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Lessons from the Dramatists Guild for the Platform Economy

Matthew T. Bodie[†]

Even if we are a “nation of employees,”¹ we have never labored solely through employment. Independent contractors provide contractually-based labor but without the employment connection. Along with providing capital, owners often work for their businesses, especially when they are sole proprietors or partners. Volunteers and students labor without pay. The employment relationship is a legal construct that designates the rights and responsibilities of a particular kind of labor relationship, and, as with most legal categories, its boundaries can be fuzzy in places. But this fuzziness heightens the stakes when workers fall somewhere along the spectrum between employment and another category. Over the years, we have layered an ever-growing host of legal obligations on employment—from minimum wages and healthcare obligations, to collective bargaining, FICA taxes, and the work-for-hire doctrine.² The question of employment status has tremendous legal ramifications.

Because of the legal importance of the employment category, there is significant pressure on businesses to push their workers out of the category and escape its attendant costs. Such pressures have existed since the New Deal, and the definition of “employee” has changed over time in response to shifting political and economic winds.³ There have

[†] Callis Family Professor, Saint Louis University School of Law; Visiting Professor, Harvard Law School (Fall 2016). My thanks to participants at the 2016 Legal Forum Symposium on “Law and the Disruptive Workplace,” particularly Catherine Fisk, for their thoughtful comments. I also am obliged for questions and comments from participants at the NYU School of Law’s 68th Annual Conference on Labor on “Who Is an Employee, and Who Is the Employer?” Thanks to Jon Jones for research assistance, and to the *University of Chicago Legal Forum* editors for a terrific conference and editorial process.

¹ FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (“We have become a nation of employees.”).

² See Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666–74 (2013).

³ See *id.* at 674–94 (discussing changes in legal definition); see also Thomas J. Power, *Fast Food Sweatshops: Franchisors as Employers Under the Fair Labor Standards Act*, 19 CUNY L. REV. 337, 340 (2016) (“The FLSA was passed at the height of the New Deal, and in addition to articulating a federal minimum wage and overtime protections, the FLSA defined ‘employ’ in a

always been industries and employers that label their workers as independent contractors despite legal uncertainty over the label, and courts have long parsed the definition to determine who is in and who is out.⁴ However, the arrival of the platform economy⁵ has brought with it a new approach to the working relationship—one for which there is no firm consensus as to its legal categorization. Lawsuits involving Uber and other platform companies continue to proliferate, and few suits (if any) have reached resolution.⁶ The legal category of employment is deeply unsettled, and a new approach to the law of individual labor may be in the offing. Indeed, we may be heading into a “post-employment” economy—a world in which employment is no longer a meaningful legal or economic category.⁷

Dramatists—those authors who write plays, musicals, or operas for performance⁸—have long existed in the legal and economic nether region between the categories of employee and independent contractor. Since the 1940s, dramatists have been considered independent contractors and have generally owned the copyright to their work.⁹ However, dramatists have struggled with the independent contractor distinction and have often sought to act collectively in setting the terms and conditions for their work. Indeed, officials with the Dramatists’ Guild of America (Guild) have bemoaned the inability of dramatists to

supremely expansive way.”).

⁴ Jean Tom, *Is a Newscarrrier an Employee or an Independent Contractor? Detering Abuse of the “Independent Contractor” Label via State Tort Claims*, 19 YALE L. & POL’Y REV. 489, 493 (2001) (contending that the newspaper industry “actively promotes the idea that its delivery workers are independent contractors, even as workers, courts, and the IRS have challenged this practice”).

⁵ See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 89 (2016) (using the term “platform economy” while also acknowledging alternative terms such as “the sharing economy,” “the peer-to-peer economy,” “the human-to-human economy,” “the on-demand economy,” “the gig economy,” and “the Uberization of everything”). *But see* Steven Greenhouse, *The Whatchamacallit Economy*, N.Y. TIMES, Dec. 16, 2016, <https://www.nytimes.com/2016/12/16/opinion/the-whatchamacallit-economy.html> [<https://perma.cc/4KPF-XMBP>] (“It’s a hip, fast-growing sector of the economy, filled with headline-grabbing companies: Uber, Lyft, Airbnb, Task Rabbit. But there’s a gnawing problem: People aren’t sure what to call it.”).

⁶ Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 578 (2016) (“While many lawsuits have been filed, there have been no definitive resolutions . . .”).

⁷ Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) (proposing in 1998 that “there is little reason to anticipate either a renaissance of collective bargaining or much growth for implicit contracts for career employment”).

⁸ See David Leichtman, *Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions*, 20 COLUM.-VLA J.L. & ARTS 683, 684 (1996) (defining dramatist or dramatic author as “a playwright, or in the context of a musical or opera, the combination of composer, lyricist and bookwriter”).

⁹ *Ring v. Spina*, 148 F.2d 647, 652 (2d Cir. 1945) (finding that the labor exception to antitrust does not apply because dramatists were independent contractors); Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1419–20 (2010) (discussing the genesis of the industry consensus surrounding dramatists’ ownership of the copyright).

set minimum terms as a group,¹⁰ and Congress has considered legislation to allow them to pursue collective representation, bargaining, and minimum terms agreements.¹¹ Dramatists are pulled by competing desires: they want the power of collective action when negotiating with others, but they want to retain their independence as artists within a larger process.

The dramatists' dilemma—independence and control versus solidarity and submersion—reflects the dilemmas posed to workers in the new platform economy. Do they revel in the freedom and the flexibility that the platform offers? Or do they seek to join together with other platform laborers in getting a better deal? The categories of independent contractor and employee are thus neither legally irrelevant nor archaic; they are instead a useful proxy for determining which way platform employees can and should structure their labor relationships. If platform workers want to prioritize their independence, their control over the work, and their intellectual and/or reputational property in their labor, they should choose the independent contractor route. But if they are working together for a company that exercises control over their jobs and their brand, in ways that elevate their collective efforts as a whole, they are working as employees.

This essay explores the dramatists' employment dilemma and explains why this dilemma helps illuminate our thinking about the future of employment. Part I discusses the structuring of dramatists' work and compares that structure to those of screenwriters and literary authors. Part II discusses the platform economy and the reasons why platform workers are causing such categorization issues. Finally, Part III discusses how issues surrounding platform workers are reflected in the dramatists' dilemma, and how that dilemma should inform the economic structuring and legal categorization of platform jobs.

¹⁰ See John Weidman, *The Seventh Annual Media and Society Lecture: Protecting the American Playwright*, 72 BROOK. L. REV. 639, 640 (2007) (discussing the DGA's role in "the development of a series of standard contracts the terms of which have guaranteed to playwrights the ability to control the content of the plays which they write, to control the disposition of those plays, and to earn a living from those plays if and when they are produced"); see also Ashley Kelly, *Bargaining Power on Broadway: Why Congress Should Pass the Playwrights Licensing Antitrust Initiative Act in the Era of Hollywood on Broadway*, 16 J.L. & POL'Y 877 (2008); Alison Zamora, *The Playwright Licensing Antitrust Initiative Act: Empowering the "Starving Artist" Through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DEPAUL-LCA J. ART & ENT. L. 395 (2006).

¹¹ See Kelly, *supra* note 10, at 905–15 (discussing proposed congressional legislation between 2001 and 2004, such as the Fair Play for Playwrights Act of 2001 and the Playwrights Licensing Antitrust initiative (PLAI) Act of 2004).

I. THE DRAMATISTS' DILEMMA

Dramatists are authors of dramatic works. They include playwrights, composers, lyricists, and bookwriters. Dramatic works can stand on their own as literature; the plays of William Shakespeare and Tennessee Williams still enjoy brisk sales. However, such works are ultimately written to be produced. The dramatic text is meant to be spoken in a live theater; the sheet music is meant to be played by instruments and sung by voices. The dramatist is thus at once an independent artist and a collaborator on a team production.¹²

Although the law is now seemingly settled that dramatists are independent contractors (and not employees), the economic reality has long been somewhat murkier. In fact, dramatists originally organized as employees, with the Dramatists Guild serving as a labor union.¹³ The Guild primarily sought, and has since zealously defended, the dramatists' continuing intellectual property (IP) rights over their work.¹⁴ The means for promoting these rights, along with other contractually-based minimums, had been the Guild's Minimum Basic Agreement. In the early days of Broadway, the Guild negotiated with theater producers to adopt the Agreement for their productions. Like other collective bargaining agreements, the Agreement set forth required terms such as minimum royalties, lengths of terms, and a grievance-arbitration system to cover disputes.¹⁵ In *Ring v. Spina*,¹⁶ however, a producer challenged the Agreement in court on antitrust grounds, and the U.S. Court of Appeals for the Second Circuit upheld a pre-trial injunction against the enforcement of the Agreement.¹⁷ As part of its ruling, the court cast doubt on the idea that dramatists were employees and producers employers:

¹² Shakespeare himself was a founding member of an acting company as well as a shareholder in the Globe Theatre. Diana Price, *Evidence for A Literary Biography*, 72 TENN. L. REV. 111, 133–34 (2004).

¹³ *Ring*, 148 F.2d at 651 (“The Guild contends, however, that it is a labor union . . .”).

¹⁴ Litman, *supra* note 9, at 1386 (“The strong copyright-like rights that playwrights enjoy today are chiefly contractual, secured for them in 1926 by the collective action of members of the Dramatists’ Guild, who claimed to be a labor union and thus entitled to an antitrust exemption.”).

¹⁵ *Ring*, 148 F.2d at 649 (“The Basic Agreement, among other things, fixes the minimum terms under which the Guild permits any of its members to lease or license a play, including the minimum advance payments and the minimum royalties to be paid by a manager. It limits contracts by both managers and authors to those made under its own terms, and between managers and members, both of whom are ‘in good standing’ with the Guild. It also provides that any dispute shall be finally adjudicated by arbitration.”).

¹⁶ 148 F.2d 647 (2d Cir. 1945).

¹⁷ *Id.* at 650.

[N]one of the parties affected are in any true sense employees. An author writing a book or play is usually not then even in any contractual relation with his producer. If and when he does contract, he does not continue in the producer's service to any appreciable or continuous extent thereafter. . . . The minimum price and royalties provided by the Basic Agreement, unlike minimum wages in a collective bargaining agreement, are not remuneration for continued services, but are the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms. We think the [labor] exception [to federal antitrust laws] therefore inapplicable.¹⁸

The *Ring* court's conception of dramatists' employment status has held throughout the years, albeit without direct reaffirmation.¹⁹ When the Guild was sued for antitrust violations in the 1980s, the court ruled against the motion to dismiss,²⁰ and the Guild and the League of New York Theatres and Producers eventually settled the case by promulgating an Approved Production Contract for Plays and Musical Plays (APC).²¹ However, this model agreement is not binding on the parties; it represents only suggested terms.²² Because the Guild could

¹⁸ *Id.* at 652.

¹⁹ Federal courts have relied on the dramatists' precedent to hold that composers are independent contractors. See *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 980 (2d Cir. 1975) ("Indeed, the record suggests that the composers contract for a specific output, work at their own pace at home, and are not subject to day-to-day supervision by the producers. It may be, consequently, that the producer has no right to control the manner in which work is performed, so that . . . the composers are independent contractors."); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 64 (S.D.N.Y. 1978) (same). However, stage directors have been held to be employees. See *Julien v. Soc'y of Stage Directors & Choreographers, Inc.*, No. 68 CIV. 5120, 1975 WL 957, at *3 (S.D.N.Y. Oct. 7, 1975) ("In sharp contrast to the playwrights in the *Ring* case and the lyricists in the *Bernstein* case, we think that defendant here demonstrated at trial that directors are employees of producers. It became clear to us during the course of the trial that the producer has the right to and does exercise control over all facets of a production and of the director's work.").

²⁰ *Barr v. Dramatists Guild, Inc.*, 573 F. Supp. 555, 559 (S.D.N.Y. 1983). ("Whether a particular group of individuals is entitled to claim the labor exemption from the antitrust laws cannot be decided on a motion to dismiss.").

²¹ See Leslie Bennetts, *Writers and Producers Reach Contract Accord*, N.Y. TIMES (Feb. 27, 1985), <http://www.nytimes.com/1985/02/27/arts/writers-and-producers-reach-contract-accord.html> [<https://perma.cc/5262-TTJ6>].

²² *Id.* ("While the new agreement was unanimously approved by the executive committee of the League and the full council of the Guild, like the old contract it carries no force of law. Industry observers expressed uncertainty over the degree to which the new contract would succeed in standardizing agreements in an arena where there have long been wide discrepancies based on the respective strength of negotiating parties."); see also DONALD C. FARBER, PRODUCING THEATRE: A COMPREHENSIVE LEGAL AND BUSINESS GUIDE 39 (3d ed. 2006) ("The net effect has been an erosion of the strict control that the Guild had been able to impose on First-Class Production contract terms in the past.").

still potentially be liable for antitrust violations for subsequent restraints of trade, it cannot advocate for any changes to the APC without the producers' approval. With the producers showing no interest in any changes, the APC has not been modified since its original creation in 1985.²³

The tortured history of the Guild's negotiations and litigation with the consortium of mainline producers, now known as the Broadway League,²⁴ demonstrates the dilemma facing dramatists as they seek to manage their relationships with producers. The Guild was formed as a union, repeatedly asserted that it was a union, and now laments that it cannot serve as a union. Like most unions, the Guild sought to provide a standardized basic agreement that would set minimum terms for the industry, and individual dramatists would then be free to negotiate higher terms based on their individual market power. However, because of the legal determination that dramatists are not employees, the Guild cannot exercise the powers of representation and collective bargaining.²⁵

If the Dramatists Guild did have these powers, however, it might very well use them to reinforce the independence of dramatists. In discussing the terms that dramatists should incorporate into their contracts, the Guild emphasizes above all else the importance of keeping copyright over dramatic works as a way of maintaining artistic integrity. The Guild's "Bill of Rights" states in its preamble: "In order to protect the dramatist's unique vision, which has always been the strength of the theatre, s/he needs to understand this fundamental principle: dramatists own and control their work."²⁶ Former Guild President John Weidman described the principle this way: "The playwright's undisputed ownership of his play, legally and artistically . . . has been the bedrock constant around which all theater-making has been organized."²⁷ Laying out this principle more

²³ See Kelly, *supra* note 10, at 904 ("[T]he Dramatists Guild continues to be prevented from negotiating the APC by collective bargaining.")

²⁴ The League changed its name in 2007. Andrew Gans, *League of American Theatres and Producers Announces Name Change*, PLAYBILL (Dec. 18, 2007), <http://www.playbill.com/article/league-of-american-theatres-and-producers-announces-name-change-com-146262> [https://perma.cc/H9G8-R4JT]. The League represents theatre owners and producers, Broadway presenters, general managers, and other Broadway industry professionals. *Id.* It negotiates with unions representing theater employees such as actors, musicians, choreographers, and stagehands.

²⁵ See ROBERT M. JARVIS ET. AL., *THEATER LAW: CASES AND MATERIALS* 80 (2004) ("Because producers typically have the upper hand in negotiations, the [Dramatists] Guild has wanted to engage in collective bargaining but cannot do so—as a trade association rather than a labor union, its activities are not shielded from the federal anti-trust laws.")

²⁶ Dramatists Guild, *Bill of Rights* (last visited Jan.13, 2017), <http://www.dramatistsguild.com/billofrights/> [https://perma.cc/2HTE-PUUW].

²⁷ Weidman, *supra* note 10, at 641.

specifically, the Guild's Bill of Rights instructs dramatists: "You own the copyright of your dramatic work. Authors in the theatre business do not assign (i.e., give away or sell in entirety) their copyrights, nor do they ever engage in 'work-for-hire.'"²⁸ Public performance rights to one's dramatic property are only to be leased "for a finite period of time."²⁹ The Bill of Rights further states: "You own all approved revisions, suggestions, and contributions to the script made by other collaborators in the production, including actors, directors, and dramaturgs. You do not owe anyone any money for these contributions."³⁰ The playwright, composer, or lyricist stands alone in her control over the dramatic work—at least, in the conception of the Guild.

However, modern theater production has put increasing strains on this ideal of independence. Movie studios such as Disney and DreamWorks have brought successful motion picture franchises, such as *The Lion King* and *Shrek*, to Broadway.³¹ These studios own the intellectual property that forms the foundation for these productions. Moreover, films have long been produced with very different expectations on the allocation of IP rights. In a marked break from the dramatists' approach, screenwriters have long ceded their copyright to the studios and producers that employ them.³² They have been firmly encamped in the "employee" category from the beginning and have bargained with the studios through their union, the Writers Guild of America (WGA).³³ Rather than retaining copyright, screenwriters receive residuals through a complicated formula that is continually renegotiated over time.³⁴ The WGA's Minimum Basic Agreement (MBA) also provides for minimum compensation for screenwriting work such as completed drafts,³⁵ as well as processes for regaining certain IP

²⁸ Dramatists Guild, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.*

³¹ Kate Feldman, 'Shrek,' 'The Lion King' and the Movies that Moved from Animation to Broadway, on the 15th Anniversary of the Big Green Ogre, N.Y. DAILY NEWS (May 18, 2016), <http://www.nydailynews.com/entertainment/movies-moved-animation-broadway-article-1.2639967> [https://perma.cc/AZ8T-BCZN].

³² See Catherine L. Fisk, *Will Work for Screen Credit: Labour and the Law in Hollywood*, in *HOLLYWOOD AND THE LAW* 235, 240 (2015) ("Writers first agreed to give up the copyright in their work in the very early history of film production . . ."). However, as Fisk points out, the work-for-hire bargain "occasionally . . . has been criticized and questioned." *Id.*

³³ *Id.*

³⁴ See *id.* at 244–48 (discussing the origin of residuals and their increasing scope of coverage to include television broadcasts, DVD sales, and the internet).

³⁵ Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 *BERKELEY J. EMP. & LAB. L.* 215, 276 (2011) ("Through control of screen credit and the compensation that turns on it, the Writers Guild has created a system of private intellectual property rights that is as important as

rights over time and determining authorship of jointly written works.³⁶ The WGA's arbitration system for establishing screen credits—and thereby not only residuals but also public recognition—is arguably the union's most important contribution to its members.³⁷

Dramatists have derided the screenwriting system as a devil's bargain in which artistic control is given away for mammon:

As legal author of the film, that studio can change the content of the screenwriter's script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set in Boston during the War of 1812, can be moved to the fifth moon of Jupiter.

Sooner or later, things like this will happen, because things like this always happen, and when they do, the screenwriter will feel talentless, humiliated, and, most importantly, every single author's impulse that made him want to be a writer in the first place will be ground into the dust.

. . . .

So why would anyone choose to write for the movies when they could write for the theater? The answer is—as it so often is—money.³⁸

This clash of cultures can be seen in the movie production of Broadway hit *Into the Woods*. Speaking to an audience of high school drama teachers, composer and lyricist Stephen Sondheim confessed that Disney had pressed for changes for their movie version, including cutting one song and sparing one character from death.³⁹ A furor resulted over this instance of Hollywood messing with the singular work of one of Broadway's most revered talents.⁴⁰ Sondheim was

copyright to the operation of both labor and product markets in Hollywood.”).

³⁶ *Id.* at 262, 266. Fisk provides a comprehensive account of the WGA's approach in her new book. CATHERINE L. FISK, *WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE* 144–168 (2016).

³⁷ *Id.* at 235; see also John August & Craig Mazin, *Scriptnotes Ep. 20: How Credit Arbitration Works*, Transcript for Scriptnotes Podcast, Jan. 18, 2012, <https://johnaugust.com/2012/scriptnotes-ep-20-how-credit-arbitration-works-transcript> [<https://perma.cc/254K-5PC8>] (discussing arbitration system for screenwriting credit).

³⁸ Weidman, *supra* note 10, at 641–42.

³⁹ Larissa MacFarquhar, *Master Class*, *NEW YORKER* (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/master-class-4> [<https://perma.cc/2TNU-4DKY>].

⁴⁰ Margaret Lyons, *Sondheim Corrects Record on Into the Woods Changes*, *VULTURE* (June 23, 2014), <http://www.vulture.com/2014/06/sondheim-corrects-record-on-into-the-woods-edits.html> [<https://perma.cc/FFG3-UBUF>].

eventually moved to say that he and the show's original book author "worked out every change from stage to screen with the producers and . . . the director," and that "the collaboration was genuinely collaborative and always productive."⁴¹ In other words, Disney was not in charge.

With such a strong cultural commitment to individual control, dramatists have often conflicted with other artisans and laborers in the theater industry. Dramaturgs are editors and/or managers who work with the dramatist, generally for a fee, to create the final product, but they have not been afforded any copyright participation.⁴² One dramaturg—a playwriting professor—sued the estate of playwright Jonathan Larson for co-authorship status for the musical *Rent*.⁴³ Even though the professor allegedly participated in a "radical transformation of the show," the Second Circuit held that the pair intended to have a traditional dramatist-dramaturg relationship, not one of co-authorship.⁴⁴ Stage directors and choreographers have mounted a more sustained effort to obtain copyright protections for their stage directions and specific choreography for a particular production.⁴⁵ Although these rights do not infringe upon the dramatist's rights to the play itself, they complicate the dramatist's control over future productions.⁴⁶ As a result, it is in dramatists' interests to concentrate IP rights to the production in their own hands. Although the issue of stage direction copyright is not completely settled, courts have not found in favor of the

⁴¹ *Id.*

⁴² Thomson v. Larson, 147 F.3d 195, 197 n.5 (2d Cir. 1998) (quotations omitted) ("Dramaturgs provide a range of services to playwrights and directors in connection with the production and development of theater pieces. . . . [T]he role of the dramaturg can include any number of the elements that go into the crafting of a play, such as actual plot elements, dramatic structure, character details, themes, and even specific language.").

⁴³ *Id.* at 195.

⁴⁴ *Id.* at 205. See also Recent Case, *Copyright—Joint Authorship—Second Circuit Holds That Dramaturg's Contributions to the Musical Rent Did Not Establish Joint Authorship with Playwright-Composer—Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998)*, 112 HARV. L. REV. 964, 968–69 (1999) (arguing for a clearer rule to address co-authorship issues).

⁴⁵ Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 429 (2009).

⁴⁶ As David Leichtman explained:

[D]irectors have sought further power through the courts by alleging intellectual property rights in their work. This attempt pits stage directors and dramatists, who must work closely together as artists, directly against one another in the legal arena. For one thing, if stage directors are found to have rights which survive the closing of a production, the publication of dramatic works will be radically affected. The printed version of the work, which normally incorporates most aspects of the premiere will cease to be a complete record, as it is meant to be, of the "defining" production in which the dramatist participated and approved of changes in the staging.

Leichtman, *supra* note 8, at 688.

stage directors and choreographers.⁴⁷ Some commentators have even argued that stage directions are not copyrightable.⁴⁸ Thus far, dramatists have remained alone in their control and power over the intellectual property of the stage.

The dramatists' position is enviable and has drawn criticism along the line of the "have your cake and eat it too" variety.⁴⁹ A number of prominent legal academics have, in fact, called for a curtailment of dramatists' IP rights in order to provide greater rights or freedoms to other participants.⁵⁰ Dramatists—not surprisingly—see it differently.⁵¹ The independence of a singular author's vision is still championed.⁵² Despite their strong attachment to the notion of the individual artist, however, dramatists have still pushed for changes in the law to allow greater coordination amongst themselves. One proposed piece of federal legislation, the Playwright Licensing Antitrust Initiative (PLAI) Act, would have allowed dramatists to bargain collectively over a new standard agreement without violating the antitrust laws.⁵³ Even with

⁴⁷ See, e.g., *Mullen v. Soc'y of Stage Dirs. & Choreographers*, No. 06 Civ. 6818, 2007 WL 2892654 (N.D. Ill. Sept. 30, 2007); *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189 (S.D.N.Y. 2006); Deana S. Stein, "Every Move That She Makes": *Copyright Protection for Stage Directions and the Fictional Character Standard*, 34 CARDOZO L. REV. 1571, 1572 (2013) (finding that "no court has upheld a copyright claim in stage directions").

⁴⁸ Leichtman, *supra* note 8, at 696–707. *But see* Livingston, *supra* note 45, at 486 ("Certainly, a straightforward application of traditional copyright law would dictate that stage directions are subject to copyright protection."); Stein, *supra* note 47, at 1574 (arguing that "stage directions can be afforded copyright protection in limited instances").

⁴⁹ See, e.g., Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1382–83 (2010) ("Playwrights, finally, insist that other creators who contribute significant creative expression to licensed productions of their scripts have added no authorship and should receive no copyright protection for their additions.")

⁵⁰ See, e.g., *id.* at 1424–25 (arguing that idea of a common law "play right" has been exaggerated and overstated); Michael W. Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797 (2012) (arguing that a dramatist's "rights of creative control are too strong when applied to the performing arts because they fail to take account of the mutual dependence between writers and performers to fully realize the work in performance"); Catherine Fisk & Alisa Hartz, *Fair Treatment of Theatre Labor: A Right to Perform Plays*, ONLABOR, (June 27, 2016), <https://onlabor.org/2016/06/27/fair-treatment-for-theatre-labor-a-right-to-perform-plays/> [<https://perma.cc/285H-BQJ2>] (making the case for a statutory license to perform plays as a way of limiting dramatists' power over performances).

⁵¹ Leichtman, *supra* note 8, at 726 ("To reinvest them with the strong grant originally intended by the copyright law, dramatists should be relieved of the fear that their collaborators are lurking in the shadows with a pencil and a script.")

⁵² See, e.g., U.S. SENATE COMMITTEE ON THE JUDICIARY, HEARING, S. 2349: *The Playwrights Licensing Antitrust Initiative Act: Safeguarding the Future of American Live Theater*, 108th Cong., 2d Sess., April 28, 2004, p. 12 (testimony of Wendy Wasserstein) ("[T]he independent voice that makes writing for the theater so compelling has become more and more endangered as the production of plays are [sic] increasingly dominated by corporate interests.")

⁵³ PLAYWRIGHT LICENSING ANTITRUST INITIATIVE ACT OF 2005, H.R. 532, 109th Cong. (2005); PLAYWRIGHT LICENSING ANTITRUST INITIATIVE ACT OF 2004, S. 2349, 108th Cong. (2004).

bipartisan support, however, the legislation has not been passed. The dramatists' dilemma persists.

II. PLATFORM WORKERS AND THE EMPLOYMENT CONUNDRUM

The New Deal labor and employment legislation made employment status into a significant legal category. Employees are generally defined by the "control" test.⁵⁴ The test finds its historical roots in the definition of "servant" in English common law. According to the Restatement Second of Agency, "[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."⁵⁵ Acknowledging that the concept of employment is "one not capable of exact definition,"⁵⁶ the Restatement provides ten factors to fill out the basic control standard.⁵⁷ The control test is used both in the common law and for most federal and state statutes and regulations.⁵⁸ In the wake of the New Deal, there was the possibility of a broader approach: the National Labor Relations Act (NLRA) did not

⁵⁴ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–740 (1989)) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."); cf. Bodie, *supra* note 2, at 675 ("The 'control' test is the dominant standard for employment, both nationally and internationally."); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 367 (2002) ("Control/subordination is still the leading (and sometimes the single) characteristic of employment relationships in many countries.").

⁵⁵ RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957).

⁵⁶ *Id.* § 220 cmt. c.

⁵⁷ *Id.* § 220(2). These factors are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Id. The Restatement Third of Agency has adapted the language of these doctrines by changing "servant" to "employee," but the doctrines remain relatively the same. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

⁵⁸ The Supreme Court has made the common-law "control" test into the default test for "employee" whenever used without further explanation in a federal statute. See *Reid*, 490 U.S. at 739–40 ("In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.").

specifically exclude independent contractors, and so-called “newsboys” were held to be statutory employees for purposes of the Act, even though they were considered independent contractors under common law.⁵⁹ However, the NLRA was amended in 1947 to specifically exclude independent contractors from coverage.⁶⁰ There is one statutory alternative to the control test—the “economic realities” or “economic dependence” test, which is used by the Fair Labor Standards Act and the Family & Medical Leave Act. Because these statutes specifically define “employ” to include “suffer or permit to work,”⁶¹ the definition of employee includes workers beyond the reach of the common law agency test.⁶² The economic realities test thereby covers poorer or less economically independent workers, even if their working relationship is legally structured to provide less control to the hiring party.⁶³

Over time, different sets of workers have fallen into the gap between the “employee” category and the “independent contractor” category. The aforementioned newsboys were an early example. More recently, delivery drivers have experienced a wave of litigation over their employment status, as FedEx and other companies have tried to restructure the relationship to make the drivers independent contractors.⁶⁴ Even exotic dancers have had their employment status litigated.⁶⁵ However, the emergence of “platform,” “on-demand economy,” “sharing economy,” or “gig economy” workers has offered a new and purportedly existential challenge to the legal concept of employment. Rather than providing their services directly to a firm, platform workers are matched with a consumer of their services through an internet intermediary. These intermediaries describe themselves as matching services, rather than employers. For example, the ride-sharing services Uber and Lyft do not, they argue, hire drivers to provide rides on the companies’ behalf; rather, they provide a

⁵⁹ *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 127 (1944) (holding that the news vendors in question were “subject, as a matter of economic fact, to the evils the statute was designed to eradicate”).

⁶⁰ Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1988)).

⁶¹ 29 U.S.C. § 203(g).

⁶² *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (noting that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles”); *see also* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985) (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)) (“The test of employment under the Act is one of economic reality . . .”).

⁶³ *See, e.g., Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (concluding that migrant pickle harvesters were employees under the FLSA).

⁶⁴ Bodie, *supra* note 2, at 718–20.

⁶⁵ *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235 (4th Cir. 2016).

platform for drivers and riders to match up with each other for mutually beneficial transactions.⁶⁶ In suits against the ride-sharing services, however, representatives for classes of these drivers have characterized themselves as traditional employees, albeit with untraditional firm architecture.⁶⁷

These platform workers—which also include coders, data-entry providers, home repair servicers, and deliverers—have created conflict over their appropriate legal categorization. Their jobs are flexible and allow the worker (within certain incentive schemes) to choose when to work. Some commentators have argued that the platform workers are straightforward employees.⁶⁸ Others have argued that on-demand workers have sufficient flexibility in their work to qualify as independent contractors.⁶⁹ Still others have argued for a third category of workers, neither employees nor independent contractors, to cover this new category of work.⁷⁰ Much of the litigation surrounding this issue is still in stasis.⁷¹ The confusion of courts over this question is represented in this quote by Judge Chhabria: “[T]he jury in this case will be handed a square peg and be asked to choose between two round holes.”⁷²

Like the dramatists, platform workers fall into a gray area between the categories of independent contractor and employee. The history of the dramatists—in both economic negotiations and litigation maneuvers—has applications for how we should characterize platform workers going forward.

III. LESSONS FROM THE DRAMATISTS FOR PLATFORM WORKERS

Employment is about team production. Employees are part of an economic firm; they have removed themselves from the traditional

⁶⁶ See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137, 1141 (N.D. Cal. 2015) (describing Uber’s contentions about its relationship with its drivers), *vacated*, No. 13-cv-03826-EMC, 2016 WL6997166 (N.D. Cal. 2016).

⁶⁷ See *id.* at 1137, 1148–52. (describing whether the relationship between Uber and its drivers satisfies the “control” test).

⁶⁸ See, e.g., Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms As Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL’Y J. 619, 636–41 (2016); Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1 (2017).

⁶⁹ See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1541 (2016).

⁷⁰ See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST CENTURY WORK: THE “INDEPENDENT WORKER” (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [<https://perma.cc/9KH5-PSG9>].

⁷¹ Cherry, *supra* note 6, at 578.

⁷² *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

market contracting process and instead provide their labor as part of a firm.⁷³ The firm is the mechanism by which production can be coordinated amongst many when their inputs are not easily distinguishable in the final product.⁷⁴ Employees participate in this ongoing joint production as part of the firm through the employment relationship.⁷⁵

Dramatists are not employees because they operate outside of the team production process in significant respects. True, dramatists must collaborate with numerous participants—directors, actors, stagehands, funders, choreographers—in bringing a theater production to life. But dramatists stand apart in one important respect: they retain intellectual property rights over their dramatic works. Because they hold copyright to their plays and musicals, they have the traditional ownership prerogatives of control over use and profits. This difference between dramatists and screenwriters is a critical one. Screenwriters typically do not retain their copyright; these rights are either sold with the script, if written independently, or go directly to the screenwriter’s employer if the script was written through a work-for-hire relationship. Screenwriters thus become part of a team; their work is owned by the firm that is producing the movie, whether it be a production company or a studio.⁷⁶ Dramatists, on the other hand, may license their work for a particular production, but their Guild expects them to retain copyright. The dramatists’ intellectual property rights over their work has been “the bedrock constant around which all theater-making has been organized.”⁷⁷

This retention of intellectual property rights has important ramifications for team production and the working relationship. We manage most business enterprises through firms because we need firms to manage the process of production and then manage the distribution of the gains from that process.⁷⁸ Screenwriters put their contributions

⁷³ For further development of this concept, see Bodie, *supra* note 2.

⁷⁴ Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779 (1972) (defining team production as “production in which 1) several types of resources are used and 2) the product is not a sum of separable outputs of each cooperating resource”).

⁷⁵ Bodie, *supra* note 2, at 705–06.

⁷⁶ Fisk, *supra* note 32, at 240 (“Knowing that film and TV are collaborative media in which authorship is collective, [screenwriters] are willing to trade ownership of the copyright in their work for access to the resources and collaborations that will get their ideas made into movies or TV shows.”).

⁷⁷ Weidman, *supra* note 10, at 641.

⁷⁸ Under the Alchian and Demsetz definition, team production takes several types of resources and then creates a product that is not “a sum of separable outputs of each cooperating resource.” Alchian & Demsetz, *supra* note 74, at 779.

into the team's overall mix of resources and generally do not retain any ongoing copyright powers. As such, they are stuck in the muck with everyone else and must depend on the firm to manage the distribution of gains. Dramatists, on the other hand, seek to pull out their contribution from the team process and keep that for themselves. Their intellectual property rights allow them to keep their input separate in important respects. As such, they stand outside the team—and are not considered employees.

There are certain practical differences between playwriting and screenwriting that lend themselves to the different postures that these artists take. Plays are more of a stand-alone product; they enjoy at least a limited independent market of readers, and they can be produced over and over again by different sets of actors, directors, and producers. Screenplays, on the other hand, do not have significant stand-alone value and are almost always only produced once. But at the same time, both the dramatist and the screenwriter depend on a host of other participants to bring their words to life. A play cannot be truly appreciated unless it is put on stage. If they chose to, dramatists could consign themselves to a team production process by handing over their IP rights to a firm.⁷⁹ But as currently constructed, dramatists are not employees because they keep their contributions separable from the team.

Platform workers are not generally in a position to retain continuing property rights, intellectual or otherwise, over their work. But the concept of team production remains critical to determining whether they are employees or independent contractors. If the platform worker can separate out some portion of the value of her labor and can use it separately from the team, that worker is more likely to be independent from the team and therefore not an employee. On the other hand, if the workers' contributions inure to the good of the team and primarily benefit the team going forward, then employment is more apropos. This contrast will generally play out in the piece of ongoing "property" that is relevant to most businesses: goodwill, brand, and reputation. Instead of having a play or music to provide continuing value from past labor, most employees will look to their past experience, successful job performance, customer relationships, and co-worker reputation as part of their "individual capital" that they carry forward. If this capital generally goes to the firm's reputational capital, then the

⁷⁹ Even novelists can work as part of a team, and a firm can own the novel's copyright. See Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1684–86 (2013) (discussing the collaborative production of novels through which the firm owns the copyright and is considered the author).

worker is an employee. If the worker pulls out this reputational capital for herself, then she is an independent contractor.

Uber provides an example of the difference between employee and independent contractor in the platform economy. Uber drivers do create individual reputational capital through their labor. Their first names appear to customers; they are individually rated by customers, and that rating appears as part of their profile; and they interact personally with customers and can establish a relationship.⁸⁰ However, most of the reputational capital that drivers accrue is going to benefit the team—Uber. Customers use the Uber app, and the app controls the pool of drivers that can be chosen. Customers see only first names of drivers and are not given any contact information for drivers.⁸¹ Uber takes significant steps to vet its drivers and requires background checks and car inspections.⁸² Those certifications as well as a driver's customer ratings are not portable; they are usable only through Uber. Uber's goal is not to create relationships between customers and individual drivers; it is to create relationships between customers and Uber. Thus, even though drivers are individually providing rides to customers and getting paid for each ride, their contributions to the team are not separable in the ways that the dramatists' contributions are. Individual drivers are not providing rides as themselves; they are providing rides as Uber drivers. As one court described it, "Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices."⁸³ Uber's driving services are provided through the team, and the team receives the ongoing reputational capital. This critical distinction is what makes Uber drivers employees.⁸⁴

Uber could structure itself in a way that made the drivers more akin to independent contractors. It could construct its app more like a marketplace for individual drivers, in which each driver set the rates,

⁸⁰ See Cherry, *supra* note 6, at 597; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 490–91 (2016); Tomassetti, *supra* note 68, at 9.

⁸¹ Aslam, Farrar & Others v. Uber, Case No. 2202550/2015, U.K. Employment Tribunal, ¶¶ 90–91, Oct. 28, 2016, <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf> [<https://perma.cc/247A-LQKD>] (discussing absence of information between driver and passenger); Tomassetti, *supra* note 68, at 25 (discussing Uber process).

⁸² Rogers, *supra* note 80, at 490–91.

⁸³ O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015).

⁸⁴ See also Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, SPAN. LAB. L. & EMP. REL. J. (forthcoming 2017), <https://ssrn.com/abstract=2877134> [<https://perma.cc/L7DB-QA RZ>] (describing Uber drivers as employees based on their democratic deficits and economic dependence).

established the ground rules for the ride, and received independent reputational capital that was portable to other transportation markets. Customers would be looking for individual drivers and would view Uber as more of a market: a food court with different offerings from different vendors. Instead, Uber offers the Uber experience, and customers rely on Uber to make sure that experience is provided.

The platform economy's radical technological changes do allow for teams to break down more easily into individual actors, and for those individual actors to act independently within the platform. But the nature of companies such as Uber and the businesses that they are in makes it more likely for them to orient themselves toward team production rather than individual markets. Customers generally do not want to have to vet a set of drivers individually; they want Uber to do it for them. They do not want to establish relationships with specific drivers; they want to have a driver available as soon as possible by drawing from a large pool.⁸⁵ Uber is a transportation company, not a technology company, and it is hard to imagine it being successful if it were to reconstruct itself as a pure market. But other platform companies may be able to work as a market more successfully and thereby create a true marketplace for independent contractors.

Even if we ultimately characterize certain platform workers as independent contractors, we may still find aspects of the dramatists' dilemma: a need, or at least a desire, to provide them with certain of the protections generally afforded to employees. And we may conclude that it makes sense to carve out a middle ground between employees and independent contractors with respect to certain legal doctrines. The Dramatists Guild seeks to obtain the collective-bargaining protections afforded to employee unions in order to negotiate more forcefully with producers and enforce standard terms and conditions for dramatists' work. The Guild has pursued legislation amending antitrust laws to permit dramatists to negotiate collectively, even if they are not employees. Such concerns could also apply to platform workers who may be considered independent but similarly wish to band together for bargaining purposes.⁸⁶ We may find that various aspects of the employment relationship fit broader or narrower categories, and should

⁸⁵ See Sheelah Kolhatkar, *The Anti-Uber*, NEW YORKER, Oct. 10, 2016, at 40, 45 (noting that "customers summoning Ubers want their cars to come quickly" and that the company wants the service "to be as reliable as running water").

⁸⁶ For a discussion of antitrust as applied to Uber, see Sanjukta Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERK. J. EMP. & LAB. L. 233, <https://ssrn.com/abstract=2817653> [<https://perma.cc/5YZA-FTTZ>].

be expanded or shrunk as appropriate.⁸⁷ An “independent worker” category may be more appropriate for some employees if it offers a better regulatory mix of employer responsibilities.⁸⁸ The legal and economic “disruption” caused by platform companies should prompt a reevaluation of specific legal regimes and their fit with the employment relationship.

At the same time, however, it is important not to lose sight of what the employment relationship does provide. Employment allows for meaningful collaboration on an ongoing basis through firms. Team production is difficult to manage through pure market relationships. Firms are important within our economy and are likely to remain important, even in the face of platform technology. As such, the choice between firm and market will remain a significant economic and legal choice. We cannot let firms like Uber receive the benefits of team production without the concomitant responsibilities. When companies choose the firm structure to provide their goods or services, they must treat their workers as employees. That remains true even in this new economy.

CONCLUSION

The critical question to ask when it comes to platform workers is this: are they part of a firm or are they working as individual businesses? Are they providing their labor as part of a team, or do they hold on to individual capital throughout their transactions? The dramatists have chosen to conduct their work as separate artists; screenwriters, as part of a team. This distinction should provide the best way forward as we endeavor to categorize an ever-wider array of workers and their work. Once categorized, we need to address their needs as workers in tandem with our categorization. Certain protections that are currently tied to employment may make more sense applied to a broader set of contractual participants. But understanding the underlying core of the employment relationship, and categorizing workers accordingly, will help us then move on to reassessing labor and employment laws and applying them more appropriately to those who need their protections.

⁸⁷ Cf. Davidov, *supra* note 54, at 371 (discussing the category of dependent contractors).

⁸⁸ See HARRIS & KRUEGER, *supra* note 70. Orly Lobel has recently argued that it makes sense to extend certain “employment” laws such as antidiscrimination protections, collective bargaining rights, and worker safety regulations to all workers, including independent contractors. Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law* 9–14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848456 [<https://perma.cc/8G8L-QW2J>].