Let’s Do Something New for Lunch: Re-evaluating Hollywood Handshake Deals

A study of the industry benefits and legal problems of oral contracts in the Hollywood film industry to create a framework for forming or evaluating a viable alternative

Shuangjun Wang
Advisor: Professor Felipe R. Gutteriez, Department of Rhetoric
Professor Musheno, Christina Stevens Carbone
Legal Studies H195B
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ABSTRACT

The Hollywood Film Industry has the unique characteristic of producing feature-length films that undergo an extended and intensive creative process. Because of this characteristic, the industry has developed a tradition of using oral contracts – unsigned contracts with terms drawn from a collection of deal memos and verbal agreements – in order to account for creative flexibility and project changes from various players. Oral contracts have become so prevalent in the industry that many players, whatever their own opinions on the merits of using oral contracts, accept that they must conform to the industry standard to succeed.

On the other hand, oral contracts pose legal problems in its potential unenforceability and negative consequences (for example, highly unequal bargaining power) that contradict courts’ policies. As a result, the moving trend with judges and juries is that they are increasingly favoring ruling against oral contract enforcements. Analyzing this conflicting dichotomy through case data collection, law review analysis, and personal interviews with industry players, this project consolidates the necessary characteristics of oral contracts for fulfilling the needs of the Hollywood Film Industry and the characteristics that cause legal problems and need to be solved.

After consolidating these necessary benefits and problems, this paper will endeavor to create a framework for creating and evaluating viable solutions and alternatives for oral contracts in the film industry. This paper in particular will focus on evaluating the viability of digital contracts with this framework and analyze its ability to adapt to the various needs of the industry while solving the problems that courts have with oral contracts.
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INTRODUCTION

Since the rise of feature-length films and large-scale motion pictures, the Hollywood Film Industry has relied upon the use of oral contracts instead of written contracts to produce its commodities. Oral contracts consist of a collection of deal memos and verbal agreements that develop and change as film production progresses and various players (directors, producers, actors, writers, set managers, etc.) contribute to the project. An oral contract is ‘oral’ as opposed to ‘written’ because it is not signed and there usually is not an actual finalized, written contract. For example, a director who hires an actor may outline the requirements, filming needs, and general compensation to the actor through deal memos and handshake agreements, but neither party will actually sign a written contract until usually well after production is finished. While most businesses think that anything except written and signed contracts is an unbelievable practice (even those in television), the film industry stubbornly persists in using it, so much so that it has almost become the industry standard. The fast-paced and dynamic business transactions in the industry call for contracts to be more versatile, fast, and flexible than the traditional written ones that travel at snail-mail pace through lawyers. On the other hand, that same versatility and flexibility afforded by oral contracts has forced the Hollywood Film Industry to face many legal problems and business problems with oral contracts, which have led to quite a few court cases and staggering expensive consequences.

Even in light of these problems however, the players that use these contracts (the corporations, especially the Hollywood “Big-10” – Warner Brothers, Universal, etc., screenwriters, directors, and actors) persist in this tradition. In fact, the oral contract tradition has not changed much since its rise a few decades ago in the 1940s (Smith 153). The Hollywood Film Industry still works very much on a “handshake agreement” (McLaughlin 118) standard, in which film projects progress and develop through verbal agreements, promises, and a collection of separate deal memos and other unofficial notes. While this persistence alludes to the notion that oral contracts have some quality which are necessary for satisfying the industry’s needs, the practice of using oral contracts has become a problem that has gained quite a bit of recognition and is one that the Hollywood Film Industry needs to address.
The focus of this paper is to explore the conflicting relationship between the film industry players and legal courts. In this exploration, I hope to examine this relationship with the goal of considering both the pros and cons of this situation and producing a cohesive and concrete set of requirements to consider when looking for a solution to the problems of oral contracts. This set of requirements will outline exactly what any viable solution would need to satisfy in order to stay beneficial and effective for industry needs while accounting for or avoiding the problems that result from oral contracts. I do not presume to develop a solution with this thesis – rather, as one can see from my research questions, I intend to evaluate an already existing (although newly existing) contract form on its merits as a viable solution for the industry. The following three questions will serve as guidelines to help reach my project’s goal:

1) How have courts changed their policies on dealing with oral contract cases in the Hollywood Film Industry and what do they cite as their reasoning for such change?
2) How does the film industry, both as a whole and from the perspective of individual players, view oral contracts and its prevalence in their business transactions and why has the tradition of oral contracts persisted in light of its many problems?
3) What about digital contracts significantly distinguishes them from oral contracts, and how do these differences contribute to improving the shortcomings of oral contracts?

In terms of discussing the first two questions, I will briefly discuss the development of the oral contract: how and why it emerged in the entertainment industry, the issues surrounding it when it became popular, and how the law and court cases decided to treat it. I would then like to explore the reciprocal relationship between the entertainment industry and the law/courts and see how each side modifies its behavior or standards as a result of changes from the other side. To answer the first question, I will analyze law reviews, trends in trial case decisions, and look to reasoning in appellate case opinions. For my second question, I plan to look at industry standards through analyzing business and social science articles and texts, as well as conduct interviews with film industry players.

In considering the underlying factors for why the courts and the industry oppose each other on the issue of using oral contracts, and looking at the exact means by which they conflict each other, I propose to develop a framework of the necessary elements for a successful solution.
After analyzing the differences between traditional oral contracts and the new digital contracts, I plan to use this to evaluate ‘digital contracts’ – a hybrid mix between a written and an oral contract. Digital contracts allow industry players to record project agreements and any contractual developments that may occur. My goal with this project is to evaluate the merits of this new type of oral contract – a digital contract – and determine whether this is a viable solution to some if not all of the problems posed by traditional oral contracts while still maintaining the benefits afforded to the industry by these traditional oral contracts.

LITERATURE REVIEW

Although literature on this topic has thus far specified various trends in oral contracts, it is only limited to either the legal side or the industry side and never a consolidation of both. These separate trends, however, pave the way for me to parse out the underlying themes and significant issues within these trends and incorporate them into a cohesive unit. Using current literature, I can propose and define a set of evaluations to complete the goals for my project.

I. Legal Developments – Evolution of Court Decisions and Scholarship

A contract, at its most basic level, is just an agreement between two parties in which some exchange and consideration is promised. A contract becomes binding as soon as the two parties reach a mutual agreement on all the important and necessary details for the terms of the contract, either by word, act, or conduct (17A Am Jur 2d Contracts § 34). Thus, the key issue with the enforcement of oral contracts will not be “the fact that it is oral, but rather proving that there is actually an agreement” (McLaughlin 104). Here, literature does not provide a clear standpoint on how to prove an agreement was actually made. Since the creative nature of film productions usually result in spontaneously made deals, there is a gap in the literature regarding developed, set practices to document the existence of these agreements.

In response to the growing number of deals being made through handshakes and lunchtime meetings, legal courts have likewise revised their decision-making policies to accommodate the changes in law regarding the weight of oral contracts relative to written ones. Since oral contracts have been a customary practice since the advent of large-scale production
movies, courts began to recognize oral contracts formally in court (for example, *Columbia Pictures Corp. v. De Toth* in 1948; ). More and more however, judiciaries started showing exasperation to the ongoing cases involving oral contracts, such as “Los Angeles Superior Court Judge John Zebrowski scolding Warner Brothers’ attorneys by exclaiming, ‘Aren’t you people ever going to come in front of me with a signed contract?'” (Bogner 362).

This attitude culminated into large-scale growing discontent over oral contracts, starting with *Main Line Pictures, Inc. v Basinger* in 1994. For example, in 1996 Mandalay Entertainment sued John Travolta for a breach of contract (oral) for quitting a film project during production. In 1998 *Banner Entertainment, Inc. v Alchemy Filmworks, Inc.*, Alchemy sued Banner for failing follow through with an oral contract to advertise and help distribute two of Alchemy’s films. *Coppola v Warner Bros* in 2003 saw Coppola suing Warner Brothers for interfering with his taking his “Pinocchio” project to another studio. This case illustrates the change in courts’ opinions on oral contracts and its prevalence in the Entertainment Industry. In that case, the appellate court upheld a jury award of $80 million in punitive damages to Coppola citing a lack of oral contract in order “to send [a message stating] that Hollywood has to revise the way it does business” (McLaughlin 125). *Coppola v. Warner Bros.*, Cal. App. Unpub. LEXIS 1782, (2003).

Apart from the sheer amount of money at stake in relying on oral contracts, other problems also arise in terms of legal limitations. These limitations place undue burden upon courts in making decisions that, despite being made with often times lack of sufficient information (oral contracts are usually quite ambiguous), lead to very significant and drastic consequences. For example, because the Copyright Law Section 204A only allows the transfer of copyright ownership through an “exclusive license, [which means that] the transfer must be in writing” (Klein 38), ruling against oral contracts produce legal problems during advertising and distribution of the film (Claire 158). Another problem that courts face is Imputed Knowledge Rule, which “will treat the principal as having actually received the information in question, even if it is clear from the facts of the case that the agent [of the principal] failed to transmit the information to the principal” (Scordato 131-132). Because the entertainment industry works

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1 Since copyright is not my particular focus (just an added evidentiary note) and has not, to my knowledge, been common in cases, I do not propose to do much further research on this particular problem.
through “middle men” – agents, managers, executive representatives for companies, etc., information flow does not always work very efficiently.

Current literature, however, does not provide information on exactly why courts have changed their view on enforcing oral contracts, or how legal policies have changed in terms of why courts want the Hollywood Film industry to change. My research will focus on this gap in the literature and pull out what seems to be the prevailing themes in court cases.

II. Oral Contracts in the Entertainment Industry

Weiler argues that two distinctive features of the film industry influenced the emergence of this oral contract – one is that “any entertainment product is the sum of a host of creative efforts” (Weiler 643). Although all products and commodities have a creative component, the entertainment industry is unique, Weiler says, because the entire process of creating the product (a feature-length film) is made of a collection of creative efforts from various different players. Because this creative spontaneity renders every project, “parties feel that stopping to haggle over details of contracts, when the main terms are clear and easy to state, will place projects at a great risk of losing momentum and may lead them to be derailed completely” (Bogner 365). Since contracts take too long to draft, deal memos usually take the place of contracts as agreements between parties and act as the formal evidence for an existence of an oral contract (Weiler 465).

The second reason is that no one in the business wants to make a clear-cut, complete contract with all the terms set out before knowing the profitability of the venture, which in the entertainment industry, is unpredictable at best (643). Since films cost up to “$50 million to produce and another $31 million to market” (Dealmaking 2), the monetary risk in signing binding contracts is too great. The industry’s status quo process of playing a “shell game”, a common industry practice in which “key start [actors] will not participate [in a production] until a particular director and co-star agree to do so, and the director will not commit until the stars do” (Weiler 644), also creates great risk for players already committed to the project. From this, we can see the benefit of an oral contract: if a studio decides to withdraw from a project without having signed any contracts, no one incurs monetary harm. “Once the studio obligates to a star or

2 Deal memos are not written contracts because they only address a subset of the terms and are not signed.
director ... [however,] it is too late to turn back. Suddenly, from nothing, tens of millions of dollars are at stake, and if that money is lost, it will be remembered” (Smith 524).

To mitigate this, the behavior and reputation standards for industry players have also evolved in response to this problem. The industry does not respect dishonesty and bad faith, however shrewd and otherwise tricky the negotiators may be. “Many players take great pride in keeping their word. They make oral agreements with one another that are relied upon [their honor codes. Though] the honor code does permit a certain amount of hype and exaggeration” (Dealmaking 251), blatant disregard for their (often times) unwritten rule codes destroys a reputation faster than anything else in the industry, as no one wants to work with someone who is unreliable and breaks promises (252-54). Because the Hollywood Film Industry is small enough that the same groups of people rotate through the same Big-10 companies, quite a few players “may even scoff at someone asking for an agreement to be put in writing” (McLaughlin 112) because the industry is more of a ‘club’ rather than strictly a ‘business’ (Bogner 366).

With this mindset, industry players have stubbornly held onto their oral contract tradition. Contracts found in the film industry are therefore a collection of incomplete puzzle-piece deal memos at best, oftentimes unsigned, in order to maximize everyone’s profit and give everyone a back door in case the venture turns sour. This is such a common practice that virtually all major feature-length films done by Hollywood’s Big-10 companies are made with oral contracts (Litwak, Dealmaking 252). If parties ever sign a written contract, its execution by signature will only come “at some point between the oral agreements memorialized on the deal memo and the completion of principal photography of a film” (Giordano). In fact, most of the time “an agent may commit his client to a project, and the written contract may not be signed until the project has been completed” (Litwak, Dealmaking 251). The signing of the written contract at the end usually only serves to make ‘official’ the process and subsequent payment.

III. Social Consequences – Industry Players

Smith delves into the disparity in bargaining power between studios and artists that stem from oral contracts. While other businesses have clear and set salary numbers for each player/party in any endeavor by using a written contract, players in the Hollywood Film Industry do not. This poses a problem for job security and employment benefits/payments, because
“although oral contracts are thought to provide flexibility for a fast-paced and dynamic industry, the reality is that their lack of clear and defined contractual terms often leaves parties making up the rules as they go along” (Smith 503). In other words, in these oral contracts artists can “sign” themselves on to a movie deal and allow the contract to bind them to the project without any guarantee that the studio will actually ever make the film, which “leaves the studio with a "way out" of a handshake deal that the artist clearly does not have. [...Because] a film might not be produced [due to] lack of funding, withdrawal of talent, and problems with a script, the studio is equipped with an arsenal of excuses” (Smith 508) in case it needs to back out of the deal. Unfortunately, artists have no such bargaining power: “there are roughly ten major film companies that […] earn more than ninety-five percent of the box office revenue. By contrast, […] the Screen Actors Guild, [which] admits only a fraction of [actors], boasts approximately 98,000 members” (Smith 506-507). With these odds, actors do not have bargaining power to demand written contracts from studios.

In this case, many individual players such as directors and actors conform to this practice out of necessity. Forcing or demanding formal, written contracts actually incur “high social and psychic costs [...] because the parties in the industry] view themselves as friends and partners [more so than they view themselves as disinterested businessmen]” (McLaughlin 112). The film industry is unique in that it is a localized group of very rich and powerful individuals with lucrative talents and a flair for the dramatic, so taking care to not step on sensitive egos through using oral contracts is more important than being potentially unprotected from and vulnerable to potential disputes (Bogner 366). These power dynamics are institutionalized to the point that “an actor who refuse[s] to work under an oral agreement might well be unable to find a job” (Smith 510). If an artist does try to argue for a written contract, the studio will immediately seek to find a replacement to protect its own interests and the artist “gets a reputation for being obstreperous” (Dealmaking 163). In the Hollywood Film Industry, reputation is everything (Giordano 298).

Although the above literature paints a an accurate picture of how oral contracts fit into the industry, it does not provide a solid framework for naming what exactly it is about oral contracts that make them so important to the industry. My project will focus on filling this gap in

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3 In my thesis, I will refer to citations from psychology literature about how reputations in the Hollywood Film Industry are similar to social norms, which play huge roles in dictating people’s behavior.
the research and developing a thesis on exactly why oral contracts (or, which components of oral contracts) are so valuable and necessary to the industry. In addition, although the literature names a lot of various problems and pitfalls in using oral contracts, none of them actually attempts to provide for or evaluate the possibility of a viable solution (from what we know of industry needs, written contracts would not work), which will be the goal for my project.

METHODOLOGY

I. Courts and Oral Contracts

The first approach is to use appellate courts to look at how courts perceive oral contracts and what they have done about its enforcement in cases involving top ten large film companies. Because the judiciary is in a position to regulate the conflict between the legal problems that courts have with oral contracts and the industry’s persistence in using them, looking at judicial opinions will help to see why this judicial shift has occurred. On the other hand, socio-legal research on judicial decision making warns against using specific case opinions as a generalization of courts, as judges often have “frequent recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies” (Posner 7) or even omit partial reasons when deciding cases. To mitigate this, I also plan to use law reviews, case briefs, and work with law professors specializing in this topic.

With this data, I can map out policy trends and categorize the opinions into three different focus groups: legal, industry, and other. While looking at the specific content of the arguments is important in finding the exact reasons for why courts are so against oral contracts, focusing on the frequency of the categories will help to ascertain which category poses the greatest problem and consequently on which category my framework needs to focus. I will draw up a table like so:

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<th>LEGAL</th>
<th>INDUSTRY</th>
<th>OTHER/MISC.</th>
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<td><strong>Case Name</strong></td>
<td><strong>Case Name</strong></td>
<td><strong>Case Name</strong></td>
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<tr>
<td>Policy – ex; using oral contracts needs to be stopped to preserve the vitality of contracts in the future</td>
<td>Policy – ex; oral contracts proliferate unequal bargaining power between industry players and should be discouraged as a practice</td>
<td>Policy – ex; this case has been remanded back to the trial court level and has no conclusive opinion.</td>
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The legal category will focus on policies that gravitate towards legal reasoning on why the industry should not use oral contracts as a general practice. These examples will serve as part of the reasons why oral contracts need to stop showing up in court. The industry category focuses on policies that reflect general concern for industry traditions, practices, and the future of the industry as a consequence of using oral contracts. This focus group serves as a core set of reasons why the tradition of using oral contracts needs to change for the industry. The last category keeps a tracker of how many cases (a percentage) use policies that deal with neither legal ramifications nor industry standards. This category’s use is primarily to safeguard my findings from misinterpretation and over-exaggeration. It clarifies that legal and industry ramifications are not the only two reasons for judicial decision. Having this last category also helps to uncover any other significant categories.

On the other hand, not very many cases from the industry go to the appellate level, as most finish at the trial level and are not appealed. Therefore, drawing conclusions about general trends simply from these cases would be quite inaccurate and severely limiting. Therefore, I would like to do a longitudinal study of sorts and look at trial cases not argued on the appellate level. It is not exactly a pure longitudinal study, because even though I am looking at cases across a timeline, the actual individual cases are different. Even though the sampling population is different (since we are looking at individual cases as a collective, each case might have a different judge), the general population of these cases – that is, the industry players that make up the Plaintiff and the Defendant and the geographical location of the jurors, etc. remains the same.

In other words, I will take a random sampling (with the time and access limitations I have, most likely only one or two samples) from each year between 1985 and 2011. I will either find these cases through the Law Library’s databases or collect them from Los Angeles next semester. I will limit my cases to ones that cite the Hollywood Big-10 film corporations as a party. After collecting this data, I will chart their decisions/judgments over time to see the decision-making trend: the X-axis will consist of the number of oral contract cases for that year and the Y-axis gives the number of cases that says yes or no on the matter. I will also analyze my samples as a set of cross-sectional studies to look at what factors influenced courts to decide on one outcome over another. Lastly, I will compare and contrast law reviews to synthesize their arguments.
for/against the use of oral contracts in the industry. This comparison will reaffirm my policy interpretations and act as a safeguard against any discrepancies, bias, etc. in analyzing the cases.

I realize the limitations of my research methods for this since I only focus on cases with “Big 10” film companies as one of the parties. However, I feel that this is nevertheless satisfactorily representative of the industry as a whole, since over half of all films made, and over 90% of total gross revenue come from these ten companies. In productions of lesser monetary value (such as with independent films and low-budget films), the prevalence of using oral contracts is much less than with these Hollywood ‘top shots’. Therefore, in limiting my scope of research methods, I believe that I can delve deep enough into a specific group to better grasp the fundamental problems behind oral contracts yet at the same time have the information I find be general and workable for the greater film community in Hollywood.

II. The industry’s tradition and practice

My second topic question looks at the industry’s take on oral contracts – what industry players think about using it as a normal business practice and why, if at all, they want to keep something so entrenched with problems and legal issues. To avoid, as much as I can, both an ecological fallacy and a reductionist fallacy (Schutt 174), I plan to take two approaches on my research methods here: one is to get a grasp of general perceptions and opinions of the industry through analyzing business books and articles regarding the industry as a whole. The other is to go to the individual level and interview key players in the industry to get personal opinions on the subject. That way, I have means to gather both a conclusion about the group as well as a conclusion about the individual without assuming either one from the other’s data. After obtaining these two data sets, I can compare them to see if they are similar or conflicting.

The first approach is to analyze industry texts, business articles, and film production procedures to get a sense of players’ relationships and their influence the industry as a whole. From a close reading of these texts, I can parse out code words, implied meanings, and general industry attitudes. From this analysis I will make a collection of quotes, trends, beliefs in traditions, and procedures by collaging different viewpoints together from these sources, thereby allowing me to paint a general picture of what the industry looks like – in other words, sort of like an opinion map. For example, by comparing this opinion map with the pattern of filming
procedures, we can obtain a flowchart that will give us an idea of each group’s general opinions within the context of their power and status in relation to everyone else. For example, here is a simplified version of an opinion map:

Although the flowchart above is a very generic and general structure, it helps significantly in mapping out the opinions of differing parties in the industry. While there are certainly many more players than this in the filming process, these are usually the most significant players that are involved when an oral contract is used. It gives an idea of how particular groups of players might have more influence over the industry standard of oral contract than other players do. For example, the power and influence a producer has over a film project is very different than the power an actor has on the project, but both of them are funded by the company, who although controls the money, needs to depend on both producer and actor to make the film successful. This intricate web of interconnections and dependencies lends itself greatly to why the oral contract tradition persists even in the face of so many problems.
Moving on to the second part of my approach then, I will interview individual members of the industry to reconcile my findings from the power hierarchy of the group as a whole in my first approach with the opinions of individual players in my second approach. I would like to conduct interviews in hopes of finding these actual opinions and attitudes of individual players to see if they actually coincide with what the published materials say they think. I will try what Schutt calls “mixed-mode” interviews, in which I use different modes of interviewing (in-person, phone, and emailing, for example) and consolidate them all into one major interview. I will begin with an email or phone call asking about the possibility of an interview (most likely a phone call, in order to best develop a personal contact through voice with the person) and a short description of my research thesis. Then, I will send a few preliminary descriptions and questions through email so that the interviewee knows the general types of questions I will be asking and can prepare for it. These questions will be very basic, so they I have omitted from this section.

After receiving a confirmation email with some basic answers for these questions and descriptions, I will conduct a Skype interview with more open-ended questions. I wish to employ a highly abridged form of Schutt’s Intensive Interview, in which I would like to ask open-ended questions and focus on recording their experiences, attitudes, and opinions towards oral contracts from stories. That said, I would like to begin my Skype interview with a few questions adopted from Creative Interview, in which I place them within the context of this oral contract phenomenon and see how they respond to my questions from this context. My first question then, will be something of a “grand tour question” (Schutt 304-305) in which I ask them to tell me about what they know about or how they perceive to be the industry’s tradition of ‘oral contracts’, followed up with a question that connects it to their own experiences. All of my questions will be brief and open-ended, as I am trying to gauge their opinions and attitudes. This way, I can get better insight into how they think about the issue from their own perspective, rather than trying to force their opinions to conform to my perspective of it.

Here is a general list of the kinds of things I would like to ask:

1. Tell me what you know about the use of oral contracts in the industry.
2. How often do you or your company make use of oral contract?
3. As a [X player], what is your opinion on the viability of oral contracts in Hollywood?
4. In your opinion, are oral contracts necessary should there be a better alternative?
5. What is your experience with oral contracts and how do you feel about using them?
6. Have you used digital contracts, and how do they compare with oral contracts?

I will also add a few optional supplementary interpretative questions that I can ask in the event that an answer given by the interviewee is not quite clear. For example, I can ask questions about what makes them feel that particular way about something, or why they think this over this, or in what does some practice necessitate (or not) the use of contracts, etc. I believe however, that because my interview questions are very subjective, my saturation point is very easy to reach – once they have given me their opinion, there is not much more that I can get out of any further questions. This should help in keeping the interviews short, limiting the time to less than an hour (although I predict that some might even be around 15-20 minutes, depending on how much time the interviewees have to spare). After collecting this data, I will compare general industry trends as seen from pre-existing literature and from my findings in my first approach to specific individual opinions from my interviews to see if they match.

III. Evaluating the Digital Contract

Using the information gathered from above, I will use an economical equating formula – almost like a cost-benefit analysis, but with a goal of equalizing the playing field instead of picking one side (see table below). I will look at what is negotiable and what must stay in terms of oral contract attributes for the industry, and I will look at which problems have easy solutions such as merely altering oral contracts, and which need a complete uprooting of the oral contract system and replace it with a strict written contract system. Balancing these out, I can develop a framework for evaluating and building a solid and viable solution to oral contracts.

<table>
<thead>
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<th>Benefits of Oral Contracts</th>
<th>Costs of Oral Contracts</th>
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<tr>
<td><strong>Type</strong></td>
<td><strong>Benefit</strong></td>
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<tr>
<td>Necessary</td>
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Looking at digital contracts and their functionality, I will apply the framework achieved from the above table to evaluate the viability and potential success of digital contracts, both as an effective practice for the industry and as a solid contract form for courts. To do this, I will examine the technical capabilities and limits of business software and document sharing, and see how they adapt to the requirements listed in the framework. For example, one requirement of the industry is that contracts must be easily updated and changed while maintaining open documentation and communication over who makes the edits and when to satisfy the courts.

After adapting the solution to the industry itself, I will determine if it is legally acceptable within a greater context. I will extrapolate legal policies on acceptable contracts (in general) and focus on technology and digital law to explore any restrictions that might interfere with digital contracts as a practical solution. Since this part is specific to my using my framework to evaluate digital contracts, I do not plan for a large research undertaking for this part. Although I know this will limit the validity and generalizability of my findings about digital contracts, I have to place this limitation on my project, as the other parts of my research take priority and I cannot complete more than what I have outlined in the time allotted for this project.

RESEARCH FINDINGS

I. Introduction

To begin, I would like to focus on how prevalent oral contracts really are in the industry, and how much of a problem they actually pose in courts. Coming into this project from the literature review, the premise is that oral contracts are almost a universal practice within the industry, and that industry players use oral contracts almost exclusively for their business transactions. In addition, the literature thus far implies that everyone in the industry uses oral contracts, no matter which job one has in the industry. From my research however, it seems that, while oral contracts are very prevalent in the industry, they are also not the only types of contracts used for business transactions. Furthermore, while most projects begin with oral agreements, only a handful of parties in the industry (a select few job types) actually run into problems with oral contracts. Industry players are quite diligent about using at least some form of written contract, and usually try to have something signed by the end of the production process.
Nevertheless, oral contracts is still an issue commonly debated in courts, meaning that they still give rise to a few problems that are both a legal burden on courts but can also prove quite costly to the industry.

My research findings are broken up into four sections: Industry Benefits, Legal Issues, Framework Development, and Framework Evaluation: Digital Contracts. In the Industry Benefits, I will discuss my findings from business practices, magazine and news articles, an analysis of power dynamics between industry players, and interviews with industry players. The goal of this section is to pinpoint exactly what about oral contracts is so vital to the progress and daily businesses of the Hollywood film industry. The Legal Issues section will use data collected from case histories, judicial opinions, and law reviews to narrow down the most common reasons cited for why these entertainment oral contracts are not enforced. In Framework Development, I merge the findings in the first two sections to outline a specific set of guidelines for creating or evaluating a viable alternative to what the industry currently practices. I conclude with Frame Evaluation, in which I test my framework for its practical effectiveness by evaluating digital contracts, a popular medium for contractual transactions, with the requirements set forth by my model.

II. Industry Views on Oral Contracts

For the industry, using oral contacts to handle business transactions is a system that works, despite all the risks and potential disputes that may arise from using them. Oral contracts have been around since the inception of producing feature-length films in the industry in the 1920s and industry players show no signs of stopping this tradition any time soon. As the literature is fairly uniform in showing that oral contracts are indeed quite a prevalent phenomenon in the industry, we need to know how the industry works in order to get to the root of who in the industry predominantly uses oral contracts (whether it is a select group of industry players or everyone in the industry). The first step is to analyze how power dynamics work within the industry. The second step is to look at the production process of films and how the industry power dynamics factor into the contracting timeline of when what happens with which parties; this will help us get a better idea of how to pinpoint which areas are the problem areas.
The Hollywood film industry has a very hierarchical structure: players with power and money (producers, studios, etc.) obviously have more bargaining power than players who are ‘a dime a dozen’. For example, there are less than ten large studios that produce and distribute over 90% of the major films made each year (Smith 506), while there are tens upon thousands of makeup artists, editors, costume designers, etc. to choose from when making a movie. In other words, whoever is on top uses them and sets the tone for the project. Beginning with an analysis of industry power dynamics then, we can see just how various players interact with each other, and what the expectations are of each player in the movie production process.

**Figure 1: Power Dynamics at a Glance**
For most of the industry players involved in the film production process, we see that the people working in the Hollywood film industry are split up into two groups: ‘above-the-line’ (ATL) and ‘below-the-line’ (BTL) (Interview 2). BTL players usually consist of people working in more of the behind-the-scenes jobs: editors, props management, costume designers, set producers, casting, etc. While many of them still pull in a lot of money in their line of work, they are lesser known outside of the industry (relative to ATLs) and their work is less glamorous. Agents are also part of the BTL group. These BTL parties, as I have gathered from my interview data, do not usually feel the consequences of oral contracts in the industry, apart from the occasional screenplay writer or scriptwriter whose story enters into a copyrights case. Most of the BTL players do not have stable or employee jobs; they are predominantly freelance/contract workers who agree to do specific projects (movies), so they all have preset written contracts with terms in accordance to industry standards (Interview 2). Even though the initial process is completely oral (receiving a script or applying for a script/project, interviewing for the part, and negotiating details after getting the job), “you always know a contract is forthcoming. Sometimes, [you] don’t get the contract until months after the project starts, but you know what you’re getting into because everyone knows what the contract says” (Interview 2).

For example, everyone knows what he/she is agreeing to when he/she hires an editor for a movie project (Interview 2). All editors have a fairly similar preset contract with the same basic terms: they all have ACE, first-class airfare to wherever the production occurs, credits upfront, Rent-A-Car service, etc. Editors also have standard payments: they earn their wages on a fifty-six hour workweek, and upon signing them onto a project, they are guaranteed payment for their first five to six weeks of work, whether the film falls through or not (Interview 2). This is the same across the board, so there is not much to change on the preset contract aside from small details such as one’s salary – the more famous/in demand one is, the higher one’s asking price, but apart from that, all the conditions and terms are very similar. Even then, salary differences are not completely arbitrary: there is always a standard range for each position, which industry players know (Interview 1). Because of the close-knit community that is Hollywood, where everybody knows everybody else, players who are not completely new to the industry are familiar with individuals' relative celebrity statuses and their respective salary averages. New players who are unfamiliar with industry standards and practices have agents to get them started; most BTL parties have agents who do all the paperwork and contract work for them.
One of the stipulations for most BTL contract work is that it is only guaranteed for the first few weeks (Interview 2). Because BTL players have so much less bargaining power than ATLs or producers/studios, they cannot successfully negotiate longer guaranteed periods of work. Studios and producers do not want to guarantee BTLs to an entire production’s worth of time because there is no guarantee that the film will still be in production after any amount of time: if the movie gets bad reviews in a preview, production may stop. If an actor or director backs out in the middle, then the movie may be canceled (Interview 2). Sometimes BTLs (especially editors) will be let go if a director is fired since the two parties work very closely together, but sometimes they will not. Due to the sheer uncertainty of the film production process and the lack of bargaining power on the part of BTLs, these parties lack any contractual guarantee beyond the first few weeks of guaranteed payment for committing to a certain project. On the other hand, this lack in bargaining power also allows them to avoid problems with oral contracts for the most part. Because the industry standard is to guarantee payment for only the first few weeks of a film project, BTLs don’t have any contractual leverage to sue the studio or producer if they are let go along with the director a few months down the line. Therefore, for BTLs, while the lapse in time between finalizing negotiations and waiting for producers to sign the contract seems to be at the center of the problem for oral contract disputes, these parties usually do not run into problems with them.

Moving up the bargaining power hierarchy, we look at ATL, or Above-the-Line, people. These include the creative talent such as directors, actors, and people more closely involved in what the audience usually sees in the finished production. Directors essentially run the show in terms of shooting the actual film: they head the creative process and work exclusively with many of the BTL people (such as editors, props, computer imaging, sound, etc.) to create the effects they want in order to achieve their creative vision for the project. While the producer runs the entire production project, the director has a more direct hand in the creative synthesis that leads to the actual film product that the audience sees in a movie theater. Actors too, usually have their own visions of how they want to portray their characters, often times negotiating with the script and the directors on what they would like to do to personalize and ‘bring to life’ their characters. Because these players are in charge of the creative side of the project, they usually run into the most trouble with disagreeing due to creative differences, clashing personalities, and exaggerating the drama between interpersonal relationships.
Directors, for example, will not want to sign onto a project unless he/she knows that the project has enough financial backing to buy exactly what he/she wants for the production and to recruit all the stars he/she thinks will fit the project. Actors too, play this Shell Game of not wanting to commit to a certain project unless certain other players also sign on. While this may seem like a waste of time and effort, this Shell Game actually has an economic risk-reduction basis. No one knows if a particular film project will be a box office hit, yet any film that is produced must have tens of millions of dollars invested into it. This creates a lot of risk for all the parties – money for the financial backers (studios) and reputations and future earnings/opportunity potential for the players (producers, actors, directors, etc.). In order to minimize this risk, players often play the Shell Game to try and guarantee their best chance of success.

In Hollywood, there are superstars at the top of any profession in the industry that will pretty much guarantee a box office hit if they take part in a film project (Epstein). Due to the influence of the media and how the Hollywood business works (a heavy reliance on the willingness of various fandoms to contribute exorbitant amounts of money to see their favorite actors play their favorite characters, or their favorite producers making their favorite genres of movies), sometimes the difference between a failed movie and a successful movie can be the choice in other key players. For example, according to Hollywood economist Edward Jay Epstein, only a handful of producers such as Tom Cruise, Steven Spielberg, George Lucas, and Jerry Bruckheimer who constitute “the most powerful—and richest—forces in Hollywood …can reliably [guarantee] a billion-dollar franchise” (Epstein). If a director or actor has the chance to work with one of these big names in the industry, they would undoubtedly want to be able to back out of a small indie movie project that they had already agreed upon to join whatever project Steven Spielberg has in store for them. On the other hand, this negotiation process often takes a large amount of time, and may lead on well into production, in case various players drop out for other projects or time commitments. Hence, many films must end production and are canceled if one or two actors drop or a key player has to bail on the project during the middle of production.

On top of this, most actors, because of the nature of their work – through contracting – and their schedules, prefer to have as much flexibility as possible when accepting a job, since
they want to be able to jump onto a more lucrative offer if the opportunity presents itself. Professor Barnett of USC Gould School of Law echoes these sentiments in his discussion on why industry players, and more specifically, ATLs, favor oral contracts. He proposes that the two main reasons why oral contracts (or what he terms ‘soft contract’) are so prevalent are that “the project risk arising from uncertainty as to the project’s likelihood of success or failure (the latter being the typical result); and the holdup risk arising from the irrecoverable and sequential character of investments in a film project” (Barnett 2). To back up the first claim, he cites De Vany and Walls 2009, in which the statistics show that, “from 1984 through 1996,… only 22% of releases were profitable, [and] among the minority of profitable movies, 35% earned 80% of total profits; and, in the aggregate, 6.3% of all movies earned 80% of total profits” (5). Once a contract is signed however, all parties are committed and not only do the financial risks multiply, their bargaining power with the producer, who controls the entire production process, significantly decreases. Since actors and directors are a very common commodity – some would even go as far as to say ‘a dime a dozen’, these ATLs need as much bargaining power as they can get. As actress Teresa Wright put it when she terminated her contract with Producer Goldwyn,

“The types of contracts standardized in the motion picture industry between players and producers are archaic in form and absurd in concept. We in the acting branch of the profession are to blame for accepting in our eagerness to work agreements under which we waive the natural equities prevailing in every other industry. We say in effect, ‘We have no privacy which you as producers cannot invade. Treat us like cattle. Speak to us like children. Make us work eleven hours a day. Loan us out for ten or twenty times the sums paid to us at your discretion. Only give us a big pay check at the end of the week” (BTF; GOLDWYN).

While the ‘A-list’ celebrities do not have much to worry about, they only account for a very small portion of the actor population in Hollywood, as seen in our Literature Review. Most actors cannot afford to support themselves on acting alone, and must turn to other forms of work between movie deals. In this sense, having the bargaining power to walk away if a better deal comes along is vital. Because the nature of the film industry is one in which knowing whether a film will be a success or not is impossible, actors will want to safeguard their careers (and reputations) by being able to back out of projects that are projected to be failures.
Although the limitations of my research do not allow me to conduct further research into this part of my analysis, it is my understanding and projection from literature that ATLs tend to have a larger share in oral contract disputes in court than do BTL members. I was not able to conduct interviews or find previously done interviews with actors on this subject, but the particularities and idiosyncrasies of directors and the flair for the dramatic of actors lend themselves quite well to starting up disputes about changing creative decisions on a film, or wanting more luxuries and bonuses for their work. As Professor Barnett asserts in his paper, “unsigned deals are especially prevalent [in the] transactions between studios (or other production entities) and higher-value talent (mostly, actors and directors). These practices are often attributed to the creative proclivities of actors, directors and producers” (3).

Often times, distribution also becomes tricky, in terms of marketing and advertisement. According to an entertainment marketing executive, one of the most difficult parts of her job is to make sure that all contract terms are clear for actors in their rights to publicity, using their image and likeness, and other similar torts when creating a marketing and merchandising plan (Interview 3). “Nothing moves forward without a signed contract” (Interview 3), she says, because otherwise there would be too much lack of clarity in terms and permissions that it would be impossible to do anything. Furthermore, as an executive in an industry that makes its money off of creative ideas that sell well, she cautions against making anything final or even putting out any concrete work before signing the contract. Plans are made in advance through general pitches, but the actual process does not get developed until everyone signs a contract (Interview 3). Teresa Wright, the speaker of the quote above, canceled her contract with Goldwyn because his demands for what he wanted her to do for film publicity did not follow her outlined terms.

Moving on, we come to the central key figure in the entire film production process, as well as the contracting transactions process: producers. They are usually either independent producers or employed by one of the studios. Despite them only being one party in the entire production process, producers are quite central to film making: they run the show, so to speak. Their work begins from pre-production and development all the way until distribution. Producers

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4 Another limitation of my research is the limited number of interviews I was able to conduct for this project. While all the individuals I interviewed were prominent figures in the industry and had far-reaching experiences with a variety of people across the board, it should nevertheless be noted that they are still speaking from individual opinions, which may or may not completely accurately reflect the industry as a whole.
hire the creative talent and staff personnel and supervise the film production process: they work out negotiations with various parties, find the funds and contract studios for distribution and financial backing, and essentially make sure everything runs smoothly. Producers are commonly downplayed because it “we don’t actually see their work. While watching a movie we can see that the director’s, actors’, [and] cameramen’s [input] and the stunts, makeup, props, and CGI [work]. The work that the producer is responsible for [however] doesn’t necessarily show up on the screen” (Henderson). While they do not have creative control of the film, they choose the movie projects in the first place and supervise and select who the directors and actors are. Because they are the central figure in the entire film production process (choosing the particular project, hiring the talent, securing financing) they usually call the shots in terms of forming contracts with all the various parties. The producer has the most power in this sense, because he hires everyone – meaning that all contracts involving the industry parties go through him.

The type of contracts that follow from these projects then, directly depends on what the particular producer wants. While all negotiations begin with oral agreements and oral negotiations of terms (Interview 1, Interview 2), it truly depends on the producer in charge for when contracts are signed, if ever. Due to the producer’s high bargaining power relative to all other parties (he/she is hiring everyone else, after all), however he/she wants to do the contracting process is usually what happens. For example, producer Samuel Goldwyn is attributed for praising the value of oral contracts merely based on the reputations of certain players, stating that motion picture executive Joseph Schenck’s “verbal contract is worth more than the paper it’s written on” (Shapiro 317). One famous producer proudly asserts that, in his fifty-six years of producing films, he has never once signed a contract (Litwak Dealmaking 251). Despite all possible misinterpretations and potential disputes, this does work: because of a producer’s power, they can choose to not sign any contracts and still pay everyone his/her due.

On the other hand, another famous producer, whom I interviewed, stated that, as a producer he has never not signed a contract – despite having produced over a hundred films. No matter how much negotiating and oral agreements happens beforehand, nothing begins until it is all down on paper and signed (Interview 1). He simply does not believe in oral contracts – not

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5 According to Shapiro, Goldwyn actually said this quote instead of its more famous counterpart, “a verbal contract isn’t worth the paper it’s written on”, which was an ‘improvement’ upon his original quote.
because he does not trust other industry players – but because when one is dealing with so many millions of dollars for a film project, there are less chances of being misquoted or misunderstood when terms are written down. As a producer, one has to have everything under control: the creative aspect, the financial aspect, etc., which means that producers have to negotiate with everyone involved. That necessitates honesty; merely shaking on it then, is not enough. Even after hundreds of films, he has never run into a problem of anyone ever disputing his demand for a signed contract before beginning the project. For producers and studios, the situation is a little different. Producers do not usually ‘hire’ studios – they form mutual agreements in terms of financing and distribution. Therefore, power dynamics and bargaining power does not usually come into play here: studios have in-house legal departments that only deal with signed contracts, so there is not much discussion here in the way of how producers like to do business. On the other hand, the way in which contracts are signed by producers and by studios are much the same: they both take a long time. Studio legal departments are “notoriously slow: there are always legal stipulations on credits [and other things]” (Interview 2). They can take a very long time to get back to certain parties, which creates room for disputes over contract terms to occur.

Another reason for this long period of waiting time between finishing negotiations and actually getting around to signing contracts is due to the nature of producers and their work. Because producers are so invested in the projects and have to do and oversee so much of the production process, signing a contract that just confirms what they already know they have (in terms of committed players) is simply not at the top of their priority list. Due to the nature of Hollywood film standards, contracts already have preset terms for most of its players – each job description has certain requirements that need to be fulfilled upon contracting, so there only leaves a few details to work out that is specific to the project. With all the oral agreements and deal memos in effect (or, once it has all been written down), actually getting around to signing the documents just becomes a “follow-up confirmation” (Interview 2) and not very important. “They’re inundated with problems [in] making a movie! [Producers] are too busy with everything else so they don’t push it for speed’s sake. They know they’ve got you, so it’s less substantial and [they] push it down on their list” (Interview 2). This pushing down of signing contracts on the priorities list, in tandem with renegotiating stipulations and revising various copies of the final contract document (and sending it back and forth), often takes up a lot of time – time that, under normal circumstances – happens concurrently with film production.
Another factor to think about in this process is the studio. Even though they are not considered a normal ‘industry player’ since they are large companies instead of individual parties, they still very much attribute to the process of film production. Arguably at the top of the food chain because of their financial backing power, they usually work exclusively with the producers in securing financing for the film and reserving distribution and marketing rights after production is finished. While they might not hold the greatest influence in dealing with oral contracts, they certainly hold the most power in negotiations, as they finance all the projects. Currently, there are six major film studios in Hollywood, dubbed the “The Big Six”: Sony Pictures, Warner Bros., Walt Disney, Universal, 20th Century Fox, and Paramount Pictures. Below these six, which back and distribute around 90% of large box office hits and dominate 80% of total market shares (Leading Domestic Distributors in 2012), there are the “Mini Majors”, which consist of Lionsgate Films, Summit Entertainment, Weinstein Co., Metro-Goldwyn-Meyer, Relativity Media, and DreamWorks. Contrary to the Hollywood Golden Age, most major studios no longer produce films – production happens with independent companies.

While the “Big Six” sometimes do some producing, studios now often focus solely on financing, distribution, marketing/merchandising, and development (Interview 2). What is becoming more and more common is a “negative pickup”, which is when a film with stars attached to it starts production with an independent company and is financed independently. The studio waits until production is completed and then picks it up and distributes it. The studio then pays for the completely film and pays the parties involved (or at least a percentage) and then manages the marketing and merchandising, advertising, and distribution (domestic and international) (Interview 2). According to an industry player who has been closely involved with quite a few film productions, “a lot of different movies are made this way. Studios no longer have a significant hand [in making the movies]” (Interview 2). As stated before however, in terms of contract negotiating, they lead the field. Although most people in the industry have agents who try to negotiate the best deals in the projects the player undertakes, agents do not seem to be very effective in actually negotiating any significantly ‘good’ deals (Interview 3). There are already set contract terms and standards in place, and they are not easily changed. As one editor in the film industry declared, “[agents] negotiate… contract[s] with little effect; studios have most of the power, [so] they can’t really fight and go against the studio grain. There’s not much negotiating” (Interview 2). Because the studio is the one that provides the
financial means to pay all the parties involved in a film project, they are able to influence the budget. On the other hand, although the negotiating regarding financial terms is done with the studios who finance the projects, the actual contract signed is with the producer.

The studio usually will sign one contract with the producer, who in turn hires all of the players involved in the project. If the producer is an in-house employee of the studio, then the studio’s legal department will take care of the contracting and hiring business, but as more and more producers become independents (as opposed to in-house), they have more and more hiring responsibilities. In the end then, it seems that producers carry the most weight in terms of how significant a part oral contracts play in any single project: from the analysis of power dynamics and how things get done between various parties. Because they hire everyone, how they want to run the contracting transactions is usually how it is done. While most producers will conform to a written contract sooner or later, the negotiations stage up until production is almost always oral contract negotiations. Therefore, “it would be incorrect to say that Hollywood relies solely or principally on soft [oral] contracting as the standard mode of doing business. Rather, Hollywood relies on a mix of soft and hard [oral and written/signed] contracting forms to govern relationships among the multiple parties that supply inputs to any film project” (Barnett 38). Written, signed, and officially completed contract documents constitute hard contracts, while for Barnett, ‘soft contracts’ are ones that are written down through a collection of deal memos and short-form agreements, but are not officially a contract document and are unsigned. Professor Barnett’s assertion echoes the sentiments drawn from my interviews: the industry uses a combination of soft contracts and hard contracts for its transactions. They begin with using what I term ‘oral contracts’ and follow it up with signed and written hard contracts afterwards. In terms of writing the official contract,

“In-house counsel reported that the studio will typically “green light”… a project based on incompletely specified communications with talent attorneys and a mutual understanding to subsequently negotiate and draft a fully executed long-form agreement. An executive reported that the studio sometimes commences shooting without a signed agreement but is careful to identify in its comments to outstanding long-form drafts the points that it considers to be unresolved” (Barnett 13).

While Professor Barnett distinguishes soft contracts from oral contracts, I do not. Due to the predominance of the industry using some sort of written materials for any oral contract negotiation in the industry, I have decided to use the term ‘oral contract’ to denote any and all verbal/informally written contract terms including unofficial deal memos and short-form agreements, but which have no official documentation and are unsigned.
Because the industry is at a point at which most players, if not all of them, follow the same basic steps in beginning, working on, and finishing a film project, we have a flowchart timeline of what the production process looks like in terms of negotiations and contracting (Figure 2).

**Figure 2: Production Process Flowchart**
From my interviews, it seems that the usual procedure for making a film is as follows (where contracting is concerned): first the project starts with a script from a screenwriter or an idea pitched to a producer. The party (screenwriter or other creative author/artist/pitcher) talks over the idea to the producer and tries to sell it. If the pitch works, then they begin negotiations over lunch, over the phone, over email, or some other informal communication method to flesh out the project. Once development begins, the producer then finds a director who is interested in the project and starts negotiations with studios or financers to back the project. At the same time the director negotiates with the producer and signs onto the project, the producer is also out scouting for key actors and actresses – preferably stars whose names will help to secure financial support for the film. Once the main players are assembled, producers will usually hire a casting director for the rest of the characters, and ask the director to find an editor who he/she likes, as well as finish hiring all of the other staff. Once everyone is hired, production will begin, provided everything works according to plan; for example, logistical issues and location usage rights and weather conditions just to name a few. Notice that, at this point, contracts are very rarely completely written and signed; in fact, in most cases there will only have been a few deal memos and short-form agreements about confirming the script and confirming salary numbers to various key players. Sometimes, production will begin before any contracts are even completely laid out and negotiated. For example, editors may be contacted for a job and put on board a week or so before production starts and not get their signed contracts until a few months into the project, or even sometimes at the end after film distribution (Interview 2).

As we can see from the figure then, players rely on the terms produced from oral contracts for as long as it takes between the initial negotiations and deal memos (when the players are first contacted to sign onto the project) and when everything actually gets signed, which can span from before filming/production to post-distribution. A common theme from interviews is that the literature portrayal of Hollywood as “just doing lunch” and “handshake agreements” is in fact completely wrong: while players may agree on a movie deal over lunch, a written, signed contract will always come afterwards. Industry players know very well the basic standard terms that go into a contract for each player; this is not to say that an editor, for example, will know what an actor’s contract will look like, but at the very least the parties to each contract will both know fairly well. In other words, producers are very much aware of what they are agreeing to when they hire any particular individual to work on a film project with them, just as
these individuals have a good idea of what they are signing up for when they agree to work on a film project. As most of the contract parts are already pre-written and done by the parties’ agents, it is a simply matter to say ‘yes’ to movie deals ‘over lunch’, so to speak. The only variables are contingent to the film project itself: do the actors like the script enough to work with it; does the director have enough funds on hand to satisfy his artistic liberties; does the editor feel comfortable enough with both the script and the director(s) to work extensively on it for a period of nine months or more.

These variables however, are fairly easy to flesh out and industry players are usually quite flexible and open to negotiation in hopes of trying to make a film work (Interview 1). The signing of a contract becomes something like a formality to players, but the fact remains that it still must be done. The industry is taking steps to make the situation better in terms of trying to prevent oral contract disputes by having deal memos that outline the variable terms at each step of the way and increasingly calling for having a signed contract as soon as possible after production starts, if not earlier. They are much more focused on doing ‘good business’ now than keeping up reputations, although big egos and the ‘industry way’ is still quite prevalent. On the other hand, using oral contracts, at least for a large part of the process, works for the industry because negotiations cannot take place without the flexibility afforded by them. Even players very adamant about signing contracts for a deal say that oral negotiations are necessary: “there is too much risk in just committing “right off the bat, because no one knows what’ll happen” (Interview 2). One therefore makes oral agreements and negotiate that way; so, “if someone doesn’t like X we can change it, but at the end of the day when all is said and done, you have to sign the contract” (Interview 1).

On the other hand, time is still a factor: the continuation of it remaining an oral contract relies heavily on the preference of the producer in charge and his/her priority concerns about making the film; this is where all of the problems regarding oral contract disputes come in. After the negotiations process and production begins, if anything goes wrong before everyone actually signs the contracts (provided this does not occur before production begins and large amounts of money have been invested), a lawsuit will follow that will be based solely on oral agreements and informal deal memos. Professor Barnett of USC Gould School of Law disagrees that time is
an important factor in why oral contracts are so prevalent in the Hollywood film industry. He argues, that

“Timing explanations are unpersuasive for several reasons: sophisticated law firms routinely prepare complex agreements for high-stakes transactions in other fields in a matter of days; … entertainment lawyers have access to contract templates that often do not require considerable modification (Entertainment Attorney Interview I); and (iv) timing considerations would not bar converting unsigned deals into executed long-form documents during the course of production” (Barnett 20).

While lawyers and agents do have preset contracts and only have small details to modify, and while they may not have to take much time in drafting the contracts and can get it to the various parties at an adequate speed, the players themselves have to sign it. This takes time. As stated earlier, according to one of the interviews I conducted, a majority of the parties are so preoccupied with getting the movie going and starting production that signing contracts becomes a fairly low priority for them. In addition, according to a news article chronicling the Kim Basinger case in 1993, “it’s often the case that a film has been completed before the lawyers work out the details and the star signs a contract” (Fox). One party that most commonly shows up in oral contract dispute cases are the creative talent – not only are they reluctant to sign contracts due to the reasons outlined before, but they are some of the busiest players during production. Directors are on set every day during production to manage and oversee filming, and actors work around the clock with directors to memorize lines, shoot scenes, and prepare for stunts and action shots. The other most prominent player that ends up in oral contract disputes are the producers, as they hire everyone else (including the creative talent) and basically, for all intents and purposes, ‘run the show’ so to speak. Producers have many other more pressing matters to deal with in making a movie than signing every contract with every other party that he/she has hired. Because of the industry standards and all the preset contract terms, everyone knows the terms and conditions of the contracts, they already know that everyone hired is on board (through negotiations and oral agreements, but agreements nonetheless), and they have the industry’s guarantee that everyone will stay on board.

This guarantee comes in the form of economics: while making any movie is risky, it is still a paying job: as most of the industry players cannot scrape by with an adequate annual
salary from working in/on films, any opportunity to do so is golden and will be taken. For the more in-demand celebrities in the business, the desire for using oral contracts stems from another reason: economic risk. One risk is the possibility of landing a better job: because these celebrities are so in-demand, they have more job opportunities. If they book a job for an upcoming indie film that promises to be a huge hit and commit to it, then they would not be able to accept the job that might come up next month that would allow them to work with huge name directors/ producers and be financially backed by a major studio. While having a problem of choosing between a ‘huge hit’ film and a ‘big name’ film does not sound very convincing, an actor’s reputation is always at risk in each film he/she acts: if an actor works with more big name players, then they too will have a reputation boost. If they always work on small film projects (even if they become popular cult classics or something), then they never achieve that sought-after ‘Hollywood A-list Celebrity’ status. Furthermore, because of the shell game that industry players like to play, it becomes difficult for actors, for example, to commit to one job when the entire production rests on getting another party to commit. Once one party commits, that party then has significantly less bargaining power in negotiations than players who have not, because they no longer have the option of backing out (without incurring large financial risk) and finding other work if the project goes under.

One myth about the prevalence of using oral contracts is to avoid hurting any egos and respecting players’ reputations. While this does play a factor in some circles – many very good ‘buddies’ in the business might discuss a movie idea over lunch and then proceed into the production phase together without signing a contract – it is not a predominant practice. These instances, while they happen, usually happen between parties who have worked closely together numerous times in the past and know each other’s working and creative styles. They know what the contract will look like between them (and not just the industry standard, but uniquely for that person) and they know what they need to do to flesh out any details of the project with the other party. In this kind of relationship, it might almost be seen as an insult to ask for a signed contract, as it is a way of saying, ‘I don’t trust you’ (Interview 1). On the other hand, not all players in the industry work like this. Many say that, while they have plenty of buddies, they never proceed with a project without a signed contract. They assert, quite adamantly, that it is not about the trust: it is a business, and that is how businesses are run (Interview 1).
Looking at the reasons for why the industry as a whole persists in using oral contracts, we can see that the sheer practicality and flexibility afforded to the industry seems to be a driving reason behind this persistence. Oral contracts, in their ability to change and develop as film productions progress, are best-suited for the production practices of the film industry. The industry has adapted oral contracts to abide by industry rules that standardize contract terms for any feature-film production, which means that even without clear-cut contract terms and conditions, each player usually knows what to expect from the other players in any given job and will therefore not face any unpleasant surprises. I propose that the industry will be unwilling to let go of its oral contract tradition, unless it can replace it with an alternative that provides much the same benefits that oral contracts do. Regardless, oral contracts pose enough of a problem to both courts and the industry that both parties need at least to acknowledge the need for a solution.

In conclusion then, the framework I propose to build begins with the necessity for negotiations in the deal-making stage: it has to be flexible and fast enough for all parties to lock in everyone who is playing a Shell Game and who might change their minds later on about financing the project. The framework solution for this part then, must be one in which the alternative platform affords active and fluid negotiating, easy and instantaneous access (no more snail mail between parties and agents/lawyers) for all parties, and provides all parties with an organized and complete history of revisions and negotiated terms.

III. Legal Trends for Oral Contracts in Court

In this section, I will detail the legal trends in courts regarding oral contract disputes through the use of charts and graphs made from analyzing collected data on cases spanning from 1923 to 2012. In this section, a majority of the data on cases that I was able to analyze and use is credited to Professor Barnett’s still-unpublished paper, *Hollywood Deals: Soft Contracts for Hard Markets.* I have extensively used his two Appendices (A and B) in tandem with the cases that I have found and analyzed in my discussion the reasons why oral contracts pose a problem in courts. While Professor Barnett, in his paper, asserts that the industry status quo of using ‘soft contracts’ – synonymous with my phrase, ‘oral contracts’ – is a practice that works and should be left alone, I would like to use the same data that he does to refute his argument. He argues that ‘soft contracts’ ‘constitute a hybrid instrument that addresses a challenging transactional
environment where neither formal contract nor reputation effects adequately protect parties against the holdup risk and project risk inherent to a film project” (Barnett 1). While this is true, he also argues that “the fact that Hollywood has not [selected out-of-state laws to handle its oral contract disputes] suggests that California’s soft version of contract law is efficient for the motion picture industry relative to all available alternatives” (53). While oral contracts do afford the industry protection against risk and flexibility in creative negotiations, they do not seem to be ‘efficient’ in the face of all the data on how courts are treating these contracts.

Oral contracts in general are legally binding according to California statutory law (Larson). As long as a clear, unambiguous agreement (with concrete terms) is made between two or more parties, and each party entered into the agreement consciously and willingly (without coercion – a party does not necessarily have to know all the terms of the contract to be part of it), then a court will enforce it. It does not matter if two parties verbally agreed to a transaction or if they decided to write it down and sign it; both are equally binding in court. Consent to a contract is equally easy: it may be implied from acts or may be indicated by silence or inaction. The second edition of American Jurisprudence also dictates that spoken words can also count as evidence for the existence of a contract. A contract becomes binding as soon as the two parties reach a mutual agreement on all the important and necessary details for the terms of the contract (17A Am Jur 2d Contracts § 34). In addition, if the existence of an oral contract can be proved, its terms, no matter how broad, are considered binding even if the parties sign a written contract for the same transaction (but with modified terms) at a later date. Johnston v. Twentieth Century-Fox Film Corp., 187 P. 2d 474, 489 (Cal. Ct. App. 1947). Nevertheless, courts seem to have an aversion to enforcing oral contracts in the Hollywood film industry.

This is not to say that courts never enforce oral contracts; some of the more famous cases in the 1990s with large payouts in damages were when courts enforced oral contracts, such as Basinger v Main Line Films, in which actress Kim Basinger was ordered to pay Main Line films $8.9 million dollars (Welkos), and Coppola v Warner Bros., in which the jury decided to award $80 million dollars to Coppola by Warner Bros (Pollack). One of the obstacles that I ran into in my research however, was the relatively small number of cases that I was able to find regarding oral contract disputes in Hollywood: while the final number recorded and analyzed below is fairly large, it still seems to be less than what I originally hypothesized – from the sheer amount
of pre-existing literature that emphasize the problem of oral contracts in the industry, the total number of cases I was able to find and use in this study seems to be quite a small number when compared to the number of cases that pass through courts each day. One explanation is the sheer smallness of the Hollywood community: the film industry is a very exclusive business with only a handful of industry players. Relative to their small size then, it makes sense that the total number of cases is not that high. Another reason for the lack of higher numbers in cases became apparent when cross-referencing my researched lists with Professor Barnett’s appendices and his paper: it seems that, while oral contract disputes happen more than the case numbers indicate, a large majority of them are settled out of court.

As Bartlett asserts, it is rare that “studios [bring] legal action against talent who terminates participation in a film project, as illustrated by reported cases where stars withdrew from a film shortly prior to shooting but the studio took no legal action against them (Brennan and Boyer 1994)” (Barnett 41). The players themselves, along with their lawyers, work through the disputes and re-negotiate problems more often than not, rather than publicize their deal-making by going through the court system. While the limitations of my project do not allow me to research the reasons why settlement is more preferable to court decisions, I would like to propose that it has to do with a combination of industry traditions, public reputation, and economic risks. If word spread about various industry players filing lawsuits about oral contract disputes, they would have a much more difficult time trying to find subsequent work. Their reputation, something that is very important in the industry, would be ruined because they would be seen as unreliable and difficult to work with under the conditions and standards of the industry. In addition, from personal experience in trying to request interviews with industry players, disclosing information about deal agreements, contents of contracts, and the transactional standards of movie contracts is highly restricted. One individual whom declined an interview who works closely with contracts at a large film studio company alluded to the reason for the declination being the very broad non-disclosure contract that forbids the individual from answering any questions regarding the contracts that the individual works with in the industry.

Nevertheless, even with so many cases settled out of court, there is still an astonishing amount of cases that are brought to court – further highlighting the prevalence of oral contract disputes in the Hollywood film industry and providing us with some insight on just how
problematic using oral contracts can be in expensive, high-risk business transactions. From the introduction of producing feature-length films in Hollywood (1923) until now, there have been eighty-four\(^7\) reported oral contract disputes – and that only includes disputes involving a party in creative talent (ATL) and a studio, producer, or other production entity (Barnett, Appendix A&B). As stated before, this number is not very extraordinary or incredible in comparison to the number of other types of cases seen in courts on a daily basis, but the startling aspect of these eighty-four cases is that the involved are only limited to three job types out of all the job types in the industry. While these job types, as we have already discussed, are the most likely to run into problems regarding oral contract disputes, the number is still quite staggering. According to Professor Barnett, this number is “on average slightly more than one reported talent/studio lawsuit per year of this type” (Barnett 16). While this may not seem like a significant number in comparison to the vast number of cases filed each day across the United States, we must keep in mind that the industry is a very small, very tight-knit and exclusive group of people. The Hollywood film industry, or even the entertainment industry in general, is very hard to get into, and they like to keep their numbers small. For such a tiny community to put forth that many cases about oral contracts, something so necessary to their continued existence as a business, is quite disconcerting.

While many of these cases (twenty-seven of the eighty-four) have unknown decisions – yet another limitation to my research, we do have a workable number of fifty-nine cases that do have definite decisions that we can use to generalize legal trends and court decision trends for future oral contract dispute cases. A few of these cases were either remanded or dismissed, but a majority of them have decisions that are pertinent to my argument: the oral contracts that were enforced, and the oral contracts that were not enforced. The third large group – the ones that settled after going to court – came as an initial surprise, but can be explained as further evidence that even industry players know the low percentages of courts enforcing an oral contract and prefer settling to waiting for an official court decision. A graph outlining the various different decisions of the eighty-four cases is shown in Figure 3.

\(^7\) I cross-referenced Professor Barnett’s Appendix A and Appendix B and added the cases in Appendix B that were not listed in Appendix A to the grand total. I also included a few cases that I had found in my research that were not listed in either Appendix A or Appendix B in Professor Barnett’s paper. There are eighty-six cases total, but one was withdrawn and one other is still pending in its decision, so they have been left out.
Looking at the outcomes of all of these cases brings about another interesting discovery: notwithstanding the twenty-seven cases with unknown decisions, out of the fifty-nine known decisions recorded and analysed, only in ten cases did the judge or jury decide to enforce the oral contract, while in twenty-eight cases they decided to not enforce the oral contract. In other words, there is a 5:14 ratio (or about 35% chance) that a Hollywood film oral contract that is brought up in court will be enforced – it is no wonder that in fifteen of the fifty-seven cases, the parties decided to settle privately instead of continuing with the court case. From the damages awarded in many of the cases in which contracts were enforced (or even the financial losses incurred when they were not enforced), it seems a smart decision to settle out of court, in which the two parties can decide on an outcome beneficial to both of them (instead of a clear win-lose outcome).

What is even more interesting however, is that, while oral contracts have been around for almost a century, litigation cases surrounding oral contract disputes have sky-rocketed in recent years. Of the eighty-four cases that have been found, fifty of them, which amounts to almost 60% of all recorded (and found) cases, occurred in the last twenty-five years or so. Looking at the graph below, we see that there are two main spikes in oral contract disputes showing up in courts: once in the 1950s-60s, and once again now, in the 1990s-2000s. While the plethora of cases in the 1950s and 1960s can also contribute to the reasons why courts are finding legal issues with oral
contracts stemming from the Hollywood film industry, I would like to focus on why oral contract disputes in courts have spiked up so significantly in the last two decades.

**Figure 4: Oral Contract Dispute Cases by Decade**

This spike in the 1990s-2000s (spanning from 1990 to 2010, with one still-pending case from 2012) shows a significant increase from the spike in the 1950s-60s. In the 1990s-2000s, there were twenty and twenty-two cases per decade, respectively, whereas there were only thirteen and eleven cases per decade in the 1950s-60s, respectively. This almost two-fold jump poses quite an interesting question for my thesis. From our discussion before, we know that a majority of oral contract disputes are settled outside of court. The reasoning behind this is that if a case is settled in court, one party always loses and one party always wins – it is a black and white answer in a situation that is at the best of times a myriad of gray shades. If the parties choose to settle, both parties win a little and lose a little, but they are relatively happier with the results and hold no long-term consequences of hurt reputations and bruised egos. On the other hand, oral contract disputes that have gone to court having increased significantly in the last two decades, which seems counter-intuitive to the explanation above. With financial risks even greater than ever before – major feature films now have budgets up of to $200 million\(^8\) -- it

\(^8\) *The Hobbit*, one of the major feature films produced last year, had an estimated budget of $180,000,000 (IMDB).
seems strange that industry players would be sending their disputes to court when they could settle it privately. Not only is there an economic/financial incentive to settle out of court, according to Professor Barnett, taking legal action can also incur great reputational costs. Studios “can suffer a large cost due to disclosures [of] sensitive information… or reputational injury in the labor market, and talent… can suffer a career-ending reputational injury to the extent that all future employers decline to offer job opportunities” (Barnett 38). Unfortunately, the limitations of my research (and time-frame of my research) prevent me from gathering data on why this phenomenon is happening. I can hypothesize as to why, although I would have little basis for any hypotheses I posit. On the other hand, not knowing the reason behind this phenomenon does not diminish its use in supporting my argument that oral contracts is a problem that needs to be solved. This upward trend of increasing oral contract dispute cases lends itself evidence-wise that oral contracts are becoming an increasing problem for the industry. Because settling outside of court is logically more rewarding for both parties relative to filing lawsuits and going to court, the fact that industry players are driven to go to court more and more implies an increased problem with oral contracts that renders merely settling outside of court not preferable anymore: it has become a serious enough issue that they feel the courts need to be involved.

While unfortunate for the industry, the increase in cases involving oral contract disputes helps my research in that I have more data to analyze and can therefore better generalize my findings. Looking at this data then, the next step is to analyze how courts are deciding all of these cases and why they are deciding the way they are, as an increased volume of cases does not necessarily result in increased legal problems with oral contracts. For example, even if oral contract disputes are increasing within the industry, if courts are enforcing a majority of them, then the problem is not very substantial: it is merely personal disagreements or misunderstandings between industry players and not actually a serious lack of an enforceable contract. From our first graph, we can see that courts did not enforce a majority of these cases, but what I would like to now explore is the temporal trend of court’s non-enforcement policies. For example, if most of the twenty-eight cases that were not enforced occurred in the earlier decades and most of the ones in recent decades are ones that were either enforced or settled out of court, then the oral contract problem is not as large or grave as literature would suggest.
While this does not solve the reason behind why industry players are going to court more often with their oral contract disputes, it does solve the problem that I am after, in that there are no legal problems that need to be solved in regards to oral contracts in the industry.

Unfortunately, in analyzing the data on court case decisions that I have consolidated, we can see that courts have increasingly decided *against* the enforcement of oral contracts over the last few years, the reasons for which brings to light some of the inherent problems of using oral contracts and the potential consequences on the industry of doing so. In Figure 5 below, I have isolated only the thirty-eight cases which have had decisions that either ‘enforced’ or ‘not enforced’ the oral contract in question and have summarized the trend in courts deciding either way in a chart that, like in Figure 4, spans from the 1920s to the present. From the chart, we can see that courts are increasingly not enforcing oral contracts as opposed to enforcing them.

**Figure 5: Court Decision Trends from 1920s to Present**

While the trend above may be skewed due to the low numbers of available case decisions in prior decades, the jump between the eighties and now is still quite high. While enforcement of oral contracts in court starts to steadily grow as more and more cases are introduced, non-enforcement of oral contracts shoots up exponentially. One possible reason for this is because judges and juries are becoming increasingly frustrated with trying to decide cases with oral
contracts that only have a haphazard collection of deal memos and memory recollections of agreements as evidence of their existence. It becomes quite difficult in some cases, especially if there is not much written evidence. “In oral agreements, courts will try to find any witnesses who might have heard the terms of the agreement, or if the parties have actions, evidence, or exhibit certain conduct to show that it was in existence” (Spotora). Such conduct can range from hiring a particular actor on the word of a director qualifying his/her acceptance of the job offer with the cooperation of said actor, to investing large sums of money in financing and buying preparations for the production on the word of a screenwriter promising the rights of his/her story to the studio or producer.

For example, in *Coppola v Warner Bros.*, Warner Bros. believed they had an oral contract with Coppola, so when Coppola took his idea to Columbia Pictures, Warner Bros. threatened litigation on ownership rights. Missing a large-profit venture with Columbia, Coppola sued Warner Bros. to receive damages. On the other hand, just after the jury handed out its decision the damages, the appellate court reversed the damages awarded in *Coppola*, on account of the fact that Warner Bros. could not be liable for acting on an oral contract if it had probable cause to believe in the existence of one. *Coppola v. Warner Bros.*, Cal. App. Unpub. LEXIS 1782, (2003). This decision, however, opens up the doors to a myriad of excuses which could easily be abused and written off as satisfying promissory estoppel. Promissory Estoppel grants damages to anyone who can prove (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) that his reliance was both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. *Laks v Coast Fed. Sav. & Loan Assn.* 60 Cal. App. 3d 885 (1976). Within the context of the entertainment/film industry, promissory estoppel grants damages to any player that, upon making a handshake agreement with another player, begins production or hires actors/etc for the production (or somehow spends money and resources) in reliance on that promise, provided the player can prove that the promise was clear and unambiguous.

On the other hand, showing that a promise – the oral contract – was clear and unambiguous may be more difficult than one imagines. Using the cases that have gone to the appellate level and have received judicial decisions, we can map out what the most commonly cited reasons are for not enforcing oral contracts in courts. In the thirty-eight cases surrounding
oral contract disputes that I have consolidated between Professor Barnett’s Appendix B and my own research on Westlaw, LexisNexis, and Bloomberg Law, twenty-eight of them decided against the enforcement of the oral contract. Of these twenty-eight cases, there were a total of four cited reasons (main, determinative reasons); two of these reasons dominated over the rest. Twenty-three out of the twenty-eight cases cited either ‘unclear contract terms’ or ‘violating Statute of Frauds’ as the reason for not enforcing the contract. Figure 6 below outlines these reasons and how many cases each reason had in more detail.

**Figure 6: Judicial Reasonings for Oral Contract Non-enforcement**

To clarify how this graph was created, I analyzed each case and matched my findings of the most predominant reason for the decision with the reason cited in Professor Barnett’s Appendix B. This is not to say that each judicial decision only cited one reason for explaining its decision, but I felt that overlapping decisions would skew the numbers and confuse the total case numbers: cases with more reasons would account for a larger share of the data points, etc. After assigning one reason per case, I manipulated the reasons and wordings until I had arrived at four distinct reasons for oral contract non-enforcement. The most manipulated were the two largest groups, as there are multiple variations of what can constitute ‘unclear contract terms’, for example (consolidated terms included ‘ambiguous terms’, ‘lack of sufficient contract terms’,
etc.). Because ‘unclear contract terms’ and the ‘Statute of Fraud violations’ constitute over 80% of the judicial reasonings, I will focus on these two as the predominant legal issues regarding Hollywood film oral contracts and limit my framework to these two problems that need to be fixed for the legal side. I will begin with ‘unclear contract terms’, since that accounts for exactly half of all the judicial decision reasons in cases.

‘Unclear contract terms’ usually point to the fact that, after looking through the evidence supporting the existence of an oral contract, such as written materials (emails, deal memos, notes, preliminary contract drafts, short-form or long-form agreements, etc.), the court cannot decide which set of terms was the final agreed-upon set that both parties entered into for the oral contract. Without a clear set of terms, there is no contract. “Therefore, the parties to the contract have to come to an agreement on all the major deal points. An oral contract cannot exist if there isn’t agreement on all of the major deal points” (Perez). Here, the integrity of contracts has been compromised: oral contracts in these cases have become too vague and muddled through miscommunications, different perspectives, and misinformed parties to be legally enforceable. Because courts must make a decision and rule each case, continually forcing judges and juries to try and put together a cohesive decision based upon ambiguous facts supporting one side or the other places an undue pressure on the courts to make decisions they do not feel adequate to make, especially with so much money and power on the line. In this sense, the more written down evidence, the stronger the case is for having a legally binding oral contract. One caveat to this, is that both parties must first agree that there was some sort of agreement between them – because it is almost impossible to prove that one party agreed specifically to any one deal memo (unless there was a follow-up memo providing evidence for it). The difficulty with oral contracts is that, because there is not a complete set of terms that is organized into one document and concretely written down, “the Court must hear oral evidence from the parties as to what they thought were the terms of the agreement. Since people usually have slightly different memories of a shared event, the Judge often has a difficult job determining the real terms of the agreement” (Irwin). These terms become especially difficult to distinguish for oral contracts made for film productions in Hollywood.

In the industry, a majority of the players already know the usual contract terms: if one works as an X, then one usually has a preset contract Y that automatically has terms A, B, and C
included, as well as a standard average payment of D. Industry standards form a very clear precedent and rule for contract terms for various jobs, and so most players (with some experience) will know how to play the game. What is not clear – and this is where most oral contract disputes occur – is when the terms are contingent upon the production itself. This is why most cases that I have found and used in my above analyses have had ATLS (creative talent such as actors and directors) and production entities (producers and studios) as one or both of the parties. The details of what each party wants (their creative visions) for the particular film they are all making can come into contention with one another and often contribute to misunderstandings or different interpretations of contract terms, as actor’s artistic liberties may interfere with a director’s or producer’s creative vision for the film – such is reflected by *Kim Basinger v Main Line Pictures*. On the other hand, even though industry players may know what the contract standards are for particular jobs within the industry, the courts may not necessarily know. Even if the judges or jury does know, general industry standards or expectations cannot substitute for specific contract terms, and courts cannot assume that either party meant for certain standards to be included and others to be not included.

The second main reason, a Statute of Frauds violation, is more easily explained. “For entertainment related purposes, oral contracts are binding when the object of the contract can be accomplished within 12 months” (Perez). In California, the Statute of Frauds dictates that all contracts whose objective or goal cannot be finished within one year must be made in writing to be valid and legally binding (Calif. Civ. Code, § 1624(a)(1)). While most of the time this does not pose a problem, as production does not usually last more than a few weeks to a few months, some longer term projects may take up to and over a year to complete, especially if production is delayed. Thus, with oral contracts, even though they are enforceable, the Statute of Limitations only allows lawsuits to occur within one year of the oral contract being made (Claire 156). Delaying production is very common: sometimes one player is not ready or some logistical detail has not yet been resolved. In most of these instances however, delayment does not last more than a week or so. Other times, such as when an actor agrees to do one film project and then is booked for another one too, it can be delayed for a few months, if not more.

For example, the filming of the third season of *Sherlock*, a BBC drama, was delayed by over a year because its two protagonists, played by Martin Freeman and Benedict Cumberbatch,
signed onto film productions *The Hobbit* and *Star Trek* (Hooton). This happens especially with sequels: if a movie becomes a blockbuster hit, the parties involved will usually plan a sequel. For sequels, most of the cast is usually expected to return, but with the busy schedules that everyone has (especially the stars), production of a sequel to any film may take a very long time – it may possibly never happen. Other production projects that have sequels already built in, for example the *Pirates of the Caribbean* series with Johnny Depp, Orlando Bloom, and Kiera Knightley, must have signed contracts at the outset because of their long-term commitment to the film series. While the contracts only last for each movie installment, negotiations can start early: starting as early as 2010, “Disney has begun quietly telling cast and crew to set aside a major block of time in the very near future so they can shoot "Pirates 5" and "Pirates 6"” (McWeeny). *Pirates 5’s* current release date is set for July 10, 2015 (McClintock), which is two years away even though production is already underway. In this case, a signed contract will definitely be necessary, since without a written, signed contract, it would never have held up in court should any disputes have occurred during production. With sequels and other time factors in play, the Statute of Frauds actually becomes a quite significant factor for the industry to consider, and one that will need to be accounted for in any possible solutions to oral contract that one might propose.

### IV. Framework Development

Here, I will summarize and go into more depth on the framework components outlined above. Consolidating the analyses and discussion above about how oral contracts factor into both the industry side and the legal side of the entertainment business, I outline the specific framework that my project endeavors to develop. This framework will ideally provide the requirements needed to evaluate or create a viable alternative/solution to oral contracts in the entertainment industry. On the other hand, due to the limitations of my research and time deadlines, I cannot propose that the framework that I produce here is a complete framework; rather, it will be the beginnings of a comprehensive framework that will aid in evaluating various contracting forms and mediums in terms of being suitable for the industry and for courts. At the moment, the extent of my research allows me to identify the most common trends seen in my research discussion above. Below, in Figure 7, I outline the two most significant components drawn for both the industry and legal side that need to be added to the framework.
Figure 7: Framework Outline

<table>
<thead>
<tr>
<th>Industry Requirements</th>
<th>Legal Rectifications</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Flexibility and Fluidity for Negotiations</strong></td>
<td><strong>Unclear or Ambiguous Terms</strong></td>
</tr>
<tr>
<td>➔ oral contracts allow parties to change ideas and introduce new terms or compromises without having to wait for a written contract to be made each time someone wants something changed in the contract</td>
<td>➔ as the most cited issue for courts in not enforcing oral contracts, oral contracts having unclear terms is arguably the most important point of the entire framework: because oral contracts are legally binding, if the terms are clear (enforceable), then oral contracts would not be such a large problem for industry/courts.</td>
</tr>
<tr>
<td>➔ due to the creative processes of film production, creative visions often do not synch with each other, and it becomes easier (and faster) to provide certain provisions for allowing for these artistic liberties on the part of various parties through oral agreements rather than going back to a formal contract</td>
<td>➔ on the other hand, this is almost impossible for contracts in the industry, especially because there are so many provisions for so many parties (many of which are dependent upon other players involved in the project)</td>
</tr>
<tr>
<td><strong>Ease of Access</strong></td>
<td><strong>Statute of Frauds</strong></td>
</tr>
<tr>
<td>➔ because the industry is so fast-paced, it is vital to be able to make deals quickly so that production can begin and fit everyone’s schedules (and before some other movie deal comes up, etc)</td>
<td>➔ California Civil Code 1622 states that, “all contracts may be oral, except such as are specially required by statute to be in writing” (CA Civ §1622), and the ones required in writing include agreements that “by its terms is not to be performed within a year from the making thereof” (CA Civ §1624(a)(1)).</td>
</tr>
<tr>
<td>➔ while oral contracts fit this quite well, oral contract disputes that occur in the industry are due to the long time it takes for parties to sign the written ‘official’ contracts afterwards. Because this has already been a problem for the industry and is the root of most oral contract disputes, it should be addressed.</td>
<td>➔ Even though most of the time production of a movie only takes a few weeks to a few months at the most, delays and logistical problems may push back the start date for filming, running into problems with this.</td>
</tr>
</tbody>
</table>
From the interviews and research, it seems that oral contracts – the active negotiation that occurs pre-production in the development stages in the form of deal memos and long-form agreements – are quite crucial for the industry to conduct its business in movie making. The sheer practicality and flexibility afforded to the industry to be a driving reason behind this persistence. In addition, during development, most ATL parties highly value the ability the withdraw from the project in case anything happens (predicted financial loss, a certain star doesn’t agree to sign on, etc), which means that they need the flexibility and limited legal liability of oral agreements and just a basic acknowledgement of the standard contract terms of each party. Anything more, and the reluctance to potentially tie oneself to a failed movie would be catastrophic for the business since no one knows how a movie will turn out during this stage. Some stars are very serious about this: “a studio executive reported that it was often “not worth it” to insist on a fully signed-up deal with a major star prior to production” (Barnett 44) because studios that do so must pay large amounts in concessions to the star.

Even if everything goes smoothly, oral contracts, in their ability to change and develop as film productions progress and to allow for industry players to maintain their ‘club’ atmosphere through lunch agreements, are best-suited for the production practices of the film industry. Thus, any solution that we can come up with must also be able to change and develop as film productions progress, and furthermore, to maintain the tradition of Hollywood being like a ‘gentleman’s club’, the solution must also be able to adopt an informal usage system. For example, because egos may be bruised and reputations may be ruined if one demands the formality of a signed and written contract, part of the framework solution must accommodate for a system or medium that retains a casual, informal atmosphere – similar to calling each other or going out to lunch. Thus, for our framework, the first step is to preserve the flexibility of oral contracts in facilitating negotiations between various players throughout the production process and allow for continual compromises and accommodations for varying creative visions.

The second component of oral contracts that needs to work for the industry is ease of access. Oral contracts work very well with ease of access, because they can be verbal agreements made over lunch; short memos sent to each other through texting, phone voicemail, or email; and longer negotiations can be drafted into short-form agreements after a meeting. On the other hand, written and signed contracts take much longer because lawyers must first draft an official
contract, then send it to the parties for revisions and updates, then send it back to the original
parties for their agreement to the updates, then send it back again for everyone to sign. Not
including all the shipping time of these contracts, one must also take into account the busy
schedules of all the parties involved and how able they will be to simply pull out a contract in the
middle of their to read over the entire thing and sign it. Hence, timing becomes a problem. While
the first component is something that must be maintained in the viable alternative, this second
component is something that, while it is not seen as a problem in the industry at the moment, I
argue is one of the key reasons for the large number of oral contract disputes in the industry.
Because producers hire all the party members and are the ones who oversee the entire production
process, they usually have too much on their plates to worry about signing a few contracts when
he/she already knows that everyone involved is committed to doing the project – provided that
there is no delay. Because the industry has developed its practices to negotiations with oral
contracts and then signing written contracts eventually, the problem is the wait time between
finalizing an oral agreement and signing the actual contract. If production begins before contracts
are all signed and confirmed (as it often does) and something does not work out or goes wrong,
then the parties involved must move forward with an oral contract dispute. In other words, the
crucial problem that needs to be fixed is not the fact that oral contracts are unreliable or
somehow problematic in and of themselves, it is the fact that the industry’s use of oral contracts
necessitate the move towards written, signed contracts at the end to avoid problems with oral
contract disputes, but these oral contracts are staying oral for too long, increasing the chances of
disputes to occur.

To minimize the timing of converting oral contracts then, the framework I construct
would have to include a qualification that encourages all parties to sign the contract documents
in a timely manner. The alternative set would need to retain an oral contract’s ease of access for
all players while negating the need to move towards a written contract in the end. In other words,
the alternative, according to the framework, would need to be sufficient to pass as a written
contract in court. Ideally, the time frame will be bridged to have signed contracts all finalized
before production begins, but due to some of the tight deadlines that can happen (for example,
BTLs sometimes are hired quite late in the pre-production process and can be taken on board as
little as a week before production begins, as stated before), it might not be always possible. On
the other hand, the framework should require the alternative or any proposed solution to enable and promote all parties in being able to sign contracts in a quick, efficient manner.

One possible means by which this can happen is to increase ease of access to contracts by allowing for instantaneous sending and receiving of signatures and/or signature notifications. For example, even though lawyers can draft contracts very quickly, it still takes time for the actual documents to be sent back and forth to the respective parties. If the contract – which still has to be signed and written – can allow for very easy and very fast ways for parties to read through it and sign, then it does not become a chore or a large undertaking that necessitates an envisioned large block of time set aside just for signing contracts. Signed and written contracts could be done much faster, especially if contracts had a revision history to augment reading time, so that players do not have to read through entire contracts over and over again and can rather just skim through the new, updated portions and sign. Apart from being easy and convenient to sign then, having contracts in which any negotiation updates are easily discernible and outlined in the document can also contribute to closing the time gap. One way in which the industry can maintain their use of deal memos, phone conversations, etc. and other forms of ‘oral agreements’ but still have a clear set of terms at the end (one that is ready to be consolidated and signed) is to find a way in which one can collect all of the various media with contract negotiations data on it and organize it into one space, with date/time markers and contributor names. Thus, it would be a lot easier for courts to discern which terms were the most recent and up-to-date ones, which had been discarded, and which terms had been agreed to and which ones had not.

This provision works quite well in tandem with one of the legal issues brought up by my discussion on court case decisions. If the time in between finalizing the oral contract negotiations and signing the written equivalent is shortened to prior to production/film shooting or limited to the beginning (first few weeks) of production, then the issue regarding fulfilling Statute of Frauds then becomes a moot point. On the other hand, the Statute of Frauds should still be kept in mind for projects that are, for whatever reason, postponed due to logistical reasons or otherwise delayed. In such a case, despite the risks to all parties in signing contracts for a project that is postponed and therefore may or may not be continued, parties should make every effort in trying to sign all contracts upon confirmation of re-starting the production process.
Last but not least, the most commonly cited legal reasoning for not enforcing oral contracts in courts is due to a lack of clear, discernible terms. A disagreement in what the agreed contract constitutes is the reason why parties enter into disputes and form lawsuits against each other. This problem can stem from two reasons: one, that the multiplicity of deal memos, short-hand agreements, and other informal notes/phone conversations/verbal agreements make it difficult to distinguish which terms were agreed upon and which terms were thrown out; and two, the parties involved have two sets of differing opinions on what the contract terms are – usually due to misunderstandings or differing interpretations of the negotiations that occurred between them. Both of these problems can lead to courts becoming increasingly frustrated in dealing with oral contract cases. The first reason is difficult because it is very difficult to prove which memo or agreement is the most recent one, or which offers were accepted and which were still in the process of being negotiated. Proving that both parties agreed to any one particular memo or agreement is also difficult, as any developments and updates are not collected in an organized way. The second reason causes a lot of strain for the parties and often can lead to ruined reputations, the possibility of one’s career ending, and bad blood between the parties is imminent. This is because in the industry, big egos with a flair for the dramatic hold grudges – as one interviewee related, he turned down a job once due to the unsatisfactory salary he was offered, and the producer never forgave him and will never hire him again (Interview 2). Thus, it is imperative that any solution posed is able to account for this problem.

To resolve this problem is more difficult than resolving the others, as one would need contract platforms that allow for an organized listing of all negotiation updates and the previously agreed-to terms and the yet-to-be-determined terms. In other words, the framework, in accounting for this problem, will need to require that any viable alternative must have a means of consolidating, in a timely manner, all negotiations (or records thereof) that take place, as well as a master list of the agreed terms. In determining contracts, the industry is fortunate in having preset contracts for most professions within the industry, so usually the negotiations process is not a long, arduous one that must go through every detail of the job related to the project. On the other hand, negotiations for the various details and considerations not included in the standard preset contract document may still take a significant amount of time, especially if creative differences render any compromises difficult to make. As a whole though, contract negotiations are fairly straight-forward in that, as long as the players involved are satisfied that their
preliminary conditions are met (approval of the script, successfully played Shell Game, etc), then the rest is just a matter of sitting down and working out the small details. Tying this into our framework then, it would be more effective if the platform on which all these small details are worked out is shared among the parties, thereby creating less chance of misunderstandings or misinterpretations as separate documents travel between lawyers and players and make their rounds through various parties in the contract formation process. In other words, the more concrete and organized one can make the contract, the better chances it will have in being upheld in court as a legally binding and enforceable contract.

The difficult part about developing a framework for evaluating potential solutions however, is that the very benefits that oral contracts provide for the industry also cause the problems that courts want solved. Despite the timing of signing contracts playing a central role in the problem of oral contracts, the most significant reasons of 1) why the industry absolutely needs to maintain its use oral contracts and of 2) what the courts most cite as its reason for contract non-enforcement seem to contradict each other. While the ease of access of oral contracts and trying to transfer that ease of access into a new solution requires the potential solution to be just as flexible and easily changed and updated as oral contracts, that conflicts with another framework requirement, which is to prevent unclear contract terms. The reason that contracts are vague and sometimes unenforceable is because of its fluid and flexible nature: fluidity in contract terms usually leads to miscommunication between parties, as one party will interpret certain verbal comments or lines in deal memos to mean one thing where the speaker or another party will interpret it another way. Solving this paradox then becomes the difficulty in trying to satisfy my framework. I expect however, that with contracts done in a different medium – one that is written and cites all changes and updates to their respective authors yet still affords the flexibility of an oral contract will satisfy the basic needs and expectations of a normative contract. Although not perfect, at the very least it will satisfy it enough to appease the courts and alleviate some of the industry problems noted by individual parties. The difficulty then, is finding a medium that, at the same time satisfies the written and signed component of a contract that will uphold the Statute of Frauds and appease the courts, will also solve the paradox of having a contract that is organized and clear but allows for flexible changes and updates and an open forum of negotiation space.
V. Framework Evaluation: E-Contracts

Now that we have a framework for building and testing viable alternatives that can prevent many of the problems oral contracts bring to both courts and the industry, I would like to test it by evaluating digital contracts, or E-contracts, with the elements of my framework. The goal of this evaluation is two-pronged. On the one hand, I would like to see the practical limitations of using my framework to find viable alternatives (the theoretical parts have been fleshed out already in creating the framework). On the other, I hypothesize that digital contracts have the capabilities of becoming a viable alternative and I would like to see if the internet, an increasingly popular medium for drawing up contracts in many industries (including entertainment), can be the solution for oral contracts in the Hollywood film industry.

With the rise of technological advances in online communication and conference meeting capabilities, E-contracts have become quite popular in corporate business transactions. E-contracts function quite similarly to written contracts, with the exception of their being written and signed online. Although there are specific software programs that draw these contracts up, one may also use generic file-sharing programs such as Google Docs to negotiate contracts between parties or even combine generic file-sharing programs with specific software dedicated to digital contracting. Applying our proposed contracts framework to an evaluation of E-contracts then, we can seek to analyze their viability as an alternative to oral contracts by evaluating exactly what an E-contract software platform needs to provide in order to work for both the industry and for the courts – and if it can provide them. We will proceed with this analysis first with E-contracts in general and discuss what new capabilities they bring that will benefit the industry and satisfy the needs of judicial courts. Afterwards, we will progress into a juxtaposition of an idealized E-contract program that satisfies the framework with an existing E-contract software program and see if our proposed theoretical ideal can be materialized into reality.

According to our framework, one of the main problems regarding oral contracts is that its issues arise mainly during the interim between initially agreeing and starting a project and getting the finalized contracts signed. While in most cases, there are no problems with this business system, unanticipated obstacles sometimes come into play – by the very nature of the
creative processes that develop these movie productions, creative vision disagreements and artistic differences are quite abundant. E-contracts seem to alleviate these issues in their capacity to be very flexible in terms of group access and realtime updates while still retaining a written format. For example, online file storage/sharing systems allow for instantaneous sending of document files from one person to another and allows multiple users to view, edit, and otherwise contribute to the same files simultaneously. For example, Google Docs allows for file sharing with capabilities that work very well with the requirements of the framework. Not only can creators of the document grant or limit access to the document, everyone that is signed into an account has an electronic signature when they are actively viewing or editing the document. Edits show up in realtime and can be simultaneously done by multiple users, so contracts can be formulated at the same time that parties are talking to each other over a video conference (or in person). The video conferences themselves can be recorded and transcripted, allowing for even more possibilities of keeping an verbal deal-making tradition yet still conferring everything onto ‘paper’. The flexibility of the digital platform and accessibility (one can access these documents on any device that connects to the internet) lends itself very well to satisfying the first requirement of the framework on the industry side. Digital platforms allow for recorded video and audio messages to be placed in one digital space as a collection of written agreements and negotiation developments, allowing for a consolidated file or package of evidence that can be used in court should the need arise.

Given the increasing numbers of people switching to using digital means of communication and business transactions, digital contracts may very well be the solution that the industry and courts need to solve the problem of oral contracts. One can write the contract components online and have a database of preset contracts for various jobs already inputted into the system, so that there are no outstanding misunderstandings or misconceptions at the outset of negotiations. For example, if everyone were to create an account for a digital contracting system in the Hollywood film industry and input their basic contract terms and preset provisions into their profile, then anyone interested in hiring a party can request to view the contract as a starting point of their negotiations. The template, so to speak, could then be turned into a working document in which video/audio files could be attached, edits and contributions from both sides could be inserted, and so on. New edits can be highlighted for emphasis and consolidated into the completed document as they are agreed to by the other parties.
This also contributes to ease of access, as anyone involved in the contract can be integrally involved in not only the negotiations process, but the actual drafting of the contract with their lawyers. Because the documents can be viewed and edited from any internet device, players can sign contracts electronically without waiting for their lawyer to present them with a paper copy of all the terms for revision: the entire back-and-forth process is downsized to electronic edits and acceptances on the part of both parties. The lawyers would have access to the document to make sure that everything is written in an acceptable manner, and players themselves can view and sign the online documents with just the touch of a button on their mobile devices. Any communication needed between them can go through video conferences within the same software, eliminating the need to set up appointments in law offices so players can stay on set and focus on film production. For the producer then, he can have an active list of all contracts for each movie set in its own large folder and sign them as they are finalized. The timing question in regards to having a written, signed contract before production begins or very soon afterwards and the issue of violating the Statute of Frauds on the legal side can also be thus solved. Because signing a written contract is as easy as checking one's email or phone and clicking a button or typing one’s name as a signature in the shared document, it can be more easily fit into industry players’ schedules. While players (especially producers) may not have time to sit at a desk and look through a paper copy of a contract and make sure all the revisions are what they want the terms to be, they certainly do have a few minutes in between sets or during breaks to scan over a digital document that allows them to easily search for keywords and look over highlighted edits, a history of revisions and changes, and click or type a signature into their phone or internet device.

Lastly, because all the parts of the contracting process (the conversations and memos and other forms of negotiations) are consolidated into one platform system with date and time markers, the probability of ending with a dispute over unclear contract terms will also diminish. For example, in Windows OneNote, all entries have a date-time stamp and all insertions, pasted, or attached documents have a footnoted link to the original source, as well as its own date-time stamp) and can show revision histories, newly edited or updated terms, accepted terms and rejected terms on the part of both parties, etc.. With everything ordered into one file and organized according to a few specific categories (edited, pending acceptance, rejected, outdated, etc), finding a thread of clear terms, not only in the final product, but also in the development of
the final contract, should be a lot more straight-forward. One consideration for this is that, with
not only lawyers being able to view and edit the files but all the involved parties as well, keeping
track of who said what and what should be included and what should not be included becomes a
problem. In the interests of maintaining an open forum in which things can be accepted or
rejected as easily as in verbal agreements, the organization and maintaining the clarity of the
document (the danger of it becoming so chaotic and muddled that no one knows what is
happening) becomes a very difficult task. In developing a software for this then, the algorithms
must walk a fine line in keeping this balance and making sure not to oversimplify or
overcomplicate matters.

While all the merits of using E-contracts on a digital platform software sound very ideal,
we do not yet know how they will all pan out when put in tandem with each other. Notice that, in
my discussion above, while everything stated is technically possible, they are not all put in the
same software platforms together and when they do, a few technological problems may arise.
Furthermore, none of the ones I listed is actually an exclusive software platform that is geared
towards dealing with contracts, which is why I would like to analyze an actual software program
that is focused on producing digital contracts and analyze its functionality (and its potential for
the film industry). Although not specifically geared towards large business transactions (on the
scale of entertainment contracts), I would like to explore the possibilities and limitations afforded
by a real software program that does digital contracts whose “design and execution of contracts
integrates patterns from the CORBA Join Business Object Facility” (Griffel 46). CORBA,
Common Object Request Broker Architecture, is a computer infrastructure application that
allows various parties using different computers and using software written in different
languages to work together in a single application/program or set of services (CORBA: Basic).
The application allows parties to integrate services and programs coming in from desktops,
laptops, mobiles, embedded systems, and other electronic devices into one application. For
example, one party could be typing on a laptop and sending information written in a certain
software language to an online platform and CORBA would allow another party texting on a
mobile device to view and contribute information written in another software language to that
same platform so that both parties could view and interact with each other.
One such program that uses CORBA that I would like to discuss is COSMOS, as detailed and analyzed in an article written by F. Griffel, M. Boger, H. Weinreich, and W. Lamersdorf of the University of Hamburg and M. Merz of Ponton Hamburg. COSMOS “is an internet-based electronic contracting service that facilitates commercial partners with… contract negotiation and signing” (Griffel 46), among other services. By using and adapting the CORBA model, it allows multiple parties using different internet-accessible devices to work on one contract document simultaneously. The article argues that, because “a contract represents gathered information, agreed terms and conditions, and steps to fulfill mutual commitments in a formal way, combined into one structured document” (46), the digital platform is ideal for realizing these points. Because of the logical algorithms and flexibility in software data collection, storing, and recollection, software programs can do a lot of what both the industry and courts want. What COSMOS brings to commercial contracting is a “high degree of consistency and ease of use” (46). While a high degree of consistency is not one of our framework points, ease of use, which ties into ease of access, does factor in significantly for our purposes.

The main difference between a simple sharing site like Google Docs, for example, and using an actual software program for developing contracts, is that a sharing site is “mainly a data exchange technology for simple ‘forms’” (47), while software programs like COSMOS “establishes a technology to create quite complex ‘forms’ [contracts] in an easy way, supports their semi-automated filling and even the execution of the resulting or implicit business processes for negotiation” (47). Software programs also allow for a multitude of parties to be included within any contract, and also creates defining roles to various parties. For example, COSMOS can define roles within the contract program for ‘buyer’ and ‘seller’ – translated to entertainment law terms, it could very well also differentiate roles for ‘talent’, ‘lawyers’, and ‘agents’, allowing for clearer duties on the part of each party. COSMOS also supports tying related contracts together and noting inter-contract dependencies, which all benefit various parts of the industry’s side of our framework (for example, the inter-contract dependencies can account for the Shell Game that creative talents like to play during the negotiations process). In terms of ease of access and sending documents back and forth, COSMOS has an “object migration… feature [which allows for] electronic contracts [to] be shippable to the site where they are needed or administered as appropriate in a changing and developing infrastructure” (50).
To do this effectively, COSMOS employs CORBA in tandem with Voyager, a Java-based ORB and legacy systems (50).

**Figure 8: COSMOS Model (Griffel)**

Courtesy of the Griffel and co. article, I have appropriated their Figure 4 chart outlining the COSMOS Contract Model above. As one can see, the model is quite sophisticated and allows for multiple parties to contribute to the contract model by filling in the boxes where needed. The system keeps all the input data organized and the final version is the complete, signed contract. One of the limitations of using a software system however, is the complexity that the set of algorithms need to be in order to build what Griffel and co. define as a “contracting expert system”, which accounts for the automated processing of a contract. As contracts are “considered a structured document composed out of text blocks” (50), the editing process of constructing individual contracts is quite straight-forward and simple. What is difficult is the processing of said contracts (making sure that everything is in order, that there are no glitches or inconsistencies between the various versions of the contract document that the respective parties see and sign, that all signatures are verified for officially producing the signed contract at the end,
etc.), as it requires many variables and must be able to “cover the full semantics of a contract” (51). The other limitation that unfortunately renders it problematic for using it as an alternative to oral contracts is the lack of an open negotiations space. Because the system is built on a platform in which contract formation is done through editing texts in preset boxes, the industry tradition of intense and freeform negotiations, deal memos, phone conversations, and conference meetings have no place to go in this model: much of the evidence that accumulates in the oral contract process, even if it is transcribed into digital format, would have no space in this contract model.

On the other hand, these limitations can be remedied (some more easily than others) by changing the software program algorithms or adding new features. While technically possible, it would just need a significant amount of financial investment in producing such a program; as we can see from the above discussion, even with these limitations a software program focused on creating digital contracts works much better than a generic file sharing platform. While the act of changing contract mediums from traditional paper/written contracts into a digital medium relieves many of the concerns related to oral contracts, it raises new questions about enforcement and interpretation that remain vital concerns for both the industry and for courts. Unfortunately then, an evaluation of E-contracts is not as simple as just applying my proposed framework and evaluating how E-contract characteristics measure up against it.

According to Donnie Kidd, Jr. and William Daughtrey, Jr., the problem is that people expect parties of a contract “to conduct themselves in the same manner as they have under traditional rules. The fatal error, however, is that electronic contracts do not always fit the traditional framework that structures general contract law” (Kidd 240). In order to evaluate E-contracts adequately then, we must first look at how E-contracts differ from traditional paper contracts. At first look, E-contracts afford many more possibilities of access and sharing contracts: for example, E-contracts can be viewed and edited on multiple computers simultaneously, allowing for increased ease of access for both lawyers and creative industry players throughout the entire production process. Electronic contracts can also track edits with authorial identity markers and automatically notify all involved parties through texting or email of any updates that may happen. With technological capabilities in electronic signatures, industry players can write, negotiate, edit, and sign (with e-signatures) without the hassle of organizing conference meetings and sending paper stacks of contract terms back and forth between players.
On the other hand, E-contracts also open up an entirely new issues in regards to interpretation and enforcement that need to be resolved if E-contracts hope to be adopted for regular use in the Hollywood Film industry. Thus, while the possibilities afforded by E-contracts seem to work very well against our proposed framework, we must ascertain that these new components also comply with and satisfy the conditions set forth by contract law for digital mediums for them to be upheld in court. For example, contrary to traditional contracts, “electronic contracts may never appear on a piece of paper, may involve instantaneous transactions,… and may involve no human interaction at all” (240). This can be quite problematic in adapting it to traditional contract law, as much of contract law for written and signed contracts revolves around a physical document and mutual agreement on the part of both parties (usually covered in meeting in person or having some human interaction to discuss and agree on terms). Although laws and courts have adapted contract laws to accommodate for the necessities of digital contracts, without a distinct system in place that can account for a myriad of variables, it will be difficult for courts to decide on the enforceability of E-contracts. While E-contracts are not purely oral, they are also no tangible in a permanent, fixed sense either: contracts written over the internet or on a computer have terms that “are not ‘etched’ onto a permanent medium. Rather, the terms exist only as a continuous stream of electrons,… an intangible composite of electricity, computer code, and algorithms that lacks any ‘fixed’ status” (249). The concept of a digital contract, one in which everything is transient and immaterial, able to be deleted at a moment’s notice (whether according to one’s will or against it), brings about quite a few complications for how they can be constructed legally.

For example, Kidd and Daughtrey raise the concern of discerning ‘mutual assent’ in particular types of E-contracts (243). Because viable E-contracts for the Hollywood film industry must be ones in which the software system allows editing and active negotiation participation from all parties, after a few rounds of negotiations it would become a muddled mess in terms of who said what, changed what, and agreed to what. Mutual assent would be difficult to prove, since party A could say that it signed a different agreement than Party B’s version because another party added something later on that got mixed into the contract terms. In this sense, the digital medium itself would contribute to a lack of productive negotiations, because it would be impossible to keep track of every change and addition/deletion, which can happen without prior notice or consultation with any of the other parties. Not only would a court find it difficult to
decide positively for mutual assent, such a contract severely restrict production progress since a freely-editable document platform, unless closely moderated, will have no organization and could raise more problems than solve them in court in contract enforcement. Therefore, viable E-contracts for the Hollywood film industry must be one that has some sort of built-in organizational system that will aid lawyers in keeping separate and clear all the involved deal memos, agreements terms, and addendums. At the same time, they must also preserve copies of each edited version at regular time intervals so that nothing is lost (to counter-act the intangibility of digital contracts).

On the other hand, the accountability and enforceability of contracts produced in a medium with unlimited and un-moderated editing capabilities is quite problematic, since allowing every player to edit the contract makes it impossible to really prove who agreed to which terms. With promissory estoppel still in effect for digital contracts, this problem has the potential to result in costly consequences. If edits to a contract can be freely made by all parties, just keeping track of each edited version and organizing all the different contract terms and agreements might not be enough: without adequate identification of who edited which part of each contract section, deal-making responsibility and liability become major problems. Without knowing who wrote/wanted which terms (remember that E-signatures only work at the moment if one is logged into an account; otherwise it can only be an IP signature, which can only be traced back to the device and not the person), it becomes difficult to negotiate a deal that will please all the players, something that is crucial to getting actual production rolling. One means of alleviating this issue is to enforce mandatory identity-tracked changes: each party that edits the contract document(s) must also have their signature present identifying him/her as the author.

In relation to these signatures, the UCITA now only uses the concept of ‘authentication’ instead of ‘signature’ to help E-contracts adapt to contract laws. Authentication can be in the form of typing one’s name or initials, recording sounds, clicking “I agree” buttons – anything that satisfactorily “identifies the party and the party’s intent to enter the agreement that the writing purports to establish”(251-252), as long as there is evidence of such intent and proof that the party identified used the method to authenticate. Therefore, a viable contracts software

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9 Due to the limitations of my research, I do not propose either way if this is actually feasible or not with our current technological systems. It is merely an assertion of what would need to be feasible for E-contracts to work as a viable alternative.
platform could mandate that all changes made to the document tracked with a name/time/date stamp. Approved changes can be checked by other parties leaving their own stamp on the changes – once everyone involved has checked their approval, it becomes a set part of the contract and all stamps may disappear (they would, of course, as a preventative feature, be able to be pulled up again as a ‘history of edits’ if the need arises). While the UCITA may grant this type of stamping as a signature and while general practice of online contracts generally allow legally binding agreements to be signed this way, the fact is that only two states thus far have passed UCITA; California is not one of them. In Hollywood then, while courts may still rule in accordance to UCITA guidelines and provide numerous accommodations for their enforcement in cases, they are not bound to do so. Normally, online seller/vendors can choose the two states (Virginia and Maryland) as the governing law of a software contract. But, these situations are usually limited to when the entire transaction is online (for example, if person X were to sell software coding to person Y), so this wouldn’t work for Hollywood film industry contracts: while the contract itself is digital, the services and products involved are very much in the material world.

On the other hand, the Governor of California passed the Uniform Electronic Transactions Act (UETA) on September 16, 1999, which states that “an electronic record or signature may not be denied legal effect or enforceability solely because it is in electronic form” (Hassett). In this sense, a digital signature would not hinder the enforcement of a signed contract, provided that it is the only factor in question. Nevertheless, although authentication may work very well in theory, in order to guarantee the authenticity of such authentication, especially in a manner that adequately prevents fraud, can be quite difficult. Professor Michael Froomkin at University of Miami Law School argues that, “since digital signatures often have little “means of confirming [a party’s] identity and the security of their signatures, [they often] require a certificate issued by someone other than the parties to back it up” (Froomkin 6). This requirement can pose quite a significant problem for the Hollywood industry, since applying for and being issued a certificate takes time, which is something that industry players don’t have in abundance when trying to close movie deals. For example, how could one ensure that the name/time/date stamp is accurate and not a forgery? The system could force every party sign into the system with his/her unique name and passcode and have an account that organizes and outlines each of the contracts in which they’re involved (active and completed), so that the stamp
is automatically attached as a separate comment bubble or hover-text when a party changes or
adds something in the document. Companies such as Verisign can ensure that these accounts are
real and registered with the person for whom they represent, although how effective this method
truly may be in terms of whether it will become a too complicated a burden on the industry
remains to be seen.

Now that we have worked through many of the content-driven issues regarding E-
contracts, we can turn to the formatting issues. One main issue at hand is the reliability of digital
contracts, as it can prove very difficult to discern “whether a string of electronic bits stored in the
memory cache of a laptop satisfies the writing requirement of the Statute of Frauds, or whether
instantaneous messaging obviates the mailbox rule for delivery of acceptance” (Kidd 245). The
Statute of Frauds states that “certain types of agreements must be in writing before they may be
enforced, [meaning that], absenting a writing and the signature of the party charged, a court will
refuse to enforce what may be an otherwise valid agreement” (246). The Statute of Frauds
however, does not specify the definitions of ‘writing’ within the scope of digital contracts. To
help remedy this, UCITA, the Uniform Computer Information Transactions Act, accommodates
for E-contracts by revising the Statute of Frauds to requiring contracts merely to be ‘recorded’
rather than explicitly ‘written’. The revision states that any “information that is stored in an
electronic or other medium and is retrievable in perceivable form, even if the recordation is only
temporary” (249) will satisfy this enforceability requirement for courts. In addition, the UETA
states that, “if a law requires a record to be in writing, an electronic record satisfies the law”
(Hassett), which seems to address the Statute of Frauds requirement that all contracts must be in
writing if the performance of the contract lasts more than one year. Thus, digital copies of
contracts, whether saved in email drafts or on the internet (Google Drive, for example), can
satisfy this requirement.

As for the mailbox rule of delivery of acceptance, a contract becomes legally binding as
soon as all parties express their explicit agreement (and not when the other parties receive notice
of such acceptance), while reneging on a contract does not come into effect until receipt of the
rejection statement. Because digital contracts are instantaneously delivered and can be
transmitted back and forth in real time between parties, the “Restatement (Second) of Contracts
requires application of the delivery rules used when the parties are negotiating face-to-face”
(Kidd 262). The problem with this however, is that unless the parties are chatting through video with each other and are actually negotiating face-to-face (and using digital technology merely as a tool for doing so), the information transmitted between the parties is still closer to mailbox style format even though the delivery time is instantaneous like face-to-face negotiations. The consequence of this is that information stored on documents, emails, and other file types can be distorted, corrupted, changed, lost, deleted, or otherwise somehow compromised during or after delivery, whereas in actually negotiating face-to-face one does not come across a delivery failure problem.

In this sense, precautions must be made in an effort to minimize the occurrence of files being compromised during or after delivery: the software platform would need to ensure extra protection of files so that they are saved and sent successfully without complicating it to the point where it would no longer be an efficient and instantaneous process. One way to remedy this could be to coordinate a shared document: instead of sending it to one another, it could be a document accessible and editable simultaneously by numerous parties on different machines so that no delivery is required. The only thing that would need to be perfectly coded would be that all changes, without fail, must show up on each copy viewed by each party as soon as the change is made so that simultaneous edits over one another do not occur. Google Documents has such a program, but its editing process still lags if more than a handful of people edit one document at once, causing unanticipated edits and deletions through one party overwriting an existing section because the section had not yet updated on his/her copy of the document.

Bottom line however, is that while we can postulate all the different ways in which E-contracts can be tailored to fit into pre-existing legal boundaries while still catering to the needs of the industry, there are no real US codifications on governing digital contracts. The UETA may provide many remedies to this in terms of accommodating for digital contracts satisfying the ‘writing’ requirement for the Statute of Frauds and the ‘signature’ requirement for signed contracts, it does not provide for a holistic protection of digital contracts. For example, are certain types of digital contracts considered ‘in writing’, or all digital forms (email, sound bites, word documents, etc.) considered equivalent? In addition, while a digital ‘signature’ is legally permissible as an enforceable signed contract, how does one define a ‘digital signature’? In other words, there is no uniform rule for how courts should deal with E-contracts and how judges
should decide on the E-contract enforceability and the potential for how E-contracts can be legally binding. Any attempt at doing so that also provides definitions of permissible digital ‘writing’ and what would satisfy a digital ‘signature’ is met with heavy skepticism and opposition.

For example, before trying to pass UCITA as a uniform state law, the parties leading the project tried to draft Article 2B into the UCC (Uniform Commercial Code). Although Article 2B “can be thought of as akin to a complex computer software suite [for E-contracting],… its rules interoperate poorly with existing digital signature laws, and with some forms of electronic commerce… and is therefore still not ready for adoption” (Froomkin 1). After Article 2B failed to be adopted by the UCC, the parties involved began the UCITA project. The UCITA however, as previously mentioned, has only been passed in two states: Maryland and Virginia. According to Jane Winn and Jens Haubold, the UCITA “has been hugely controversial and seems unlikely to achieve widespread acceptance” (Winn 4). The UCITA has also been withdrawn from trying to be passed by the ABA in an effort to standardize E-contract law, after it “failed to garner support from six ABA sections, including the Business Law, Intellectual Property, Litigation, Torts and Insurance Practice and Science and Technology sections” (Ashworth). Such lack of support and subsequent withdrawal highlights the difficulty in codifying laws to govern E-contracts, as well as the reluctance on the part of legal organizations to accept any attempts.

On the other hand, while Article 2B and the UCITA both seem to “lack the consensus and support needed for successful passage of a uniform state law” (Ashworth), critics still argue that they nevertheless are still relevant legal guidelines that will still affect court decisions. Supporters of the UCITA cite that UCITA still will hold as a general standard of law (as persuasive authority in providing usable guidelines) because “it will be up to the courts to sort out [any] issues. And the courts can use UCITA as a blueprint to craft decisions” (Thibodeau). Since we established earlier that there currently does not exist a uniform codification of statutes governing E-contracts, many of these laws will have to come from case precedent; courts themselves will have to decide on a case-by-case basis to build a system of digital contract regulation, which will take some time. In this sense, projects such as the UCITA and Article 2B come in handy, because they provide preset guidelines that judges can use as an outline for how
they can decide the cases they oversee, but at the same time cannot dictate how judges will actually decide on particular cases open, as they are not accepted statutes.

In conclusion, digital contracts, although not perfect in that it poses some problems of its own, will satisfy most of the requirements in the framework I develop and at least have the potential to sustain itself as a viable solution. Even though I do not expect that the current means of producing digital contracts is enough to solve or avoid all the problems that oral contracts face, the software and development needed to improve how digital contracts are created and used should be quite easy to write. The different forms all already exist – writing the software just becomes a matter of incorporating different types of software together in such a way that is still easy to use and accessible to multiple parties across a variety of media. On the other hand, one of the main complications that I anticipate with digital contracts is the technology laws that must also come into play when evaluating its use (as I have already demonstrated in my brief discussion on technology law limitations and accommodation initiatives), as well as how contract doctrines and policies change when terms are in digital format and sent over the internet. Although this problem may be something to explore in a subsequent project, I would like at least to introduce the notion of it in my project to make way for future papers.

VI. Framework Limitations and End Discussion

Thus, in analyzing my framework in a practical setting, we see that, while theoretically sound (as it is derived from an intensive analysis of both the industry and the courts), it does have practical limitations. The framework allows for the production of solutions – using the guidelines set in the framework, one can brainstorm possible means of solving each main part and work with the other factors to create something that could satisfy each segment. On the other hand, all of these solutions are merely theoretical: as we have seen in our evaluation of E-contracts, whatever solution we produce or try to evaluate also brings with it many laws and limitations regarding the medium, format, or style of the proposed solution that also need to be factored into the evaluation – something that the framework does not provide. Only by using the framework in tandem with an extensive discussion about all of the other legal ramifications of using the proposed solution in a practical setting can we really get a sense of how viable any alternative or solution is.
In light of these findings however, we must also consider the (very real) potential that the industry will be unwilling to let go of its oral contract tradition. Even if we can find a solution that improves upon the problems found in the oral contract system while providing much the same benefits that oral contracts do, the industry may be hesitant to switch over to any new alternative. Not only is the Hollywood film industry steeped in traditions (and oral contracts is one of the oldest trademark traditions of the industry), the very fact that they have worked tirelessly to accommodate for oral contracts in regards to business and legal issues is a testament to their unwillingness to change. The industry has adapted oral contracts to abide by industry rules that standardize contract terms for any feature-film production, which means that even without clear-cut contract terms and conditions, each player usually knows what to expect from the other players in any given job and will therefore not face any unpleasant surprises.

The problem with this however, is that even though the industry players know what the standard preset contracts are, it would not hold in court because preset contract standards in the industry does not satisfy or substitute for express agreement to the preset contract on the part of both parties. One possible solution would be to store all of these preset contracts into a written database from which players can draw and use – that way, it becomes part of their negotiations in a concrete manner rather than just (potentially varying) ideas in their minds about the industry standards. Regardless, we still come back to the problem of whether the industry would be willing to move its business transactions away from using oral contracts (or now, their two-step process of oral contracts and then transferring it to a written/signed contract later on) and towards a new alternative, even if that alternative will relieve both the industry and the courts of many of the problems and disputes that rise up from using oral contracts. Although not a definite part of my framework, for practicality’s sake, this should be a qualifying consideration for any alternative or solution one creates or evaluates in the face of my framework.

CONCLUSION

Oral contracts in the Hollywood film industry has been an integral part of the industry’s tradition, despite its incongruency with most other contracting transactions in business industries. While the benefits afforded by oral contracts are quite necessary for the industry’s projects and business to function, oral contracts also contribute to a significant number of disputes and lawsuits within the industry, often costing involved parties many millions of dollars in damages.
Although oral contracts according to California Civil Code are legally binding, the sheer amount of negotiations and evolving contract terms involved in making business transactions around huge, multi-million dollar film productions is often too complex to do and enforce adequately with mere oral agreements and deal memos – as evidenced by the increasing number of cases in which courts have decided against enforcing oral contracts for the industry. Through exploring both the industry’s main arguments for maintaining the use of oral contracts and analyzing the court’s reasonings on not enforcing these oral contracts, I have created a framework that outlines what any viable alternative needs to create a solution that will satisfy both the industry and the courts.

On the other hand, while my proposed framework is theoretically sound for identifying and evaluating possible alternatives to oral contracts that will both satisfy courts and industry players, its practicality is still limited. While the framework tells us what is necessary for any alternative to be a viable solution, it does not give an idea of what would be sufficient for an alternative to actually work in practice. To gain this comprehensive view, we still need to conduct a careful analysis of the laws governing the type of alternative proposed, such as the medium (for example, my evaluation of digital contracts). Nevertheless, even though the work in this paper does not allow for a simple solution to the problem, the framework built in this paper is still instrumental in facilitating the finding an improved contract form for the Hollywood film industry that will both maintain the industry’s need for flexible negotiations and be legally enforceable.

WORKS CITED

17A Am Jur 2d Contracts § 34


WORKS REFERENCED


