

The WGA strike to date has been more or less characterized as a strike over money; most press reports have dealt with negotiation demands like residuals and up-front compensation on internet streams and downloads, jurisdiction over reality and animation, and other such issues. However, the press reports have missed the central, underlying issue of this strike: copyright. This battle is not "poor laborer" versus "greedy company" - everyone in Hollywood is pretty greedy frankly. Rather, in the same way that fiction is the business of Hollywood, so is the entire underpinning of Hollywood built on an enormous fiction. But to understand the fiction, you first need to understand some facts.

Copyright is literally the right to make copies of something for public distribution and exhibition - a CD, a DVD, a painting, etc. An idea is never copyrightable; the unique expression of an idea in a fixed form is. "I'm going to write a movie musical about kids making a high school musical" is not copyrightable; the teleplay for "High School Musical" is. The latter is writer Peter Barsocchini's unique expression of the high-school-musical idea in a fixed form - a written script. Copyright also extends to "derivative works;" the TV-movie "High School Musical" is DERIVED from Peter Barsocchini's script. Since scripts - unlike books - don't have much of a market, copyright, in terms of the WGA strike, is really referring to the right to make copies of derivative works and distribute and exhibit them, e.g. the right to make copies and further derivative works of the movie "High School Musical" and show it on TV and other media.

The U.S. recognizes two ways by which copyrightable material can be produced. The first way is the way most people are familiar with - you put a unique expression of an idea into a fixed form on your own - write a movie, compose a song, make a sculpture. You own the copyright. The second way is called work-for-hire. With work-for-hire, the person or organization doing the hiring is considered the content creator and owns the copyright. If a company hires someone to write an ad, the company owns the copyright to that ad because the company commissioned it; the company, in this case, is legally considered the content creator and the owner of the copyright, meaning the company can exploit that copyright and all derivative works as it sees fit.

There are two types of work-for-hire. The first type relates to Employees and the second relates to Independent Contractors. "Employee" and "Independent Contractor" are actual definitions rather than legal ones. By this I mean that you can call someone whatever you want in a contract, but whether they are an

Employee or an Independent Contractor is based, for the most part, on a series of questions developed by the IRS. An example of the distinction: If the person who pays you controls both what you do and how you do it, you are an Employee; by contrast, if the payer only controls the result of your work but not the method, you are an Independent Contractor. Many companies have been hit with tax penalties for terming workers independent contractors when, by IRS definitions, they were actually employees. Here are some questions the IRS asks to determine what someone's employment status is (and this isn't just a sidebar - it's central to what's happening with the strike):

- How much does a worker invest in his or her own facilities, e.g. does the company provide a computer and office or do you provide those yourself? The former is Employee, the latter, Independent Contractor.
- Are you told when and where to work? What equipment to use? What order or sequence to follow? Employees generally are; Independent Contractors generally aren't.
- What is the permanency of the relationship? Is there a stop date, e.g. an option period?

In Hollywood, full-time studio staff publicity writers are Employees. TV and Film writers are Independent Contractors. This point is important and is worth repeating (you'll see why later): barring the occasional oddball situation, WGA writers are never Employees from the perspective of the law.

Here's how this relates to copyright. With regard to Employee work-for-hire, the reason Microsoft can own the copyright to its programmers' code is that the programmers are legally employed by Microsoft (software code, being a unique expression of an idea in a fixed form, is copyrightable). Thus, under work-for-hire, Microsoft owns the copyright to its employees' software output - assuming they're Employees by the IRS definition.

Independent Contractors must meet three conditions - all three - in order for their work to be considered work-for-hire. First, the work must be "specially commissioned;" in practical terms, this means the work cannot pre-date the contract; if you created the work prior to the contract, it wasn't "specially commissioned." Second, the work must fall into one of nine categories delineated in copyright law. Third, both parties need to agree in writing that the work is a work-for-hire.

If you're married, you've probably encountered work-for-hire. Wedding photos can never be work-for-hire, even though they are

clearly "specially commissioned," because photography is not one of the nine designated categories. Wedding videos CAN be work-for-hire - since audiovisual material is one of the nine categories - as long as the parties agree in writing upfront. This is why, if you want copies of your wedding photos, you have to keep paying the photographer, because that photographer owns the right to make copies aka the copyright - even though they're pictures of you. In contrast, if you make an upfront work-for-hire arrangement with your wedding videographer, YOU own the right to makes copies and derivative works of your wedding video.

The reason it's important to understand work-for-hire is that basically every single writing contract in Hollywood is a work-for-hire contract. When you look at the end of a movie or TV show, you'll see something ala "Copyright Disney" and not "Copyright Peter Barsocchini." As long as Disney owns the copyright via work-for-hire, Disney can do whatever it wants with it - make sequels, do an ice show, a Broadway production, a theme park event and/or ride, release a YA book series, etc. If the work is not work-for-hire - meaning if Peter Basocchini owns the initial copyright - then Disney would have to license the rights to those derivative works and pay Peter Barsocchini for them. Or Peter Barsocchini could decide to shop the rights to those derivative works around town and sell them to the highest bidder. Without work-for-hire, the studio OWNS nothing; instead, they've LICENSED one thing: the right to make a film from a screenplay. Depending on the deal that was made, Peter Barsocchini could conceivably license that right multiple times to multiple different studios. Or he could license it to Disney for TV, another company for internet streams, yet another company for internet downloads, etc. Or he could transfer his copyright in its entirety to Disney - though he or his heirs could terminate the transfer after 35 years and re-license or re-transfer the copyright etc. at that point if they chose. This is the power of copyright in the entertainment industry - it's where all the money is. The copyright owner holds all the cards.

And we are now getting to the heart of the WGA strike. If a studio is looking to do a romantic comedy and solicits romantic comedy pitches, the final screenplay could very well be considered work-for-hire and thus owned by the studio and not the writer because it may meet all three conditions of the Independent Contractor section of work-for-hire law. If, however, a studio is looking to do a romantic comedy and decides to purchase a completed screenplay from a writer - a "spec" -

Matt Prager  
mprager@jivemonkeyinc.com

this screenplay is not work-for-hire, regardless of what the contract says, because it was not specially commissioned. The writer of that spec is not an Independent Contractor in the legal sense.

Thus, if a writer creates a work on his/her own - a spec, an original TV pitch, an animated series treatment - then that writer's work is NEVER work-for-hire, because that writer is neither an Employee nor an Independent Contractor in the legal sense. All TV and Film spec writers own their copyrights, REGARDLESS OF WHAT THEIR CONTRACTS SAY.

The AMPTP companies are not content creators in the work-for-hire sense - the way Microsoft is with its employees or The New York Times is when it solicits an independent contractor to contribute a story; rather, the AMPTP companies are financiers and distributors of other people's copywritten content. Their business model is built on exploiting copyrights... that they don't actually own.

We know AMPTP companies are not work-for-hire content creators in two ways. First, The AMPTP companies are obviously not content creators in the sense that Microsoft is a content creator. If they were, they would have no problem staffing their shows and rewriting their films during this strike - the same way Microsoft could hire new programmers if all its programmers quit. The creative force behind Windows is Microsoft not Microsoft's programmers whereas the creative force behind an original film or TV show is the writer and not the company that bought it.

Second, we have an example of when the AMPTP companies were content creators, which is in the studio system days. Back then, lots of writers cheaply turned out product - much like advertising copywriters do - because the creative force lay within the studios. The studios told writers what to do, where to do it, how to do it, and when to do it, which made those writers Employees in the legal sense. So if today's studios are genuinely work-for-hire copyright holders, why would they ever pay a writer 6+ figures for a piece of material? Instead, if they were actual work-for-hire content creators, they might hire that talented writer to join the studio staff - like, for example, the way an ad agency might hire a particularly skilled freelance copywriter to go in-house - and oversee the production of a line of cheap, disposable writers.

Thus, the reason for the viciousness between the AMPTP and the WGA doesn't have to do with internet residuals or reality TV jurisdiction or anything like that; rather, it has to do with the AMPTP's entrenched need to maintain its fiction-based copyright-ownership business model and the WGA - for the first time - refusing to uphold that fiction anymore. So how did the fiction begin and why? Here, in a nutshell, is what happened.

About 60 or so years ago, the WGA and the AMPTP (though it wasn't called that then) agreed to decide that writers were employees of the studios - even though this definition would never hold up in court. Both sides got something from this arrangement. The AMPTP companies got copyright ownership via Employee work-for-hire; the WGA members got a union with union benefits - pension, health, etc. Remember when I noted earlier that WGA writers are basically never Employees in the legal sense? Here's why it's important: in order for there to be a union, there must be an employer-employee relationship. If writers are not Employees, then there's no Writers Guild. If there's no WGA, there's no health, pension, collective bargaining, etc. While Independent Contractors can join together and bargain, they can never be a union in the legal sense. Playwrights, for example, can't form a union, because plays are not one of the nine designated work-for-hire categories; playwrights can never be Employees. The Dramatist's Guild - playwrighting's nearest equivalent to the WGA - bears no resemblance to the WGA in the legal sense (nor does it purport to).

So this fiction worked for both writers and the AMPTP. If you've ever seen Craigslist ads offering to buy a spec for \$100, you'll immediately see how things like minimums, pre-negotiated legal complexities (separated rights, definitions of "streaming," etc.), pension, and health care benefit writers. They also benefit the AMPTP of course; without the WGA, there's no Minimum Basic Agreement, meaning the AMPTP companies would have to reinvent the wheel every time they made a deal. Having it all laid out upfront benefits everyone as long as the tradeoffs on both sides seem more or less fair. And, with a few glitches - like home video and DVD in the '80s - this scenario has pretty much suited both sides until now.

This fiction about copyright ownership underlies the entire strike because here's the naked truth: the AMPTP companies don't own the copyrights to the bulk of their product. Were an extremely wealthy TV or film writer to decide to fight an expensive legal battle over a spec work, that would be the end

of Hollywood as the AMPTP knows it. The AMPTP would be unable to meet either qualification of work-for-hire. Writers clearly aren't Employees of studios by the IRS definition. Nor are spec TV and film writers Independent Contractors since their works obviously weren't "specially commissioned" - the unique expressions of ideas were in fixed form PRIOR to the sale. Also arguable is whether or not a screenplay is a "contribution" to an audiovisual work. Without the script, there's nothing for an actor to act, a director to direct, a producer to budget, etc. It's like saying a judge is a "contribution" to the justice system rather than saying a judge is the *sine qua non* of the justice system. Certainly, it's not cut-and-dried.

Studios sometimes have backup clauses in their contracts, e.g. "if this work is found not to be work-for-hire, then you've transferred all your copyrights to us." However, there's no certainty there for them either. The essence of any contract is "consideration," meaning there's some kind of exchange between the two parties. The writer is exchanging rights for cash. Thus, is it even legal to swap out the very thing under consideration? If I agree to sell you my Honda Civic for a dollar, can you have a clause in the contract that says if it turns out the Honda Civic Sale isn't legal, you can have got take my Rolls Royce instead? Perhaps. But, even so, then that means that copyright was transferred and can be terminated down the road.

Regardless, there need not be a lawsuit for this fiction to topple, because the key component that allowed the AMPTP to maintain its false claim to copyright is vanishing: the AMPTP companies' stranglehold on the distribution chain. For many years, distribution has been prohibitively expensive. Airwaves are expensive (note the \$19 billion 700Mhz auction for an idea of how expensive); laying cable is expensive; launching satellites is expensive; making movie prints and getting them to exhibitors (movie theaters) is expensive; mass-producing and distributing VHS and later DVD is expensive - though significantly less so than other mechanisms. What is extremely cheap, however, is the internet.

The AMPTP companies have utterly failed to understand the message from their compatriots at the RIAA (the record label arm that is best-known for suing individuals for file-sharing). The AMPTP heard issues filtered through its false claim to copyright - Piracy! Peer-to-peer! Filming in theaters! Lobby Congress for harsher copyright penalties! Instead, the AMPTP missed the real message of the RIAA companies' financial plummet, which is that

Matt Prager  
mprager@jivemonkeyinc.com

10 years ago you went to Tower Records to get your music, and 3 years ago Tower Records went bankrupt. Much like how the dodo became extinct because it couldn't adapt quickly enough to breed fear of humans into its offspring, so the AMPTP is being faced with the predicament of either adapting or vanishing.

Here's how the AMPTP is going to go away if it doesn't start doing something quickly - like sucking up to content creators instead of alienating them to point where they bust the fiction on which the entire AMPTP system is based. Jon Stewart, Stephen Colbert, Jay Leno, David Letterman, and Conan O'Brien: whether you've returned to work or not, check with your attorneys to see if your contracts stop you from, say, doing humorous political commentary or interviewing celebrities on the internet. If not, then - to use Jon Stewart as an example - do the following: hire back your writers; produce a political news show for the internet; cut your show into snippets; get an ad sales person; post your snippets on the web with embedded ads - oh, say, 15 seconds per 120 seconds of programming; put cut-and-paste links on your site so people can easily make use of their millions of computers and millions of websites to show your programming - you pay for your own bandwidth but others distribute your content for you (no need for the AMPTP with the internet); embed a counter in those links so your advertisers can know how many of their ads were viewed - and charge more for that since it won't be an estimate like the Nielsens but an actual count; pay your writers royalties on the streams and downloads - the more a particular clip is viewed or downloaded, the more that particular writer makes. And then keep all the leftover ad money - after production costs - for yourself. Keep it all.

The band Radiohead did something similar in October. Madonna dumped her record deal. In the same way, you don't need network distribution because you can do it yourself - anyone heard of this thing called YouTube? And think of the creative freedom where you don't have to deal with a bunch of suits telling you want to do!

The AMPTP has said that internet revenues are "experimental" which is why it wants to "study" them before making a deal. So, Jon Stewart et al, how about you graciously conduct the experiment on behalf of the AMPTP - by cutting them out of all the money.

And that's just for TV. Here's how the AMPTP goes away in film. Rich outside investor/hedge fund: pick the top 50-100 top-grossing screenwriters and offer them script deals in which you

license - as opposed to illegally own - their copyrights, i.e. license film rights, TV rights, internet rights, etc.; licensing means writers will get paid for all those distribution mechanisms and will own their own copyrights, meaning they can license other portions - a Broadway play etc. - as they choose; what top screenwriter would decide to lose their copyright to an AMPTP company when they've been given the choice to own their copyright and get paid licensing fees; in fact, those top writers might very well take less upfront money in exchange for the licensing fees and copyright ownership; set up a distribution arm - like Miramax did in the '80s - or sell cheap to the studios and their now-starved-for-product distribution arms. Now you, investor, have all the best content, meaning you will attract the top directors and actors. And you will have no competition when your movies come out since the best writers will all be working for YOU and not creating product for other studios.

The AMPTP appears to think that the less-militant DGA will set the financial bar for issues such as internet residuals and that the WGA and SAG will simply be dragged along in the DGA's wake. What the AMPTP fails to understand is that it doesn't matter what the DGA does with its upcoming negotiations since, as is abundantly obvious, without written material, there's nothing for directors to direct. For example, the DGA is currently still under contract right now and its members are, basically, sitting around doing... nothing. If the DGA members strike an early deal, its members will still be sitting around doing nothing until the actual content creators and copyright holders - writers, not the AMPTP companies that falsely claim copyright ownership - start writing again.

My cousin used to write books for the SWEET VALLEY HIGH series. The editors would send her an extensive, chapter-by-chapter written outline, and her job was to take that outline and make it into a book. If AMPTP companies wanted to genuinely own copyright, they would need to do something akin to that. In other words, in order to have content to sell, SOMEONE has to create it. Either a writer creates it on his/her own or a writer is hired to execute a corporation's vision (like in my cousin's case). In the former, the writer owns the copyright; in the latter, the corporation does. The sole reason the WGA strike has any power is because the bluff of AMPTP work-for-hire content creation has been called - and the AMPTP has come up empty.