major studios with oppressive, long-term personal service contracts.[2] Studios often extended actors' contractual periods of personal service by adding the duration of any suspensions incurred by the actors to the original contract period.[3] In practice, suspension/extension could result in the doubling of an actor's contractual period of personal service,[4] and could extend the period far past California's statutory time limit of seven years.[5] Some stars rebelled against studio control, including one of Warner Bros. Pictures, Inc.'s ("Warner Bros.") biggest stars, Academy Award winner Bette Davis.[6]

Davis's clashes with Warner Bros. over being paid less than male actors, artistic autonomy, and the practice of suspension/extension ultimately led them to a London courtroom in October 1936 in *Warner Bros. Pictures, Incorporated v. Nelson* ("*Nelson*").[7] Although Davis lost her case, eight years later in 1944, the Second District of the California Court of Appeal put an end to the practice of extending personal service contracts beyond the seven-year statutory limit in *De Haviland v. Warner Bros.* ("*De Haviland*").[8]

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1. The classic studio era has been defined as the years between 1929 and 1945. *See* RICHARD B. JEWELL, THE GOLDEN AGE OF CINEMA 1 (2007); *compare with* DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM: A HISTORY 71 (2005) (defining classic studio era as the years between 1931 and 1951).

2. *See* JEWELL, *supra* note 1, at 255. As a category, personal service contracts "include[] nearly all master/servant continuous employment agreements." Jonathan Blaufarb, *The Seven-Year Itch: California Labor Code Section 2855*, 6 HASTINGS COMM & ENT L.J. 653, 657 (1983).

3. *See* JEWELL, *supra* note 1, at 255. Hereinafter, this practice is referred to as "suspension /extension." The standard personal service contract used by the studios included suspension/extension clauses. *See infra* notes 43–44.

4. *See infra* note 47.

5. In 1931, the statutory time limit for personal service contracts was expanded from five to seven years. CAL. CIV. CODE § 1980 (West 2020); *see* Blaufarb, *supra* note 2, at 657 n.19 (discussing the legislative history of the adoption of a seven-year period).

6. *See, e.g., infra* notes 150, 183, and 222.

7. Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209. Davis was married to musician Harmon O. "Ham" Nelson, Jr. in 1936. *See* ED SIKOV, DARK VICTORY: THE LIFE OF BETTE DAVIS 90 (2007).

8. De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 985 (Cal. Dist. Ct. App. 1944). The case caption is published in the official case reports with Olivia de Havilland's name misspelled as "De Haviland." *See* Robert Steinberg, *Injunctions-Unjust Restraint on Entertainers in*

The resulting decision became known as "the De Havilland Law."[9] Today, the De Havilland Law remains relevant in labor relations in the entertainment industry and sports, and its consequences resonate in the current dispute between the Writers Guild of America and the Association of Talent Agents member agencies.[10]

This Article examines *Nelson*[11] with the aid of archival research and demonstrates that, although Davis did not prevail, her case concretely foreshadowed the De Havilland Law. The history of the De Havilland Law is usually told in the following way: Olivia de Havilland won, whereas Bette Davis lost. But archival research shows that in spite of Davis's loss, her case compelled Warner Bros. to make two unexpected decisions: (1) to waive the studio's right to extend Davis's contract past the seven-year limit in the *Nelson* case and (2) to examine their standard contracts with an eye toward restricting the practice of suspension/extension.[12]

Part II of this Article describes the era in which *Nelson* and *De Haviland* took place, including how the standard studio contract played a part in the star system in the classic studio era. Part III examines *Nelson*,[13] in which Warner Bros. filed an injunction against Davis to prevent her from starring in a film for another production company. Part III also addresses research from the Warner Bros. archives which shows how Davis's case came very close to forcing a change in the standard personal service contract used by Warner Bros. Part IV discusses the case that *Nelson*[14]

California, 1 LOY. ENT. L.J. 91, 106 n.83 (1981). When referring to Olivia de Havilland herself, her name will be spelled correctly. When referring to the case caption, her name will be spelled consistent with the spelling in the official case caption.

9. *See, e.g.*, HOLLYWOOD AND THE LAW 210 (Paul McDonald et al. eds., 2015) (describing *De Haviland v. Warner Bros.* as the seminal case that interpreted § 2855 and came to be known as the "De Havilland Law" in legal parlance); Russell Fowler, *Three Women Take on the Hollywood Studio System*, 55 TENN. BAR J. 27, 28 (2019) (referring to de Havilland's precedent-setting case as "the De Havilland Law").

10. *See infra* Part V.

11. *Warner Bros. Pictures, Inc*., 1 K.B. at 209.

12. See *infra* Part III Section F.

13. *Warner Bros. Pictures, Inc*., 1 K.B. at 209.

14. *Id.*

foreshadowed, *De Haviland v. Warner Bros.*,[15] which ended the practice of extending personal service contracts past seven years. Part V explores the significance and relevance of the *Nelson* and *De Haviland* cases, and how the aftershocks from these related cases were felt in postwar Hollywood[16] and continue to be felt today. In the words of Bette Davis's Margo Channing in *All About Eve*, "Fasten your seatbelts, it's going to be a bumpy night."[17]

II. BACKGROUND

This section contextualizes the legal disputes in *Nelson* and *De Havilland*. First, it describes how the classic studio era was organized. Next, it addresses how the star system worked in the classical studio era. And lastly, it discusses how the studios used standard long-term personal service contracts with their stars.

A. Corporate Organization of the Classic Studio Era

The classic studio era was ruled by a small set of companies.[18] Eight studios collected ninety-five percent of film industry revenues: Paramount, Metro-Goldwyn-Mayer ("MGM"),[19] Radio-Keith-Orpheum Corporation ("RKO"), Twentieth Century Fox Film Corporation, Warner Bros., Inc., Columbia Pictures Corporation, Universal Corporation, and United Artists Corporation.[20] These eight studios were known as "the majors."[21] Through collusion and other monopolistic practices, the majors kept control of the industry and kept out, for the most part, other potential players.[22] Five of the

15. De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 985–86 (Cal. Dist. Ct. App. 1944).

16. *See* DREW CASPER, POSTWAR HOLLYWOOD 1946-1962 1 (2007).

17. ALL ABOUT EVE (Twentieth Century Fox 1950).

18. *See* GOMERY, *supra* note 1, at 79 ("Eight major corporations . . . dominated all phases of industry operation.").

19. MGM was owned by Loew's, Inc. *See id.* at 99.

20. *See id.* at 79.

21. *Id.* at 1.

22. *See id.* at 79 (identifying Republic, Monogram, and Disney as small, marginal companies that were tolerated by the majors).

majors— Paramount, MGM, RKO, Twentieth Century-Fox Film Corp., and Warner Bros.— produced, distributed, and exhibited their own motion pictures.[23] These five studios were known as the Big Five.[24] The majors controlled most theaters in the United States and were able to deny outsiders access to theatrical exhibition in desirable venues.[25]

B. The Star System

The star system was a critical component to the success of the film business during the classic studio era.[26] "Stars" can be defined as "actors who became intense objects of public fascination."[27] The star system included the way studios cultivated actors into stars, marketed their stars, and in turn, marketed their films to exhibitors.[28] The stars cast in a particular film signaled to both exhibitors and audiences what kind of picture to expect.[29] Studios cast their stars in multiple films each year in different genres, and audiences could pick the type of film in which to see their favorite actor.[30] Furthermore, instead of being screened to exhibitors beforehand, films were marketed based on "star power."[31]

Star development represented a significant investment for the studios.[32] This investment included a range of lessons and training such as acting

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23. *See* Brandon Drea, *Antitrust Conflict in Hollywood*, 9 ARIZ. STATE SPORTS & ENT. L.J. 98, 108 (2020).

24. *See* GOMERY, *supra* note 1, at 71.

25. *See id.* at 79.

26. *See* JEWELL, *supra* note 1, at 250. Even after the U.S. Supreme Court broke up the majors in U.S. v. Paramount Pictures, 334 U.S. 131 (1948), stars were an important factor in the newly formed companies. *See* GOMERY, *supra* note 1, at 94.

27. JEWELL, *supra* note 1, at 250.

28. *See id.* at 251; GOMERY, *supra* note 1, at 7 (attributing the creation of the business strategy known as the star system to Adolph Zukor, which was copied by all studios).

29. *See* JEWELL, *supra* note 1, at 251.

30. *See id.* at 256–57.

31. *Id.* at 251.

32. *See id.* at 258.

lessons, voice training, grooming advice, and physical fitness coaching.[33] To protect their investments, the studios kept their actors under long-term employment contracts.[34]

C. Use of Long-Term Personal Service Contracts During the Classic Studio Era

The long-term personal service contract was crucial to the star system.[35] Personal service contracts during this era were usually for five or seven-year terms,[36] but that limitation only applied to the stars. A studio bound by such a contract was committed to a given actor for only a six-month term because these contracts commonly contained a six-month option clause for the studio to exercise or not.[37] Clearly, the contracts gave studios most of the power in these relationships.[38] For instance, the studio could determine when vacation periods began and ended, and it had the right to loan its

33. *See id.*

34. *See id.* at 255.

35. *See id.* at 255. Personal service contracts create a "master/servant" relationship. Artists are not typically classified as servants, but "they will be so defined as long as the promised performance is of a personal and non-delegable character." "Duties are nondelegable if pertaining to a contract based on artistic skill or unique abilities." One reason that an employment contract defines the services provided by an employee as being "of a special, unique, extraordinary and intellectual character" is to establish that the services are nondelegable. Blaufarb, *supra* note 2, at 657.

36. *See* JEWELL, *supra* note 1, at 255. The term for personal service contracts was limited by statute to two years until 1919. In 1919, the term was expanded to five years, and in 1931, the term was expanded to seven years. *See* Blaufarb, *supra* note 2, at 656. The expansion to seven years did not sit well with the acting community: "[n]ew California law allowing seven year contracts is not looked on favorably by talent, who see it only as an advantage to the producer." *Objections to 7-Yr. Contract*, VARIETY, June 30, 1931, at 3.

37. *See* JEWELL, *supra* note 1, at 255; Contract Between Warner Bros. Pictures, Inc. and Bette Davis, 15–16 (Dec. 29, 1934) (on file with Warner Bros. Archives at the University of Southern California).

38. *See* Blaufarb, *supra* note 2, at 659 (explaining how entertainment industry contracts "are written in options, rather for a flat term, in order to allow the employer an advantageous degree of flexibility in determining the duration of the employment relationship."). For the star, a long-term contract could offer a degree of security, but this benefit was in tension with the potential detriment the star may experience when her worth rises dramatically during the contract term, which was the case with Davis and de Havilland. *See id.* at 658.

actors to other studios (called "loan-outs").[39] In addition, the studio had full control over the star's acting assignments.[40]

A standard studio contract included several clauses central to the *Nelson* and *De Haviland* cases. The first such clause defined the services provided by the star as being "of a special, unique, extraordinary and intellectual character[] . . . ."[41] The second important clause required the star to render their services exclusively for the studio.[42] Third, the standard contract gave the studio the right to suspend the star for a variety of reasons if the star could not, or refused, to work.[43] Fourth, the contract allowed the studio to extend the duration of the contract by the length of time of each suspension.[44]

The last two clauses—the right to suspend and the right to extend—embodied the practice of suspension/extension in the standard studio contract.[45] The time an actor was placed on suspension was automatically added

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39. A "loan out" occurs when a studio gives another producer or studio the temporary right to use one of the lending studio's stars in one of the borrower's films. *See* JEWELL, *supra* note 1, at 255. The standard personal service contract gave a studio the right to loan out its contract actors to other studios.

40. *But see* JEWELL, *supra* note 1, at 257 (noting that, at times, stars successfully negotiated for the right to refuse an acting assignment). The way in which an actor broke into the business could dictate their negotiating posture with the studio. For example, Edward G. Robinson performed in LITTLE CAESAR (Warner Bros. 1931) without a long-term contract, and that film's success gave him considerable negotiating leverage with the studio. *See* THOMAS SCHATZ, A TRIUMPH OF BITCHERY: WARNER BROS., BETTE DAVIS AND JEZEBEL, IN THE STUDIO SYSTEM 77 (Janet Staiger ed., 1995).

41. Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 11. The main reason for adding a "unique and extraordinary services" clause is to provide evidence for a claim of injunctive relief. *See infra* Section III (C)(1).

42. Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 5 ("The Artist agrees that she will, during the term hereof, render such services solely and exclusively to and for the Producer, and that she will not, during such time, render any service for or in any other . . . motion picture production . . . .").

43. *See, e.g.*, *id*., at 8, 12 (if a star could not perform for medical reasons or did not perform due to failure, refusal or neglect).

44. *See* Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 12. Suspension/extension clauses demonstrate the studios' superior bargaining power. *See* Blaufarb, *supra* note 2, at 665 (explaining that suspension/extension benefits the employer by "insuring receipt of the contracted-for period of service at the employee's current level of compensation"); SCHATZ, *supra* note 40, at 81 (describing the function of suspension/extension clauses as preventing stars "from waiting out their contracts and becoming 'free agents'").

45. *See* Blaufarb, *supra* note 2, at 664.

to the original duration of the contract,[46] a practice that could double the length of the contract.[47] Although standard studio contracts were burdensome, stars risked being blacklisted—for example, by other studios refusing to hire such stars—if they openly challenged the studios, such as by filing a lawsuit.[48]

III. WARNER BROS. V. NELSON

This section examines *Nelson* and looks behind the scenes at Warner Bros.'s actions with respect to their standard personal service contract after the case ended. Section III.A reviews some of the particular issues and events that led up to Warner Bros. seeking injunctive relief against Bette Davis. Section III.B analyzes why damages were inadequate in this type of dispute between a star and her studio. Section III.C examines the nature of injunctive relief available in California where the contract was made between the parties, and under English law, the law of the case's venue. Section III.D outlines Davis's legal strategy. Section III.E reviews the outcome of the case and the court's decision. Finally, Section III.F demonstrates, with trial records and internal documents, how the practice of suspension/extension came under scrutiny by the court, and how the Warner Bros. legal team reacted to that scrutiny.

A. Background of the Dispute Between the Star and the Studio

Bette Davis has been described as "the most unusual of movie stars."[49] Her stardom was surprising because of her willingness to play unsympathetic

46. *See* JEWELL, *supra* note 1, at 255.

47. *See, e.g.*, DAVID NIVEN, BRING ON THE EMPTY HORSES 20 (1976) ("Some of us gave twelve or fourteen sulfurous years of our short actor's lives working off a seven-year contract"); VICTORIA AMADOR, OLIVIA DE HAVILLAND LADY TRIUMPHANT 141–42, 146 (1st ed. 2019) (describing how actors were known to have their period of personal service extended up to twelve or fifteen years because of the practice of suspension/extension).

48. *See* Thomas J. Stipanowich, *Olivia de Havilland: The Actress Who Took on the Studio System and Won*, L.A. TIMES, (July 1, 2016, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-stipanowich-de-havilland—20160701-snap-story.html [http://archive.today/8Ojuu]; AMADOR, *supra* note 47, at 143 (describing efforts by Warner Bros. to prevent de Havilland from being hired by other studios and delaying the release of her latest film).

49. JEWELL, *supra* note 1, at 268; JAMES SPADA, MORE THAN A WOMAN: AN INTIMATE BIOGRAPHY OF BETTE DAVIS 1036–37 (1993) (Bette Davis was described by Angela Lansbury at

roles, such as the morally corrupt Mildred in *Of Human Bondage*[50] and villainesses in other films.[51] She won two Oscars for best actress and at one time held the record for most nominations at ten.[52]

In 1931, Warner Bros. signed Bette Davis to a standard contract for the first time.[53] Warner Bros. began as a family-owned business in 1923.[54] In the 1930s, the three brothers: Harry, Abe, and Jack L. Warner led different parts of the company.[55] Jack Warner, the youngest, was the head of the studio in Burbank, California.[56] While the other major studios made efforts to remain on good terms with their stars, Warner Bros. earned a reputation for being the most contentious of studios because of its many conflicts with its stars.[57]

In 1936, a few months before the dispute over her contract erupted, Davis won her first Oscar for Best Actress for her performance in *Dangerous*.[58] Because of the recognition she gained from *Of Human Bondage* and

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Davis's memorial service as a master of the craft "who should serve as an example to future generations of actors").

50. *See generally* OF HUMAN BONDAGE (Warner Bros. 1934).

51. *See* JEWELL, *supra* note 1, at 268.

52. *See Academy Awards Database*, ACAD. MOTION PICTURES ARTS SCIS., https://www.oscars.org/oscars/awards-databases-0 [https://perma.cc/BEH8-ERNF].

53. *See* SIKOV, *supra* note 7, at 44. Davis agreed to a new contract with Warner Bros. in 1934. Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 1. A good argument can be made that under § 2855, seven years should be counted from the original contract in 1931 rather than from the contract executed in 1934 because: (1) she likely negotiated her new agreement as an employee still obligated under an existing contract (and such an employee is not in a position to negotiate for the highest possible compensation) and (2) she was not able to test her value in the entire marketplace during an "open-market break" between contracts. *See* Blaufarb, *supra* note 2, at 682 (setting forth the argument that without an "open-market break," the new agreement "cannot be viewed as a truly 'new' contract" for purposes of § 2855).

54. *See* GOMERY, *supra* note 1, at 46.

55. *See id.* at 130. Sam Warner, the fourth brother who co-founded the studio, died in October of 1927. *Id.* at 51.

56. *Id.*

57. *See* JEWELL, *supra* note 1, at 257; SCHATZ, *supra* note 40, at 77 (noting that Davis's lawsuit was one of many between Warner Bros. and its stars in the 1930's).

58. DANGEROUS (Warner Bros. 1935); *see* JEWELL, supra note 1, at 267.

her recent Academy Award, Davis wanted more substantial roles.[59] During the summer of 1936, she refused to perform in the film *God's Country and the Woman* and sought to renegotiate her contract with Warner Bros.[60] The inequality in pay between her and male actors was an additional reason fueling her dispute with the studio.[61] Davis complained to the press in March 1936 about receiving a telegram request for her to return to the studio for retakes.[62] Davis reportedly complained to the press that her studio bosses were a "headache," which did not go unnoticed by those same bosses.[63]

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59. *See, e.g.*, BETTE DAVIS, THE LONELY LIFE: AN AUTOBIOGRAPHY 147–48 (2017) (ebook). Davis's evolution as a star was a situation the statutory term limit in § 2855 was intended to address, *see* De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 988 (Cal. Dist. Ct. App. 1944); *see also* Blaufarb, *supra* note 2, at 653 (discussing public policy considerations for limiting the term of a personal service contract which include "circumstances will change over the course of the agreement" and an employee's worth may increase "as a result of increased experience, talent, and skill").

60. Letter from Roy J. Obringer to Morris Ebenstein (Aug. 17, 1936) (on file with Warner Bros. Archives at the University of Southern California). For a detailed account of Davis's negotiations with Warner Bros., *see* SCHATZ, *supra* note 40, at 78–81.

61. *See* Alma Whitaker, *Bette Davis Tells of Battle for Pay*, L.A. TIMES, July 12, 1936 at C1. The archive also contains various summaries of the events leading up to the litigation. *See, e.g.*, Letter from Roy J. Obringer to Robert W. Perkins (Sept. 9, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

62. *See Film Bosses 'Headache' to Bette Davis*, EVENING J., Mar. 25, 1936, at 17 (on file with Warner Bros. Archives at the University of Southern California). The term retake refers to a "second, third, tenth, or even hundredth attempt to film a given shot; the term *retake* sometimes implies that the shooting occurs on a day subsequent to the original takes; actors are often brought back to the studio at the end of production to shoot retakes of shots and scenes the director finds to be problematic for one reason or another." ED SIKOV, FILM STUDIES: AN INTRODUCTION 223 (2d ed. 2020).

63. *See Film Bosses 'Headache' to Bette Davis*, EVENING J., Mar. 25, 1936, at 17 (on file with Warner Bros. Archives at the University of Southern California). The "headache" comment was precipitated by Davis receiving a telegram from Warner Bros. upon her arrival in New York for a vacation, which required her to immediately return to Los Angeles for retakes. *Id*. The term "retake" refers to a "second, third, tenth, or even hundredth attempt to film a given shot; the term *retake* sometimes implies that the shooting occurs on a day subsequent to the original takes; actors are often brought back to the studio at the end of production to shoot retakes of shots and scenes the director finds to be problematic for one reason or another." ED SIKOV, FILM STUDIES: AN INTRODUCTION 223 (2d ed. 2020) (emphasis in original). *See also* Telegram from Harry M. Warner to Hal Wallis (Aug. 10, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

In a letter from one of her attorneys, Dudley R. Furse, Davis set forth ten terms as a basis for a new contract,[64] which included the following demands: a limit of four pictures per year; three months of vacation time; increased pay; identification of acceptable cameramen; and a contract term of five years.[65] Jack Warner responded that Warner Bros. would only agree to an increase in pay if the studio could retain all the other terms from the previous version of the contract.[66]

Soon, Warner Bros. learned that Davis was traveling to England with the intention of appearing in a film for Toeplitz Productions Ltd. ("Toeplitz").[67] Roy Obringer, counsel for Warner Bros. in Los Angeles, advised Morris Ebenstein, counsel for Warner Bros. in New York, to have the studio's English counsel notify Toeplitz that Davis was still under contract with Warner Bros.[68] Ebenstein wrote back confirming he did this, and further stated, "I believe this takes care of the situation."[69] However, the situation was not resolved as Davis still intended to appear in the film for Toeplitz.[70] Davis arrived in the United Kingdom in mid-August of 1936, and was warmly welcomed by Ludovico Toeplitz himself in London shortly thereafter.[71] Warner Bros. thus pursued an injunction against Davis in the London courts, initiating *Warner Bros. v. Nelson*.[72]

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64. *See* Letter from Dudley R. Furse to Roy J. Obringer (June 19, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

65. *Id.*

66. *See* Letter from Jack L. Warner to Bette Davis (June 24, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

67. *See* Letter from Roy J. Obringer to Morris Ebenstein; *supra* note 60; *see* SIKOV, *supra* note 7, at 90.

68. *See* Letter from Roy J. Obringer to Morris Ebenstein; *supra* note 60.

69. *See* Letter from Morris Ebenstein to Roy J. Obringer (Aug. 25, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

70. *See* SIKOV, *supra* note 7, at 90.

71. *See id.*

72. Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209. Davis was served with process in her hotel room. *See* SIKOV, *supra* note 7, at 90.

B. The Inadequacy of Damages

When seeking injunctive relief, as Warner Bros. did in *Warner Bros. v. Nelson*,[73] one must show damages are an inadequate remedy.[74] This section takes a slight detour to examine why damages were inadequate in a situation where a star like Davis breached her contract. Generally, the non-breaching party to a contract is compensated with an amount approximate to the benefits the party would have received had the breaching party performed under the contract.[75] Although many benefits are compensable, they must be "clearly ascertainable."[76] For example, lost profits or expenditures, such as overhead,[77] are often sought as damages.[78]

An instructive example of how damages were difficult to calculate when actors refused assignments can be drawn from the Warner Bros. legal file for the lawsuit between Warner Bros. and actor Olivia de Havilland that occurred eight years after *Nelson*.[79] Olivia de Havilland, who was a friend of Davis,[80] had great versatility as an actor.[81] She appeared in a variety of films from a Shakespearean adaptation[82] to horror.[83] De Havilland is most well-known for her role in *Gone With the Wind*[84] and the successful pairing

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73. *Warner Bros. Pictures, Inc.*, 1 K.B. at 209.

74. *See, e.g.*, Elliott Axelrod, *The Efficacy of the Negative Injunction in Breach of Entertainment Contracts*, 46 J. MARSHALL L. REV. 409, 411 (2013); Steinberg, *supra* note 8, at 99 n.43.

75. *See* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 869 (11th ed. 2020).

76. *Id.* § 879.

77. "Overhead" for a studio included expenses not directly related to production, such as executives' salaries, costs of studio real estate, security, insurance, maintenance and other miscellaneous items. *See* JEWELL, *supra* note 1, at 69.

78. *See* SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 879, 883, *supra* note 75.

79. *See infra* Section D.

80. *See* AMADOR, *supra* note 47, at 50.

81. *See id.* at 148.

82. *See* A MIDSUMMER'S NIGHT DREAM (Warner Bros. 1935).

83. *See* HUSH HUSH SWEET CHARLOTTE (Twentieth Century Fox 1964).

84. GONE WITH THE WIND (Selznick Int'l Pictures in association with Metro-Goldwyn-Mayer 1939); *see* Justin Chang, *Appreciation: Olivia de Havilland Was Never to Be*

of her with Errol Flynn in eight films.[85] De Havilland received five Academy Award nominations and won twice—the same number of wins as Davis.[86]

In 1943, de Havilland sought a declaration that her contract had ended,[87] and, in response, Warner Bros. looked closely at pursuing damages against her in a counterclaim.[88] She was suspended multiple times and replaced on four films because she refused to perform several roles assigned by the studio.[89] The studio examined its potential to recover lost profits on the films she refused to perform in, and whether the studio had incurred increased production costs.

One difficulty with awarding lost profits is the struggle to prove what "would" have occurred had the contract not been breached. A claimant must show that the hypothetical profits are not the product of speculation.[90] One measure of lost profits is past performance.[91] In pursuit of their counterclaim against de Havilland, Warner Bros. compared the profits of her past films with the ones she refused.[92] Internal program sheets were compiled listing

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Underestimated in Life or Art, L.A. TIMES (July 26, 2020, 6:18 PM), https://www.latimes.com/entertainment-arts/movies/story/2020-07-26/olivia-de-havilland-appreciation [https://perma.cc/3HQM-3KUJ].

85. AMADOR, *supra* note 47, at 38.

86. *Id.* at 13; *see Academy Awards Database*, *supra* note 52.

87. De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 984 (Cal. Dist. Ct. App. 1944).

88. *See* Memorandum from Jack Warner to Roy J. Obringer (July 27, 1944) (on file with the University of Southern California, University Archives) ("Reference [de Havilland] along the lines we discussed today. Will you investigate the possibility of our bringing suit against her from the time she was in default."); *see also* Letter from Roy J. Obringer to Charles Loring (Aug. 1, 1944) (on file with the University of Southern California, University Archives) ("[Jack Warner] desires to be advised with respect to the possibility of seeking damages against Miss [de Havilland] . . .") (sic).

89. *De Haviland*, 153 P.2d at 984.

90. *See, e.g.*, Fallis v. Julian Petroleum Co., 292 P. 168, 170 (Cal. Dist. Ct. App. 1930).

91. *See, e.g.*, Grupe v. Glick, 160 P.2d 832, 840 (Cal. 1945).

92. *See* Pictures in Which Olivia DeHaviland Appeared (on file with Warner Bros. Archives at the University of Southern California); *see also* List of Pictures Rejected by Miss DeHavilland (on file with Warner Bros. Archives at the University of Southern California).

only her films.[93] The lists showed the films she appeared in for Warner Bros. and identified her "loan-outs."[94] Warner Bros. saw a profit on all of her films.[95] A second program sheet was compiled with the films she refused.[96] Each of the films she refused earned a profit.[97] Based on the program sheets alone, it would have been difficult to demonstrate to a judge or jury that Warner Bros. lost profits on the films de Havilland refused.

Warner Bros. also analyzed internally whether de Havilland's actions caused an increase in production costs from the cost of replacing her on the pictures she refused. The archive contains a document entitled "Picture Assignments Rejected by Olivia de Havilland, and comparative cost of replacement artists."[98] The document identifies the salaries de Havilland would have been paid on each film and what Warner Bros. paid the replacement performer. On two films,[99] Warner Bros. paid more for the replacement artist, and paid less on the other two pictures.[100] In total, Warner Bros. would have paid de Havilland $60,165 for all four films and paid the replacement artists $57,690. The studio's own internal analysis demonstrates it would have been difficult for the studio to recover damages for increased expenditures, since it paid $2,475 less to the replacement artists overall.

Despite the difficulty of attaining actual damages, studios still threatened performers who refused assignments with a claim for damages. For instance, in a different dispute with Bette Davis in 1934, the studio sent a letter informing her that she was required to appear at the studio for wardrobe fittings and other preparations for a picture called *Case of the Howling*

93. *See* Pictures in Which Olivia DeHaviland Appeared, *supra* note 92.

94. *See supra* note 39 (defining "loan-outs").

95. *See* Pictures in Which Olivia DeHaviland Appeared, *supra* note 92.

96. *See* List of Pictures Rejected by Miss DeHavilland, *supra* note 92.

97. *See id.*

98. Picture Assignments Rejected by Olivia DeHavilland, and Comparative Cost of Replacement Artists (on file with Warner Bros. Archives at the University of Southern California).

99. *See id.*

100. *See id.*

Dog.[101] The letter stated that since she failed to appear, the studio would "hold [Davis] responsible for all damages which have accrued or may accrue to [the studio] as a result of [Davis's] failure, refusal or neglect to so perform[] . . . ."[102]

A lawsuit seeking damages posed difficult problems of proof. The remedy's impact as a disciplinary tool was diminished by the potential for a long period of time to pass before a resolution was reached. Moreover, this remedy did not protect the studio's interest as effectively as an injunction, and further did not work as a method to force stars back to work.[103]

C. Injunctive Relief and Personal Service Contracts

Since the remedy of damages was not effective for studios, injunctive relief was their remedy of choice. Part III.C provides a brief summary of California law with respect to injunctions and personal service contracts, which will shed light on why the studio contracts were drafted the way they were. Part III.C also provides a brief overview of relevant English law to fill in the legal landscape of the *Nelson* case.

1. California Law

The California statute which allowed some personal service contracts to be enforced with injunctive relief was amended between the *Nelson* and *De Haviland* cases, but as discussed below, the substance of the statute was the same in all relevant respects. Until 1919, section 3423 of the Civil Code of California prohibited the use of injunctions to prevent a breach of contract.[104] In 1931, the statute was re-codified as section 1980 of the Civil

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101. CASE OF THE HOWLING DOG (Warner Bros. 1934). *See* Letter from Paul A. Chase, Assistant Sec'y, Warner Bros. to Bette Davis (June 14, 1934) (on file with Warner Bros. Archives at the University of Southern California).

102. Letter from Paul A. Chase to Bette Davis, *supra* note 101. At times, studio contracts provided that the star shall pay for costs and expenses incurred due to the star's absence unless the absence was the result of "unavoidable physical disability." *See* Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 9.

103. In *Warner Bros. v. Nelson*, Warner Bros. specifically argued in the London court that the difficulty of estimating damages meant that injunctive relief was more appropriate. Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209, 210.

104. *See* De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 987 (Cal. Dist. Ct. App. 1944); *see also* Blaufarb, *supra* note 2, at 657 n.29 (1983) (discussing evolution of California statutes and personal service contracts from 1872 to 1937).

Code and amended to allow injunctive relief for the breach of a certain type of personal service contract as described in the next paragraph.[105] In 1937, section 1980 of the Civil Code was repealed and section 2855 of the Labor Code was enacted.[106] The court in *De Haviland* held section 2855 was a restatement and continuation of Civil Code section 1980 and not a new enactment.[107] In effect, the court stated that the California statute applicable to personal service contracts was the same during the time that both Davis and de Havilland were under contract with Warner Bros.[108]

Injunctive relief was permitted only if the personal service contract satisfied two requirements: the contract provided for a service of a "special, unique, unusual, extraordinary or intellectual character," and provided a rate of compensation of a minimum of $6,000 per year.[109] The first requirement has been called the "unique and extraordinary services rule."[110] If the services were not unique or extraordinary, damages were the appropriate remedy.[111] The reasoning behind the requirement is that when others can be found to perform the services, the cost of replacement can be readily calculated.[112] This section of the statute was incorporated in paragraph 22 of Davis's contract.[113]

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105. *See De Haviland*, 153 P.2d at 987 (discussing the history of the California statute); *see also* Blaufarb, *supra* note 2, at 656 (noting that the term for personal service contracts was expanded from five years to seven years in the 1931 amendment).

106. *See De Haviland*, 153 P.2d at 986; *see also* Blaufarb, *supra* note 2, at 656 ("The statute was transferred into the Labor Code in 1937 as section 2855 pursuant to the Industrial Labor Relations Act.").

107. *See De Haviland*, 153 P.2d at 985.

108. *See id.* at 986 (discussing the consistency of section 1980 of the Civil Code and section 2855 of the Labor Code).

109. *See id.* at 985, 987.

110. David Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18, 21 (1954).

111. *See* Steinberg, *supra* note 8, at 99, n.43.

112. *See* 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 51 (10th ed. 2005).

113. *See* Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 11. *See also* Blaufarb, *supra* note 2, at 657 ("The employer includes such provisions in the contract in order to satisfy the condition precedent to obtaining injunctive relief: that the services be unique and extraordinary").

A second requirement must also be met before an injunction is ordered to enforce a personal service contract.[114] The contract must provide a minimum amount of compensation.[115] In 1919, this amount was set at the rate of $6,000 per year.[116] Converted to contemporary dollars, the statutory requirement is equal to approximately $100,000 per year.[117] The dollar amount suggests the legislature intended this exception to apply to people whose personal services were valued highly.

On the surface, the statute seemed to allow for broad injunctive relief; however, the courts have held an injunction cannot require the employee to render personal services or to hire another to perform personal services.[118] Several reasons have been recognized for limiting injunctive relief in the enforcement of personal service contracts: the difficulty in enforcement; the unsatisfactory character of services rendered when compelled; and, if physical labor is involved, the Thirteenth Amendment's prohibition of involuntary servitude.[119] Rather, the statute has been interpreted to allow an injunction to enforce a negative promise only, such as a promise to render services exclusively.[120]

2. English Law[121]

The Davis contract did not contain an explicit choice of law provision. The court in *Nelson*[122] applied British law without discussing choice of law principles. By 1936, both jurisdictions viewed injunctive relief which

114. *See De Haviland*, 153 P.2d at 987.

115. *See id.*

116. *See id*.

117. *See* 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 48 (10th ed. 2005).

118. *See* 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 52 (10th ed. 2005); Steinberg, *supra* note 8, at 91 n.3 (specific performance cannot be used to enforce a party's obligations to perform under the terms of a personal service contract in California) (citing Poultry Producers of S. Ca., Inc. v. Barlow, 189 Cal. 278, 288, 208 P. 93, 97 (1922)).

119. *See* SUMMARY OF CALIFORNIA LAW, *Equity* § 48, *supra* note 117.

120. *See* SUMMARY OF CALIFORNIA LAW, *Equity* § 52, *supra* note 118.

121. A nuanced comparison of British and American law is beyond the scope of this article.

122. Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209.

enforced a "negative stipulation not to serve any third person within the time agreed" as an appropriate remedy for the breach of a personal service contract.[123]

In 1852, England's High Court of Chancery issued its landmark[124] opinion in *Lumley v. Wagner.*[125] Lumley owned an opera house and contracted with the opera singer Johanna Wagner, the niece of composer Richard Wagner, to perform at Lumley's opera house for three months.[126] The contract contained a covenant in which Wagner promised not to render her services for any other theater.[127] Before the contract expired, a rival opera house offered her more money to sing, and she accepted.[128] Lumley sued, and the court held that although it could not compel her to sing for Lumley, it would enforce the covenant not to sing for another.[129]

In subsequent cases, English courts enjoined performers who would not be considered stars in their fields.[130] As one legal commentator put it, "the English courts are not impressed by this 'unique and extraordinary services' rule."[131] In *Grimston v. Cuningham*, the court issued an injunction against an understudy.[132] In *Lanner v. Palace Theatre Ltd.*,[133] the court rejected the

123. *See*, *e.g.*, Karrick v. Hannaman, 168 U.S. 328, 336 (1897) (citing Lumley v. Wagner, 42 Eng. Rep. 687 (1852)).

124. *See* Axelrod, *supra* note 75 at 410; Tannenbaum, *supra* note 110, at 18 ("the single, well-accepted principle that, under appropriate circumstances, equity will enjoin the breach of a covenant in an artiste's contract not to perform for others, can be traced back directly to the landmark case of *Lumley v. Wagner*[]").

125. Lumley v. Wagner (1852), 42 Eng. Rep. 687.

126. *Id.* at 605.

127. *Id.* at 606.

128. *Id.* at 606–07.

129. *Id.* at 619.

130. American courts have enjoined a variety of performers and athletes from providing their services to third parties before their contracts expired. *See* Tannenbaum, *supra* note 110, at 21–22.

131. *Id.* at 22.

132. Grimston v. Cunningham, [1894] 1 Q.B. 125 (Eng.).

133. Lanner v. Palace Theatre Ltd., [1893] 9 T.L.R. 162, 165 (Eng.).

argument that a distinction should be made based on the "eminence" of a performer before issuing an injunction.[134] The plaintiff, a renowned ballet instructor, entered into six-year contracts with her students in which she promised to train them and took a percentage of their wages for work she found them.[135] The students agreed in the contracts not to perform for anyone else.[136] Two of her students signed contracts to perform at the Palace Theater, and Lanner sued to enjoin them from performing.[137] One of the student's attorneys argued that the court should not follow *Lumley*, because *Lumley* involved a performer who "had some special qualifications which could not be dispensed with or replaced—*e.g.*, those of a *prima donna* . . . ."[138] The court rejected this argument explaining "[t]o distinguish between degrees of excellence and to determine who was an indispensable performer or who was not would be a very difficult task for the Court."[139] These decisions show that English courts considered the personal service provided by most artists and performers to be sufficiently unique and specialized in order to be enjoined.[140]

If English courts enjoined an understudy and a ballet student, certainly Bette Davis would be enjoined. Notably, in the case of *Gaumont British Corporation Ltd. v. Alexander*,[141] which was decided in the same year as Davis's case and also involved a film actor and film studio, the court ruled that the contract which required the actor to provide her services exclusively to the studio during the term of the contract was not an unlawful restraint of trade.[142] Furthermore, establishing that Bette Davis's services were unique and extraordinary would not be difficult. Her contract, like similar studio contracts, provided that the parties agreed "the services to be rendered by the

134. *Id.* at 163.

135. *Id.* at 162.

136. *Id.*

137. *Id.*

138. *Id.* at 163.

139. *Id.*

140. *See* Tannenbaum, *supra* note 110, at 22.

141. Gaumont Corp. v. Alexander [1936] 2 All E.R. 1686 (Eng.).

142. *See id.* (affirming arbitrator's decision).

Artist . . . are of a special, unique, extraordinary and intellectual character[] . . . ."[143]

D. Davis's Strategy

Davis and her legal team probably knew an English court would enforce the contract.[144] They gambled that they could show the contract was so unfair it should not be enforced at all.[145] The Times Law Report summarized Davis's claims as follows: Warner Bros. "required [Davis] to play unsuitable parts, and had frequently required her to work for excessive periods in the day, such periods constantly exceeding 14 hours; and that [Warner Bros.] had further required [Davis] to make an unreasonably large number of films in 1935."[146] It was reported to counsel for Warner Bros. that Davis claimed she was required to work more than forty weeks that year in violation of her contract.[147]

Sir Patrick Hastings, counsel for Warner Bros., responded by characterizing Davis's claims as "the actions of a very naughty young lady."[148] In response to Davis's counsel's characterization of her contractual obligations as "slavery," Sir Patrick focused on the graduating salary scale outline in her

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143. *See* Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 11.

144. According to Sikov and his review of The Bette Davis Collection, Ludovico Toeplitz, in fact, told Davis as early as August of 1936, that he was advised by his counsel that her contract with Warner Bros. was valid; she could not legally contract with Toeplitz; Warner Bros. would be successful in obtaining an injunction; and that he was recasting her part. SIKOV, *supra* note 7, at 94.

145. The year 1936 was a busy year for the Warner Bros. legal department. In addition to Davis's case, the studio defended separate lawsuits filed by actors James Cagney and Ann Dvorak. *See* discussion *infra* note 178. James Cagney successfully claimed that his contract with Warner Bros. should be terminated after the studio materially breached it, thus entitling him to an annulment of the contract. *See* Findings of Fact and Conclusions of Law at 88–89, Cagney v. Warner Bros. Pictures, Inc. (Apr. 2, 1936) (on file with the Warner Bros. Archives at the University of Southern California). The Los Angeles Times declared with a touch of hyperbole that the Cagney case made "iron-bound contracts . . . things of the past." Edwin Schallert, *Cagney's Victory Opens Door for Stars' Walkouts*, L.A. TIMES, Mar. 22, 1936, at C1.

146. *Law Report, Oct. 14*, THE TIMES, Oct. 15, 1936, at 4.

147. Telegram from Manuel Espinosa to Roy J. Obringer (Sept. 24, 1936) (on file with the Warner Bros. Archives at the University of Southern California).

148. SIKOV, *supra* note 7, at 92.

contract, and said "[i]f anybody wants to put me into perpetual servitude on that basis of remuneration, I shall prepare to consider it."[149] Davis entertained homicidal thoughts against Sir Patrick,[150] and took to staring at the judge, Mr. Justice Sir George Branson, in an effort to hypnotize him[151] with her "Bette Davis Eyes."[152]

E. The Outcome of Warner Bros. v. Nelson

Despite the best efforts of Davis's counsel, Sir William Jowitt, she did not prevail.[153] Davis did not testify, and the court held it against her.[154] The court stated in its opinion that she had "broken her positive undertakings in the contract without any cause or excuse which she was prepared to support in the witness-box."[155] Elsewhere, the court held Davis "for no discoverable reason except that she wanted more money, declined to be further bound by the agreement, left the United States and, in September, entered into an agreement in [England] with a third person."[156]

The court issued an injunction in favor of Warner Bros., barring Davis from appearing on stage or in motion picture productions for any studios other than Warner Bros. without the studio's consent for three years, or for the remaining term on her contract, whichever was less.[157] The court relied on the contract's exclusivity provision and legal precedent such as *Lumley*.[158]

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149. *Id.*

150. DAVIS, *supra* note 59, at 153.

151. *Id.* at 155.

152. KIM CARNES, *Bette Davis Eyes*, *on* MISTAKEN IDENTITY (EMI America 1981); SIKOV, *supra* note 7, at 414 (the song "celebrated the mysterious allure of [Davis's] most notable features").

153. DAVIS, *supra* note 59, at 155 (according to Davis, "[Sir William] made a beautiful and impassioned plea for [her] rights.").

154. Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209.

155. *Id.* at 215–16.

156. *Id.* at 213.

157. *Id.* at 222.

158. Lumley v. Wagner (1852), 42 Eng. Rep. 687–88.

The court recognized that the interest of Warner Bros. in need of protecting was "vague," but held that the studio's films with Davis that were completed, yet unreleased, would depreciate in value if she appeared in films released by others.[159] The court held the three-year injunction served that purpose.[160] The outcome was an utter defeat for Davis and other stars bound by similar contracts, except in one respect.[161]

F. Suspension/Extension Under Scrutiny

During the *Nelson* trial, clause 23 of Davis's contract, which allowed the studio to add suspension time to the duration of the contract, came under scrutiny.[162] On day two of the trial, Sir William zeroed in on clause 23. He posed a hypothetical to the court:

> SIR WILLIAM JOWITT: Let me assume that this lady . . . decides: I will not work for anybody else; it is a very long time to wait, but I will wait until 1942, and then at last by 1942 I shall be free to exercise my art once more. Not at all. She will not have utilized or eaten up any of the time [of the contract term], because the period, let alone the extended periods, will never have come to an end . . . unless and until this lady carries out her contractual obligation, the period of time during which this bar is to last never comes to an end . . . It is a life sentence, therefore.[163]

After further discussion, Sir William quoted from a letter sent to Davis from Warner Bros., dated June 20, 1936.[164] The letter was a typical example of the written notice issued by Warner Bros. to inform an artist that she was

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159. *Warner Bros. Pictures, Inc.*, 1 K.B. at 221–22.

160. *Id.* at 222.

161. Actor and friend George Arliss persuaded Davis not to appeal. *See* DAVIS, *supra* note 59, at 158–59.

162. *See* Contract Between Warner Bros. Pictures, Inc. and Bette Davis, *supra* note 37, at 12–13.

163. Transcript of Hearing at 24, Warner Bros. Pictures, Inc. v. Nelson (1936) (on file with Warner Bros. Archives at the University of Southern California).

164. *Id.* at 25.

placed on suspension.[165] The letter incorporated clause 23 and stated the studio had the right to add the period of suspension to the term of the contract.[166] From a trial strategy point of view, reading the letter in court showed that the contractual language truly governed the parties' relationship, and that clause 23 accurately demonstrated the actual business practice of the studio.

Justice Branson clarified for himself that the studio had the discretion to extend the term of the contract until Davis returned to work.

> MR. JUSTICE BRANSON: If your case is correct, the effect of the exercise of the option to extend in the letter of the 20th June is to keep open the period, which would otherwise end on the 2nd January, until she shall have consented to go back to them.
>
> SIR WILLIAM JOWITT: Yes.
>
> MR. JUSTICE BRANSON: And that would last indefinitely.
>
> SIR WILLIAM JOWITT: It lasts indefinitely . . . .[167]

This part of the hearing must have set off alarms in Warner Bros.'s legal camp. Although Justice Branson never stated that clause 23 was invalid, or that it would prevent him from issuing an injunction, his demeanor must have spoken volumes to Warner Bros.'s counsel. The first item of business on day three of the hearing was Warner Bros.'s counsel *waiving* the studio's rights under clause 23.

> SIR PATRICK HASTINGS: We are proposing to suggest to your Lordship that, for the purpose of the injunction and no other purpose, we should voluntarily forego as from to-day any rights under Clause 23, which is the suspension clause.[168]

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165. *Id*. at 26.

166. *Id*. at 24–25.

167. *Id*. at 26.

168. *See* Letter from Robert W. Perkins to Freston & Files (Nov. 11, 1936) (on file with Warner Bros. Archives at the University of Southern California).

Since the waiver was buried in the middle of a longer speech, the court requested clarification.

> MR. JUSTICE BRANSON: I do not quite follow that. You are saying that, if this is carried out, you voluntarily forego as from to-day the right to extend the existing period?
>
> SIR PATRICK HASTINGS: We forego the suspension clause; therefore, the contract will come to an end.[169]

The waiver admits implicitly that the contract could last indefinitely and that this was problematic under the law. After the court issued the injunction, counsel for Warner Bros. explained that the waiver was essential to victory.[170] In a letter dated on October 20, 1936 to Robert W. Perkins, General Counsel for Warner Bros., English counsel advised that "[t]he Suspension Clause contained in [Clause] 23 proved the most troublesome clause . . . [and] accordingly instructed Counsel to waive [Warner Bros.'s] rights under the Suspension Clause . . . ."[171]

The Times Law Report dutifully reported the waiver,[172] but the legal maneuver did not seem to find its way into the American press, much less its significance.[173] In 1954, a member of the Los Angeles Bar discussed the waiver in a published law journal article about enforcement of personal service contracts.[174] Without the benefit of primary sources, such as hearing transcripts or studio records, the author admittedly could only guess at the significance of the waiver, and speculated that it "apparently" was intended to signal to the court that the studio "was ready, willing and able to perform its part of the contract[.]"[175]

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169. *Id.*

170. *See* Letter from Denton, Hall & Burgin to Robert W. Perkins (Oct. 20, 1936) (on file with Warner Bros. Archives at the University of Southern California).

171. *Id.*

172. *Law Report, Oct. 16*, THE TIMES, Oct. 17, 1936, at 4.

173. *See, e.g.*, *Bette Davis Barred From British Film*, N.Y. TIMES, Oct. 20, 1936, at 31; *Court Curbs Bette Davis*, L.A. TIMES, Oct. 20, 1936, at 2.

174. Tannenbaum, *supra* note 110, at 18–19.

175. *Id*. at 24–25. A scholarly film essay originally published in 1988 discussed how Warner Bros.'s English counsel found the suspension/extension clauses problematic, but the essay

Was the waiver significant? The case was set in a foreign court, and since it does not appear that the American press reported on the waiver, it is not clear when American lawyers would learn about the waiver and the reasons behind it.[176] English courts were more interested in weighing equities of an individual case rather than establishing consistent precedent as compared to U.S. courts.[177] In any event, an English trial court decision had zero precedential value in the U.S. And yet, Warner Bros. and its counsel must have thought the waiver was significant.[178] The Warner Bros. archives at the University of Southern California contain a number of correspondences between Warner Bros. legal department and their London counsel showing that not only did outside counsel advise Warner Bros. that Clause 23 violated public policy to such a degree that counsel did not want to defend it in court—eight years before the landmark *De Haviland* case—but Warner Bros.'s general counsel also considered changing the contract, the cudgel of the star system, altogether.

After reviewing the court's opinion and English counsel's October 20 letter,[179] Perkins wrote to Warner Bros.'s outside counsel in Los Angeles, Freston & Files, stating, "this litigation affords a good many hints . . . as to possible revisions of our form of contract."[180] He further agreed that the

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did not discuss the in-court waiver, Sir William Jowitt's arguments to the court about the suspension/extension clauses, nor that Warner Bros. considered rewriting its standard personal service contract to limit the practice of suspension/extension. *See* SCHATZ, *supra* note 40, at 81.

176. *See Law Report, Oct. 16, supra* note 172.

177. Steinberg, *supra* note 8, at 110.

178. Warner Bros. received some validation in the summer of 1936. *See* Findings of Fact and Conclusions of Law at 1, 11–12, Fenton v. Warner Bros. Pictures, Inc. (Cal. Super. Ct., July 1, 1936) (No. 396484) (on file with Warner Bros. Archives at the University of Southern California). The case was filed by actress Ann Dvorak under her married name of Fenton. She alleged Warner Bros. breached its contract by placing her on medical suspension, even though she claimed she was sufficiently healthy and able to work, thus entitling her to a termination of contract remedy. On July 1, 1936, the court ruled against Dvorak in a decision she chose not to appeal, holding that the studio had the right to place her on suspension pursuant to the contract since Warner Bros. had acted in good faith and based its decision on medical advice. The court decided that the studio could extend her contract by the length of time she was on suspension.

179. *See* Letter from Denton, Hall, & Burgin to Robert W. Perkins, *supra* note 170.

180. Letter from Robert W. Perkins to Freston & Files, Law Office (Oct. 29, 1936) (on file with Warner Bros. Archives at the University of Southern California).

court's concern about binding Davis too long to the contract "impelled the court to limit the effect of his injunction to the period of three years."[181]

However, Perkins's letter indicates that he did not believe that the studio's right to extend the term of the contract should be capped. On the contrary, he characterized the issue as the court not understanding California law, and that California law allowed for a longer injunction.[182] He proposed revising the contract with a reference or quote from California law, which provided that personal service contracts could have a term of seven years.[183] If the contract referred to California law, and showed both parties were aware of California law, the court may have felt more comfortable issuing a seven-year injunction.[184]

Subsequently, the studio's English lawyers made their own recommendation, and advised that Clause 23 should be revised. "[I]t will, when this case is completed, be desirable to consider the provisions of the Bette Davis type of Contract in the light of the Court's observations . . . It seems to us that the chief point for consideration will be the Suspension Clause, Clause 23."[185] Counsel characterized the clause as "unnecessarily wide for the protection of a Producing Company," and recommended substantially limiting the amount of time a contract term could be extended based on suspension periods.[186] Counsel wrote:

> We think that the period of prolongation when suspension is exercised might be limited either to a definite number of weeks, as for example *six weeks*, or to such a period as would be required to enable the Producer to complete the film actually in making when the Star walks out[] . . . .[187]

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181. *Id.*

182. *Id.*

183. *Id.* Perkins was probably referring to section 1980 of the Civil Code, which was repealed and replaced with section 2855 of the Labor Code in 1937.

184. *Id.*

185. Letter from Denton, Hall & Burgin, to Robert W. Perkins (Oct. 22, 1936) (on file with Warner Bros. Archives at the University of Southern California).

186. *Id.*

187. *Id.* (emphasis added).

Perkins's next correspondence to Freston & Files revealed he felt conflicted about limiting the studio's right to extend the contract.[188] At first, he instructed Freston & Files that the recommended limitation "should be seriously considered."[189] However, the letter further sets forth reasons why the studio needed the suspension/extension clauses in their present form.[190] For instance, Perkins was open to a limited suspension period at the beginning of the contract, but if the artist breached in his last year, "the artist might very well wait the contract out."[191] If the breach occurred earlier in the contract, the artist still might wait out the current term of the contract until the studio renewed its option, and then return at a higher salary.[192]

Next, Perkins set forth his interpretation of California law, which would be tested in the *De Haviland* case. This section also seems tinged with conflict: "I still cling to the thought that the California law by statute validates personal service contracts of this nature . . . ."[193] In his view, the seven-year limit on personal service contracts included "[t]he time the contract has to run, plus the period of suspension, plus the period then or thereafter to run, including all options exercised[] . . . ."[194] What Perkins wrote next reveals his struggle to reconcile his interpretation of California law and how that interpretation conflicts with California law: "An indefinite suspension, however, even if limited by the seven-year aggregate, might be undesirable[] . . . ."[195]

How could a seven-year contract result in an indefinite suspension? At first glance, Perkins seems to accept that the statutory limit starts from the date the contract is signed and ends seven calendar-years later. But in fact, he interpreted the statute to mean seven years of actual work—no matter how

188. *See* Letter from Robert W. Perkins to Freston & Files (Nov. 6, 1936) (on file with Warner Bros. Archives at the University of Southern California).

189. Perkins further writes that Jack Warner "was willing to write the clause that way." *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

long it took for the employee to accumulate those seven years.[196] This is the interpretation he "clung" to in the face of a strong opposing view—a view he turned to again at the end of the discussion: "it might be better to limit the suspension to six or twelve months."[197]

In what appears to be the last correspondence in the file from Perkins regarding the *Nelson* litigation, revising Clause 23 is not mentioned.[198] The tone of the letter is considerably different. The clause's importance is reaffirmed: "[t]he waiver might have been a high price to pay but I believe that we got value received."[199] The letter's main subject is the effect of the waiver on the duration of the present term of the contract, and the timing of the studio's exercise of the next option.[200] As far as the issue of validity was concerned, Perkins put the matter to rest:

> There was nothing in the litigation in England which indicated that it was not valid. I know of nothing in any American case which would indicate that it was not valid. The only question raised about it was whether if it were permitted to run indefinitely a court of equity would grant an injunction, and that is a question of remedy and not of validity.[201]

The last sentence seems to run counter to the relationship between rights and remedies. Entitlement to a remedy is inextricably connected to one's rights, and here, the studio's rights were sourced in the validity of its contract. Although more internal discussion may have taken place about Clause 23, the studio continued to place actors on suspensions and extend the duration of their contracts, as evidenced by de Havilland's case.[202]

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Perkins' interpretation of the hearing transcripts of the "English litigation" does not align with local counsel's view of the court's attitude toward Clause 23. *Id.*

202. *See* De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 984 (Cal. Dist. Ct. App. 1944).

IV. A CASE FORESHADOWED: *DE HAVILAND V. WARNER BROS.*

The trouble Warner Bros. faced in *Nelson* over Clause 23 was the forerunner of their next legal hurdle in *De Haviland v. Warner Bros.* eight years later.[203] Suspension/extension came under scrutiny again and the scrutiny could not be avoided this time.[204] De Havilland's lawsuit was a direct challenge to the studio's interpretation and application of the suspension clause.[205]

In 1943, de Havilland, like Davis in 1936, was discontent with her situation at Warner Bros.; the studio was not assigning her the challenging roles she craved, and was paying her a fraction of what it paid her frequent male co-star Errol Flynn.[206] She had become a major star because of *Gone with the Wind*.[207] When the seven-year term of her contract ended in mid-1943, de Havilland learned it was in fact not over because the studio was tacking on six months on for suspensions she incurred during her contract term.[208]

De Havilland's attorney, Martin Gang, made it clear in the pleading he filed on her behalf and in his other communications with the studio that the actor was taking direct aim at suspension/extension.[209] Gang filed an action

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203. *Id.* at 985.

204. *See infra* notes 206–13 and accompanying text.

205. *See infra* notes 206–13 and accompanying text.

206. *See* Stipanowich, *supra* note 48. Warner Bros. exercised all six options in its contract with de Havilland from 1936 to 1943. De Havilland was a minor when she first contracted with Warner Bros., and because of her minor status, the contract was "reviewed and approved by the Los Angeles Superior Court . . . as 'just, fair and conscionable.'" Blaufarb, *supra* note 2, at 666–68.

207. GOMERY, *supra* note 1, at 306.

208. *See* Stipanowich, *supra* note 48.

209. Memorandum from Roy J. Obringer to Jack Warner (Aug. 19, 1943) (on file with Warner Bros. Archives at the University of Southern California) (summarizing a telephone call from Martin Gang in which he asked "whether we were aware that our 7 years on OLIVIA DEHAVILLAND expired in May") (emphasis in original); *see also* Memorandum from Roy J. Obringer to Jack Warner (Aug. 24, 1936) (on file with Warner Bros. Archives at the University of Southern California) (summarizing the complaint filed by Gang on de Havilland's behalf as "merely reciting" when the contract started and that "the 7 years ran out"); *see also* AMADOR, *supra* note 47, at 142 (relating a pre-filing conversation between de Havilland and Gang in which Gang expressed his opinion that seven years "meant seven calendar years, with no provision for additional time due to suspensions").

for declaratory judgment seeking to declare de Havilland's contract had ended because it had run for seven years from the date of execution.[210] Once Jack Warner learned this was the issue being raised by de Havilland, he recognized that it was significant, perhaps recalling the issue having been raised in connection with the *Nelson* case.[211]

De Havilland prevailed in the lower court and Warner Bros. appealed.[212] The central issue was whether the legislature intended the seven-year limitation on the length of personal service contracts to be calculated in terms of calendar years or the time of actual service.[213] To justify the practice of suspension/extension, Warner Bros. trotted out its interpretation of the law that seven years meant seven years of actual work.[214] After the court outlined the history of section 2855 of the Labor Code,[215] the court rejected Warner Bros.'s argument and interpreted the statute to mean seven calendar years.[216] The court identified public policy reasons for the statutory time limit imposed on personal service contracts such as an employee's freedom to change his employer or occupation, and, as an employee grows "more experienced and skillful there should be a reasonable opportunity to move upward . . . ."[217] The *De Haviland* decision brought an end to a powerful

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210. *See* De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 985 (Cal. Dist. Ct. App. 1944).

211. Memorandum from Jack Warner to Ralph Lewis (Aug. 20, 1943) (on file with Warner Bros. Archives at the University of Southern California) (Warner writes that the "Olivia De Havilland situation is a very serious matter").

212. *See generally De Haviland*, 153 P.2d 983.

213. *De Haviland*, 153 P.2d at 986, 987–88 (declaring that since the statute created rights to promote the welfare of the general public, time limits cannot be waived by an artist).

214. *Id.* at 985; *see also* Blaufarb, *supra* note 2, at 666 n.75 (1983) (describing Warner Bros.'s position as "an extensive semantic argument").

215. *De Haviland*, 153 P.2d at 985.

216. *Id.* at 986. "It cannot be questioned that the limitation of time to which section 1980 related from 1872 to 1931 was one to be measured in calendar years."

217. Blaufarb, *supra* note 2, at 667. *Id.* at 653, 654, 681 (arguing that section 2855 provides an "open-market break" for the employee, which is "the interval following the termination of a contractual commitment when an employee is free to negotiate for his services on the open market"). One year after the *De Haviland* decision, the Ninth Circuit reached a similar conclusion in a case involving a star placed on suspension by his studio for refusing a role. When actor Robert Cummings reported for work at the end of his suspension and attempted to collect his first post-suspension paycheck, the studio refused to pay him. Cummings filed suit to declare the contract

tool used by the studios to manage labor, and ended a practice that subverted the public policy of the state of California.[218]

V. ENDURING IMPACT OF *NELSON* AND *DE HAVILAND*

Bette Davis was one of three major female stars who challenged the studio system in a significant way.[219] Davis described herself as a "pioneer in trying to break the studio system's hold on actors."[220] Her struggle was an early instance of a fight for equal pay in Hollywood—a fight that is still being waged today.[221]

A significant part of her dispute with Warner Bros. before she left for England was the inequality in pay between her and male actors.[222] It was not simply a matter of her opinion or subjective perception; Warner Bros. *did* pay men more than women, even when a man and woman starred in the

terminated based on the studio's breach. In affirming the lower court, the Ninth Circuit specifically addressed the studio's defense that it had the right to keep Cummings on suspension indefinitely: "A continued suspension and refusal to pay appellee's compensation, coupled with a continuous extension of the contract for like periods and a prohibition with the contract against [Cummings's] right to offer his services to any other employer could deny to [Cummings] forever the right to work at his profession and earn a livelihood." The court's opinion does not reference the *De Haviland* case nor § 2855. Universal Pictures Co. v. Cummings, 150 F.2d 986, 987–88 (9th Cir. 1945); *see De Haviland*, 153 P.2d at 988.

218. Warner Bros. petitioned the California Supreme Court but was denied a hearing. *See* Blaufarb, *supra* note 2, at 668–69 and accompanying notes.

219. *See* Fowler, *supra* note 8, at 27–28 (naming the three women as Davis, de Havilland, and Mary Pickford).

220. CHARLOTTE CHANDLER, THE GIRL WHO WALKED HOME 110 (2006). Directly confronting the majors over suspension/extension was a major risk for actors. *See* Stipanowich, *supra* note 48. Jack Warner tried to stop other studios from hiring de Havilland after she prevailed in court. *See* AMADOR, *supra* note 47, at 143; HOLLYWOOD AND THE LAW, *supra* note 9, at 216.

221. *See, e.g.*, Ashley Lee, *Jennifer Lawrence Pens Essay: "Why Do I Make Less Than My Male Co-Stars?"*, THE HOLLYWOOD REPORTER (Oct. 13, 2015, 7:06 AM), https://www.hollywoodreporter.com/news/jennifer-lawrence-pens-essay-why-831635 [https://perma.cc/FB5H-BHW5]; Dave McNary, *SAG-AFTRA Exploring Pay Disparity on "All the Money in the World" ReShoots*, VARIETY (Jan. 10, 2018, 5:54 PM), https://variety.com/2018/film/news/sag-aftra-pay-disparity-all-the-money-in-the-world-re-shoots-1202660831/ [https://perma.cc/V56K-JPMD].

222. *See* Whitaker, *supra* note 61, at C1.

same movie and were given equal billing.[223] Not only did Warner Bros. pay male stars more than Davis, but male supporting actors and character actors could be paid double what Davis made.[224]

To some extent, this Article corrects the record in a small but meaningful way about Davis's struggle for equal treatment and artistic freedom. Her case is viewed, not incorrectly, as a valiant loss on an issue on which de Havilland later won.[225] One notable distinction between the two cases is that de Havilland filed her lawsuit after she had completed the original seven-year term on her contract, whereas Davis still had time left on her 1934 contract when Warner Bros. sued her for an injunction in 1936.[226]

But Davis and her legal team deserve more credit than for simply trying. Only with archival research can the studio's waiver be properly contextualized.[227] A connection does not appear to have been made previously between the waiver, Davis's counsel's arguments to the court, and Warner Bros.'s British counsel's concerns about suspension/extension.[228] The arguments in *Nelson*, and the behind-the-scenes reaction to the arguments by the Warner Bros. legal team, concretely foreshadowed the *De Haviland* case years in advance.[229] The De Havilland Law itself has been utilized up to the

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223. GOMERY, *supra* note 1, at 133 ("Men were better paid than women, even in films where women got equal billing"); *see also* SCHATZ, *supra* note 40, at 77 (describing how Davis lagged behind her male colleagues in terms of salary and status at Warner Bros.).

224. SIKOV, *supra* note 7, at 106. Davis was paid 2.5 times less than supporting actor Guy Kibbee.

225. *See, e.g.*, AMADOR, *supra* note 47, at 13 ("[De Havilland] broke Hollywood's contract system by winning her landmark lawsuit against tenacious Jack Warner when Bette Davis couldn't"); Matthew Belloni, *De Havilland Lawsuit Resonates Through Hollywood*, REUTERS (Aug. 23, 2007, 7:13 PM), https://www.reuters.com/article/industry-lawsuit-dc/de-havilland-lawsuit-resonates-through-hollywood-idUSN2329585820070824 [*https://perma.cc/LZJ5-VLWU]* ("Bette Davis lost a similar case in the 1930s"); TONY THOMAS, THE FILMS OF OLIVIA DE HAVILLAND 37 (1st ed. 1983) (Davis "mounted an unsuccessful lawsuit" challenging suspension and extension).

226. *See* HOLLYWOOD AND THE LAW, *supra* note 9, at 216.

227. *See supra* Part III Section F.

228. *See supra* Part III Section F.

229. *See* SCHATZ, *supra* note 40, at 81 n.22 (observing that Warner Bros.'s British counsel's reservations about suspension/extension mirrored those of the court in the *De Haviland* case); DAVIS, *supra* note 59, at 160 ("the publicity attendant to my litigation paved the way for Olivia de Havilland's eventual court victory over the immoral suspension clause.").

present-day by recording artists,[230] boxers[231] and even talent agents[232] to cancel long-term contracts. Questions remain about how the rule will be applied in the context of Major League Baseball,[233] "360 deals" in the music industry,[234] and in the arena of mixed martial arts.[235] Today, section 2855 is often used as a tool for contract negotiation.[236]

Finally, Davis and de Havilland's struggle to liberate artists from the oppressive use of long-term contracts resonates today in yet another way. A connection can be traced from the *De Haviland* case to the present-day labor dispute between the Writers Guild of America ("WGA")[237] and the talent

230. When recording artists seek to cancel their contracts under § 2855, they are presented with unique issues under § 2855(b). *See*, *e.g.*, Kathryn Rosenberg, *Restoring the Seven Year Rule in the Music Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 275, 294–95 (2015) (discussing the band 30STM's efforts to cancel its contract with EMI); Gregg B. Ramer, *Personal Service With a Smile: A History of California's "Seven-Year" Rule*, KATTENMUCHINROSENMAN LLP, https://katten.com/files/48984_Spotlight_on_Entertainment_and_Media%20Law_Personal_Service_With_a%20Smile_A_History_of_Californias_Seven_Year_Rule.pdf [http://perma.cc/SLZ5-LZT5] ("Section 2855(b)(3) creates a unique challenge with respect to the enforceability of music industry contracts.").

231. *See* De La Hoya v. Top Rank, Inc., No. 00-cv-9230-WMB, WL 34624886, at *12 (C.D. Cal. Feb. 6, 2001).

232. Belloni, *supra* note 225 (reporting that Agent Ed Limato used § 2855 to terminate his contract with ICM in order to join WME).

233. *See* Mitchell Nathanson, *More Than Just California Dreamin'?: California Labor Code §2855 and Its Applicability to Major League Baseba*ll, 17 VA. SPORTS & ENT. L.J. 23, 24 (2017).

234. *See* Patricia Tsai, *Discovering the Full Potential of the 360 Deal: An Analysis of the Korean Pop Industry, Seven-Year Statute, and Talent Agencies Act of California*, 20 UCLA ENT. L. REV. 324, 342 (2013).

235. *See* Jeffrey B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1077–78 (2012).

236. *See, e.g.*, Ramer, *supra* note 230 (describing how the cast of the television series *Modern Family* invoked the statute in the middle of contract negotiations).

237. *See Agency Campaign Timeline* (updated August 2020), WRITERS GUILD OF AMERICAN WEST, https://www.wga.org/members/membership-information/agency-agreement/wga-agency-campaign-timeline. *See also* Drea, *supra* note 23, at 121 ("The Writers Guild is the labor union that is the exclusive collective bargaining representative for writers in the entertainment industry.").

agencies which represent WGA members.[238] The through line begins with the changes that occurred in the wake of the *De Haviland* decision. After stars were freed from long-term contracts and the practice of suspension/extension, they gained new artistic freedoms, and greater creative freedom increased their power and independence.[239]

Another development occurred a few years after the *De Haviland* decision which involved neither Davis nor de Havilland, but nonetheless plays a significant part in the chain of events explored here. In 1948, the U.S. Supreme Court in *United States v. Paramount Pictures, Inc.*[240] ended the monopoly over the film industry held by the majors.[241] As a result, the Big Five were forced to sell their theaters,[242] and all of the majors had to end a host of monopolistic practices.[243]

Thus, the *De Haviland*[244] decision and the outcome of *United States v. Paramount Pictures, Inc.*[245] operated as a one-two punch against the studio

238. *See Agency Campaign Timeline*, *supra* note 237. Four major talent agencies represented over sixty-five percent of the WGA members who had agents before the present dispute began.

239. *See* GOMERY, *supra* note 1, at 206; CASPER, *supra* note 16 at 47.

240. United States v. Paramount Pictures Inc., 334 U.S. 131, 181 (1948); *see also* Drea, *supra*, note 23, at 110–12 (discussing history of the anti-trust litigation as it progressed from the trial court level to the U.S. Supreme Court and back to the trial court on remand).

241. Before the trial court could implement the Supreme Court's order to consider ordering the majors to divest their theater chains, two of the majors, RKO and Paramount, voluntarily signed a consent decree. The final decision for the six remaining majors was filed in July 1949. Drea, *supra*, note 23, at 101, 111 (citing United States v. Paramount Pictures, Inc., 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 974 (1950)).

242. GOMERY, *supra* note 1, at 94.

243. Drea, *supra* note 23, at 112.

244. De Haviland v. Warner Bros. Pictures, Inc., 153 P.2d 983, 984 (Cal. Dist. Ct. App. 1944).

245. United States v. Paramount Pictures Inc., 334 U.S. 131, 138 (1948).

system.[246] The majors lost much of their negotiating power,[247] and actors, writers, and directors flocked to talent agencies to help them negotiate better deals.[248] Freelancing and non-exclusive contracts became standard practices for A-list stars, as long-term contracts ceased to be the norm.[249]

Because they had so much talent in their stables, and their talent had negotiating power due to their new creative freedoms, agents rose in importance.[250] Their rise leads to the next step in the through line between Davis and de Havilland's struggles and the recent labor dispute between writers and agents: the ascendancy of Lew Wasserman.[251]

While working as a movie theater usher in high school, Wasserman developed his love for film.[252] In 1936, he was hired by the Music Corporation of America ("MCA"), a Chicago agency that controlled band-bookings.[253] Soon, MCA represented singers, comedians, and other performers.[254] At this time, MCA also expanded its agency operations to the film

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246. *See* HOLLYWOOD AND THE LAW, *supra* note 9, at 216 ("The De Havilland Law was part of several larger film industry shifts that occurred in postwar Hollywood that helped to furnish the free agency that largely remains in place for A-list screen talent today."). The decline of film-going audiences due to the growing popularity of television also contributed to the end of the classical studio era. *See* Drea, *supra* note 23, at 114.

247. Belloni, *supra* note 225 (discussing how *De Haviland* "shift[ed] negotiation power from studios to talent").

248. *See* GOMERY, *supra* note 1, at 206 ("[S]tars were able to choose their films, to order script changes, and to keep a percentage of box-office revenues."). While it is true that a number of actors, writers, and directors chose to seek representation in an effort to gain better deals, many of these artists needed representation to find employment due to the studio layoffs of talent and craftsmen. *See* CASPER, *supra* note 16, at 46; Drea, *supra* note 23 at 114 (describing how studios had to layoff talent in order to reduce payrolls).

249. *See* CASPER, *supra* note 16, at 47 (noting that the number of actors under contract with the major studios steadily declined in the postwar era).

250. *See* GOMERY, *supra* note 1 at 205; CASPER, *supra* note 16, at 47; HOLLYWOOD AND THE LAW, *supra* note 9, at 217.

251. *See generally* GOMERY, *supra* note 1, at 202–10. Other important agents in the postwar era included Ray Stark, Phil Gersh, and Irving "Swifty" Lazar. *See* HOLLYWOOD AND THE LAW, *supra* note 9, at 217.

252. GOMERY, *supra* note 1, at 204.

253. *Id*.

254. *Id*.

business, and Wasserman was asked to move to Hollywood.[255] One of his earliest signings was Bette Davis in 1940.[256] Davis and Wasserman were kindred spirits in the fight against the seven-year contract system.[257] By 1950, Lew Wasserman had become one of the most powerful talent agents in Hollywood with an impressive list of clients including actors, directors, and writers.[258]

Wasserman deployed two business strategies that would change the industry.[259] First, building on strategies agents occasionally used during the classic studio era,[260] Wasserman made packaging a standard industry practice.[261] Packaging was a way for Wasserman to maximize his commissions by filling a number of positions on a movie with his clients, such as with a writer, a director, and a star.[262] Wasserman was able to package with regularity because he represented many of the biggest names in the industry,[263] and unlike the development process during the classic studio era that was centered in the studios, the majority of feature films originated outside the major studios often with one of these names attached.[264] Secondly, Wasserman created a production side to his agency.[265] After obtaining a blanket

255. Drea, *supra* note 23, at 114.

256. *See* GOMERY, *supra* note 1, at 205.

257. *Id*. at 206.

258. Drea, supra note 23, at 114–15; GOMERY, *supra* note 1, at 205–06 (calling Wasserman the "king of the agents").

259. *See* GOMERY, *supra* note 1, at 206 (identifying packaging as the end of the classic studio era).

260. *See* TOM KEMPER, HIDDEN TALENT: THE EMERGENCE OF HOLLYWOOD AGENTS 198 (2010) (describing packaging deals in the classic studio era such as the package put together by agent Charles Feldman for the film MODEL WIFE (Universal 1941)).

261. GOMERY, *supra* note 1, at 206.

262. *Id.* at 205–06.

263. *Id*. at 206; Drea, *supra* note 23, at 114.

264. *See* CASPER, *supra* note 16, at 48.

265. *See* GOMERY, *supra* note 1, at 206; Drea, *supra* note 23, at 115. During the classic studio era, agent Charles Feldman received a special waiver from the Screen Actors Guild to produce. *See* KEMPER, *supra* note 260. Feldman's production company functioned like an extension

waiver from the Screen Actors Guild,[266] MCA started producing television shows in 1950 with its clients as stars.[267] The creation of a production company grew out of Wasserman's desire to earn more than the standard agency commission of ten percent,[268] and the reality that actors needed work after the majors divested from their theaters.[269]

In 2019, the WGA sought to eliminate packaging fees and to prohibit agencies from owning production companies.[270] Since the 1950s, agencies have moved away from the standard ten-percent commission model and shifted to a packaging fee model which often includes profit-participation for the agency.[271] Writers now complain that agents have prioritized their interests in packaging fees over their obligations to their writer-clients.[272] The WGA also asserts that tying a packaging fee to a show's profits provides an incentive to reduce expenses, which include the amount paid to writers and other talent.[273] As for the issue of agents acting as producers, the three largest agencies each have an agency-affiliated production company.[274] The

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of his agency and developed projects and package deals to be presented to the studios. *See id.* at 198.

266. *See* Drea, *supra* note 23, at 116; *see generally* KEMPER, *supra* note 260, at 132–37.

267. *See* Drea, *supra* note 23, at 115.

268. *See* GOMERY, *supra* note 1, at 206 (documenting revenues that the agency earned if a television series it produced went into syndication).

269. *See id*. (explaining that SAG gave MCA a blanket waiver to allow it to move into production because "SAG members were happy for the work."). *See also supra* notes 248–249 (describing how studio layoffs put many actors and craftsmen out of work).

270. *See* Agency Campaign Timeline, *supra* note 237.

271. *See* Answer and Counterclaims at 35, William Morris Endeavor Ent., LLC v. Writers Guild, Inc., 432 F. Supp. 3d 1127 (C.D. Cal. 2020) (No. 19-CV-05465); Drea, *supra* note 23, at 124 (explaining that "[w]hen television programs or motion pictures are successful enough to generate meaningful back-end profits, a talent agency can earn more from package fees than it would under a traditional commission system.").

272. William Morris Answer and Counterclaims, *supra* note 271, at 5.

273. *See id*.

274. *See* Dave McNary, *WME Urges Writer Clients to 'Speak Up' and Push WGA for 'Good Faith Negotiation'*, VARIETY (Mar. 4, 2019, 11:58 AM), https://variety.com/2019/film/news/wme-wga-good-faith-negotiation-1203154430/ [https://perma.cc/HL3D-EWKW].

WGA objects to agency-affiliated production companies as a conflict of interest with writers' agents also acting as their bosses.[275]

The recently resolved conflict between the WGA and the talent agencies is thematically related to Davis and de Havilland's legal battles because it is another example of the enduring struggle by artists to ensure they are treated fairly. The conflict can also be viewed as a consequence of the shift in the balance of power to the agents caused by de Havilland's victory to the agents.[276] The WGA seeks to correct what it sees as an imbalance of power in its relationship with the agencies as that imbalance has manifested itself in the practices of packaging and agency-affiliated production.[277]

VI. CONCLUSION

One of the foremost labor issues in the entertainment industry today—the dispute between the WGA and the ATA—is directly linked to the innovations of agent Lew Wasserman. But Wasserman would not have had his opportunity to lead agents to the apex of the film industry unless Olivia de Havilland had fought and won her case.[278] Archival research shows that Bette Davis's challenge, although a battle she ultimately lost, foreshadowed de Havilland's victory. She cornered a major studio into waiving its rights to suspension/extension, and new research shows she nearly compelled the studio to revise its standard long-term contract. The practice of suspension/extension was an important component to the studio system, which gave the studios a means of controlling their stars even past the termination date

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275. *See* David Robb, *WGA Says 75% Of Projects At Agency-Affiliated Production Companies Are Written By Agencies' Own Clients*, DEADLINE (May 15, 2019, 1:35 PM), https://deadline.com/2019/05/writers-guild-agency-affiliation-argument-hollywood-production-wga-1202615758/ [https://perma.cc/TR33-VPR7] (reporting a discussion of members of the WGA negotiating committee about the conflict of interest that arises from having your fiduciary also be your employer). *See also* Drea, *supra* note 23, at 120 (discussing the anti-trust case against MCA which resulted in MCA dissolving its talent agency and operating solely as a production company).

276. *See supra* notes 245–52 and accompanying text.

277. As of February 5, 2021, the WGA reached a deal on a new franchise agreement with all agencies that addressed the WGA's concerns about packaging and agency-affiliated production companies. *See* Erik Hayden & Kim Masters, *WME, Writers Guild Agree to Terms as Hollywood's Bitter Feud Winds Down*, HOLLYWOOD REPORTER (Feb. 5, 2021, 4:08 PM), https://www.hollywoodreporter.com/news/sources-wme-writers-guild-agree-to-terms-as-hollywoods-bitter-feud-winds-down/ [https://perma.cc/7VQP-Q42S].

278. *See* GOMERY, *supra* note 1, at 306 ("Wasserman got his opportunity with the de Havilland case of 1945.").

of their contracts. The practice could ruin an actor's career, and openly challenging the studios could do likewise.[279] It took the bravery of two women, who wanted artistic freedom and equal pay, to end the practice with finality.

279. *See supra* notes 47 and 48.