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TUNING INTO THE ON-DEMAND STREAMING CULTURE — Hollywood Guilds’ Evolution Imperative in Today’s Media Landscape

Blaine Roth

ABSTRACT

Hollywood television and film production has largely been unionized since the early 1930s. Today, due in part to technological advances, the industry is much more expansive than it has ever been, yet the Hollywood unions, known as “guilds,” have arguably not evolved at a similar pace. Although the guilds have adapted to the needs of their members in many aspects, have they successfully adapted to the evolving Hollywood business model? This Comment puts a focus on the Writers Guild of America, Directors Guild of America, and the Screen Actors Guild, known as SAG-AFTRA following its merger in 2012, and asks whether their respective collective bargaining agreements are out-of-step with the evolution of the industry over the past ten years, particularly in the areas of new media and the direct-to-consumer model. While analyzing the guilds in the context of the industry environment as it is today, this Comment contends that as the guilds continue to feel more pronounced effects from the evolving media landscape, they will need to adapt at a much more rapid pace than ever before in order to meet the needs of their members. However only time will reveal whether the current trajectory is idyllic or flawed.

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INTRODUCTION

Since the early 1930s, Hollywood television and film production has largely been unionized by what the industry refers to as “guilds.” While the guilds bear very little resemblance to traditional manufacturing, retail, or service industry unions, because of the impermanent nature of many of the jobs in the television and film industry, Hollywood professionals needed a way to protect themselves through wide-reaching contracts with employers. Hollywood studios initially resisted unionization, but after the Supreme Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.*, which upheld the National Labor Relations Act of 1935, guaranteeing the basic rights of private sector employees to organize into unions, studios were forced to begin to recognize the legitimacy of guilds.¹ Despite the decline of the industrial unionized workforce in the United States, the guilds have grown in membership, kept a strong foothold and influence on the industry, and continue to shape the business on a multidimensional level.²

The most prominent guilds in the film and television industry include the Writers Guild of America (WGA), Directors Guild of America (DGA), and SAG-AFTRA (herein referred to as SAG, which was formed in 2012 by the merger of the Screen Actors Guild and the American Federation of Television and Radio Artists).³ Intuitively, these guilds represent writers, directors, and actors, respectively, but are not limited to those specific roles or to “A-list” talent; many lower-billing talent and even extras also depend on the job security, benefits, and credit ensured by their respective guilds.⁴

1. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Guide to the Guild*, WRITERS GUILD AM. WEST 14–15, https://www.wga.org/uploadedFiles/who_we_are/fyi15.pdf [<https://perma.cc/4VH2-UPMX>].

2. See Howard D. Fabrick, *Unique Aspects of Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS LAW., no. 4, 2015, at 1, 30.

3. SCHUYLER M. MOORE, *THE BIZ: THE BASIC BUSINESS, LEGAL AND FINANCIAL ASPECTS OF THE FILM INDUSTRY IN A DIGITAL WORLD* 65 (5th ed. 2018); see also Casey Mink, *What Actors Need to Know About the 3 Guilds that Rule Hollywood*, BACKSTAGE (Feb. 24, 2020, 11:59 AM), <https://www.backstage.com/magazine/article/need-know-guilds-rule-hollywood-4480> [<https://perma.cc/CNB8-Z5ZU>].

4. Jacqueline G.H. Kim, *Digital Media and Unionization in the “Guilded” Age: How Labor*

Other “above-the-line” individuals, who are involved with creative aspects, and “below-the-line” individuals, who are involved in the physical production, including those who often have low or no billing, are also represented by specific guilds.⁵ However, the focus of this Comment is on the three primary guilds mentioned. These guilds serve to negotiate collective bargaining agreements on behalf of their members in conjunction with the Alliance of Motion Picture and Television Producers (AMPTP), an association that represents and acts as a negotiating agent for over 350 large and independent production companies, television networks, and studios.⁶ These entities then sign on to the final agreement reached between the guild and AMPTP to become “guild signatories,” allowing and, in most cases, requiring, the signatory to only hire guild members and abide by the terms set forth in the contract.⁷ Furthermore, in most cases, if an entity does not sign on to the agreement, it cannot hire a guild member to work on its project.⁸ These contracts of nationwide application, known on the most generic level as minimum basic agreements (MBAs), provide for minimum standards of employment across a multitude of applications and roles, including individuals who typically would be considered to be independent contractors.⁹

Despite the guilds’ prevalence over the past eighty-plus years, a recurring question keeps surfacing: although the guilds have adapted to the needs of their members in many aspects, including the transforming social landscape, business models, and legal arena of Hollywood, have they adapted to the evolving nature of content production and distribution? Specifically, are the WGA, DGA, and SAG collective bargaining agreements out-of-step with the evolution of the industry over the past ten years, particularly in the areas of new media and the direct-to-consumer model?¹⁰ If so, which guild has adapted best,

Organizations in the Entertainment Industry Are Swimming Against the Current of Streaming New Media and Technology 1–2 (May 4, 2018) (unpublished student paper), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1010&context=prize_papers [<https://perma.cc/2D3J-FTVG>].

5. *See id.*

6. Alissa Wilkinson, *Why Hollywood’s Writers Are on the Verge of a Strike—and What it Could Mean for the Industry*, Vox (Apr. 27, 2017, 5:10 PM), <https://www.vox.com/culture/2017/4/19/15265700/wga-strike-writers-guild-hollywood> [<https://perma.cc/9Z9F-87QV>]; *see also* Catherine L. Fisk, *Will Work for Screen Credit: Labor and the Law in Hollywood*, in *HOLLYWOOD AND THE LAW* 235 (Paul McDonald et al. eds., 2015).

7. GREGORY BERNSTEIN, *UNDERSTANDING THE BUSINESS OF ENTERTAINMENT: THE LEGAL AND BUSINESS ESSENTIALS ALL FILMMAKERS SHOULD KNOW* 154–55 (2015).

8. *Id.* at 155.

9. *See* Fabrick, *supra* note 2, at 31.

10. *See, e.g., SAG-AFTRA 2014 New Media Agreement for Dramatic Programs*, SAG-AFTRA 1, https://www.sagaftra.org/files/2014_sag-aftra_dramatic_new_media_agreement_sample_0.pdf [<https://perma.cc/99J3-5PP8>] (“‘New Media’ shall mean the Internet, mobile devices, or any other exhibition platform now known or which hereafter may be devised or adopted other than those media covered by the SAG-AFTRA Agreements”);

and which is best positioned going forward? In answering these questions, I will first look at the composition and history of each guild before looking at the ongoing changes that have happened in Hollywood over the past decade. Then, I will attempt to analyze the guilds in the context of the industry environment as it is today and the ongoing change the industry expects to see in the near future. Depending on one's role in the industry, the answer to these questions may vary substantially; there is no right answer to these questions and only time will reveal whether the current trajectory is idyllic or flawed.

I. GUILD HISTORY, COMPOSITION, AND COLLECTIVE BARGAINING

Each guild has a distinct composition and consequently unique concerns that are accounted for in each of their agreements. Like in many industries, but even more so in Hollywood, individual employees alone, especially those who are not considered "A-list" talent, do not have enough bargaining power to raise their own wages, improve working conditions, and secure provisions for health and other benefit plans.¹¹ Thus, the guilds operate in a manner that is unique, as MBAs are renegotiated every three years in consideration of all guild members, including individuals who are currently working, those who have yet to be hired, and those, like independent contractors, who do not meet the typical definition of an employee under U.S. labor laws.¹²

In addition to addressing these concerns, the guilds essentially make it a requirement that talent join in order to have a career in Hollywood, illustrated by their yearly award events and the fact that most, if not all "A-list" talent have joined.¹³ Most strikingly, if a producer wants to hire a guild member, they must sign on to the respective MBA, and once they do so, subsequent hires within that guild's purview will be required, as a condition of employment, to join the appropriate union.¹⁴ In addition to this constraint and several other contractual requirements, each major guild makes agreements with talent agents, requiring them to only secure client employment with a guild signatory, further cementing the entrenched view throughout the industry that guild membership is essential.¹⁵

see generally Ken Ziffren, *How Disney's Netflix Rival Will Actually Work*, HOLLYWOOD REP. (Sept. 13, 2018, 6:30 AM), <https://www.hollywoodreporter.com/news/how-disney-streaming-service-will-work-guest-column-1141660> [<https://perma.cc/AA8Q-B6XJ>] (analyzing examples of the direct-to-consumer model, which include the forthcoming "Disney+" and Netflix original programming).

11. BERNSTEIN, *supra* note 7, at 154.

12. Fabrick, *supra* note 2, at 31.

13. *See id.*

14. BERNSTEIN, *supra* note 7, at 154–55.

15. *See id.* at 166; *see also* DINA APPLETON & DANIEL YANKELEVITS, *HOLLYWOOD DEALMAKING: NEGOTIATING TALENT AGREEMENTS FOR FILM, TV AND NEW MEDIA 2* (2011); *cf.* SHEL PERKINS, *TALENT IS NOT ENOUGH: BUSINESS SECRETS FOR DESIGNERS 489* (2014).

A. *A Tale of Three Guilds: The WGA, DGA, and SAG*

The WGA represents around 20,000 members, made up of television, film, news, animation, internet, and new media writers.¹⁶ Since its inception in the early 1950s, the major concern of the WGA was securing for its members control of the literary material they created, through the use of “separated” or “reserved” rights.¹⁷ These separated rights, which are based on a writer’s credit and allow the writer to retain certain uses of the copyrighted material, are unique to the WGA and arose out of the traditional Hollywood model of “work-made-for-hire,” where the “employer” owns the copyright of a writer’s literary materials.¹⁸ The WGA is further concerned with securing residual payments for the reuse of members’ works. As discussed in greater detail later, residuals are unique to the industry and provide royalties for the continued exploitation of material in the same market for which they were originally produced.¹⁹

Initially, the WGA had separate agreements for both the major film studios and independent film producers on the theatrical side as well as amongst the major studios, independent television producers, and networks on the television side.²⁰ Despite still having different rights and residual provisions for theatrical and television exploitation, today the WGA has a single agreement, totaling over five hundred pages, covering both theatrical and television content, regardless of how it was produced or where it was exhibited.²¹ It should be noted that the WGA MBA contains “some of the most complex provisions found in any union or guild agreement and embod[ies] concepts that astound labor lawyers who work outside the entertainment industry.”²²

As the smallest of the three, the DGA is comprised of approximately 18,000 members, made up of directors and other members of the directorial team.²³ Unlike the WGA, where content ownership is a major concern, the DGA is primarily focused on securing control of the production process so that directors have latitude in creating their vision of the story expressed in the writer’s work.²⁴ However, the DGA did not receive wide recognition for these

16. See *Guide to the Guild*, *supra* note 1; see also Mink, *supra* note 3.

17. See Fabrick, *supra* note 2, at 33–34.

18. See *id.*

19. *Id.* at 32–33 (“A rerun of a television program on television is a reuse and generates a residual. The release of a feature film on television is a [sic] not a reuse but a new use in a different market and generates a different kind of payment,” known as a “new use payment.”).

20. *Id.* at 33–34.

21. *Id.* at 30.

22. *Id.*

23. *About the DGA*, DIRECTORS GUILD AM., <https://www.dga.org/The-Guild/History.aspx> [<https://perma.cc/9E43-46WU>].

24. Fabrick, *supra* note 2, at 34.

rights, now known as the “director’s creative rights” until the early 1960s.²⁵ While DGA members are still concerned with residual payments and credit, there are no such “separated rights” afforded based on their contribution to the project. Covering the same general domain as the WGA, the DGA has two agreements, distinguished by genre, instead of format, amounting to over eight hundred pages.²⁶ Its original MBA still covers dramatic television and theatrical, while the other agreement covers Freelance Live and Tape Television.²⁷ Expounding upon these, the DGA has other more specialized agreements, like one that covers television commercials as well as contracts with each broadcast and pay television network.²⁸

Lastly, SAG-AFTRA, as merged in 2012, is comprised of around 160,000 members, and was formed with the initial mission of minimizing the exploitation of actors who were being forced into longlasting and unrestricted contracts with the film studios.²⁹ In the 1930s, studios essentially “owned” their actors, subjecting them to grueling work hours, insufficient food, and sometimes even 25-hour shifts, all while discouraging them from speaking up due to the threat of blacklisting.³⁰ “SAG’s central goal . . . has been providing its members with a range of basic rights and benefits, such as pension and health care that, due to the nature of their employment, actors previously had no access.”³¹ The guild’s membership is diverse and is made up of “actors, announcers, broadcast journalists, dancers, DJs, news writers . . . puppeteers, recording artists, singers, stunt performers,” and voiceover artists among many other media professionals.³² Given such a wide-reaching member base, SAG has the most contracts of the three guilds, covering content from traditional motion pictures and audio-books, to music videos and more.³³

25. *Id.*

26. *Id.* at 30–31.

27. *Id.*

28. *Id.* at 31.

29. See *About, SAG-AFTRA*, <https://www.sagaftra.org/about> [<https://perma.cc/N2ZV-LTZ5>]; see generally *About: 1930s, SAG-AFTRA*, <https://www.sagaftra.org/about/our-history/1930s> [<https://perma.cc/JT8Y-9CY6>] (SAG was established in 1933 and AFRA, the American Federation of Radio Artists was founded in 1937); *About: 1950s, SAG-AFTRA*, <https://www.sagaftra.org/about/our-history/1950s> [<https://perma.cc/3X-EY-FC6D>] (AFRA became AFTRA in 1952).

30. KC Wright, *8 Facts About SAG-AFTRA*, BACKSTAGE (Nov. 12, 2014, 12:06 PM), <https://www.backstage.com/magazine/article/facts-sag-aftra-10249> [<https://perma.cc/86UZ-AVQH>].

31. Patricia Ball, Comment, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901, 911 (2003).

32. *About, supra* note 29.

33. *Compare Contracts & Industry Resources, SAG-AFTRA*, <https://www.sagaftra.org/contracts-industry-resources> [<https://perma.cc/ay48-dd2z>], with *DGA Agreements*,

While there have been efforts to standardize common provisions amongst these guild agreements to provide consistency, there remain variations in the needs of members and thus differing interpretations of guild agreements on both the union and signatory side.³⁴ In fact, while conflicts have arisen between guilds and signatories, conflicts have also occurred between the guilds themselves. For example, in the late 1960s, the DGA threatened to strike over a WGA agreement with producers seeking to limit the on-screen credit afforded to directors, believing it created “the impression of ‘authorship.’”³⁵ Since 1960, the three guilds have initiated major member strikes a total of ten times, with both actors and writers threatening to strike over the last two years.³⁶ Of those strikes, only one has been by DGA members (lasting only a few hours) and six by the WGA.³⁷ Most recently, guild strikes have occurred on a smaller scale, with many pertaining to niche markets, like SAG’s strike against TV animation producers, video game makers, and Bartle Bogle Hegarty, an advertising agency.³⁸

B. *Collective Bargaining in Hollywood*

“[U]nions’ collective bargaining agreements with the AMPTP are so fundamental to productions regardless of scale and medium, [they] serve as the foundation” for work standards across Hollywood, where even most

DIRECTORS GUILD AM., <https://www.dga.org/Contracts/Agreements.aspX> [<https://perma.cc/VF7W-CQAW>].

34. Fabrick, *supra* note 2, at 33.

35. *Id.* at 35.

36. See Jonathan Handel, *SAG-AFTRA Passes TV Animation Strike Authorization for SVOD Fight*, HOLLYWOOD REP. (July 18, 2018, 8:59 PM), <https://www.hollywoodreporter.com/news/sag-aftra-passes-tv-animation-strike-authorization-svod-fight-1128315> [<https://perma.cc/L4HN-N6M7>]; Dave McNary, *Hollywood Wonders if Writers Guild Will Strike for Seventh Time*, VARIETY (Apr. 30, 2017, 10:36 AM), <https://variety.com/2017/film/news/strike-watch-writers-guild-hollywood-history-1202404047> [<https://perma.cc/HRL7-V8P6>].

37. McNary, *supra* note 36; *Overview: 1987*, DIRECTORS GUILD AM., <https://www.dga.org/The-Guild/History.aspx?value=1987&Decade=1980s&Year=1987> [<https://perma.cc/7MSZ-ZZGR>].

38. Dave McNary, *SAG-AFTRA Calls a Strike Against Ad Agency Bartle Bogle Hegarty*, VARIETY (Sept. 20, 2018, 2:34 PM), <https://variety.com/2018/tv/news/sag-aftra-strike-ad-agency-bartle-bogle-hegarty-1202951350> [<https://perma.cc/M62G-9R8P>] (discussing the 2018 SAG strike against advertising agency Bartle Bogle Hegarty); Dave McNary, *SAG-AFTRA Members Approve TV Animation Strike Authorization*, VARIETY (July 18, 2018, 7:22 PM), <https://variety.com/2018/tv/news/sag-aftra-tv-animation-strike-1202877662> [<https://perma.cc/GFL2-QDN7>] (discussing the 2018 SAG TV animation strike); Andrew Wagner, *Why the Actors Behind Popular Video Games Are on an Epic Strike*, PBS NEWS HOUR (June 23, 2017, 3:18 PM), <https://www.pbs.org/newshour/arts/actors-behind-popular-video-games-epic-strike> [<https://perma.cc/LD7Y-EWD3>] (discussing the 2016–17 SAG video game strike).

nonsignatories adhere to the provisions agreed to with the AMPTP.³⁹ “As union membership continues to decline nationwide, Hollywood remains a bastion of organized labor”⁴⁰ This is perhaps due in part to unions’ unique collective bargaining process, whereby an entire loosely defined segment of an industry, consisting of a vast and diverse group of individuals across various mediums, is represented.⁴¹ Since the guilds’ inception, they have worked to adapt MBAs to meet the changing media landscape and to continue to protect the needs of their members, and because “both management and labor have demonstrated the same shared interest—to make movies, not labor law precedent,” the guilds have been rather successful in their negotiations.⁴²

1. Major Provisions Across Three Minimum Basic Agreements

Over the years, the DGA, WGA, and SAG have succeeded in negotiating for their members’ basic contractual provisions, several of which are consistent throughout the three major guild agreements. These rights include provisions for pension and health care plans, minimum services to be rendered, and working condition standards. In addition to these basic rights, each of these guilds have further financial provisions covering residuals, new use payments, and “scale,” the term for minimum salary.⁴³ On top of these basic universal terms, the guilds have several unique provisions of their own.

The DGA is also concerned with protecting directors’ artistic freedom and placing strict control over credit.⁴⁴ In fact, the DGA’s MBA has a provision outlining a procedure through which a director may elect to use a pseudonym in place of his or her name on any materials in which credit is given for direction of a film.⁴⁵ Historically, Alan Smithee as well as various iterations of the name, were “primarily employed when a director felt a studio had usurped his or her creative vision and ruined their film,” but over time the “director” became known for his atrocious films and so the name fell out of use.⁴⁶

39. Kim, *supra* note 4, at 3–4.

40. David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017, 3:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> [<https://perma.cc/B3RV-AQGF>].

41. See Ball, *supra* note 31, at 911.

42. Fabrick, *supra* note 2, at 36.

43. BERNSTEIN, *supra* note 7, at 155 (“Minimum salaries, referred to as ‘scale,’ represent the least amount of money a union member can be offered to do a specific job.”).

44. See *Welcome to the Directors Guild of America Website*, DIRECTORS GUILD AM. <https://www.dga.org/The-Guild.aspx> [<https://perma.cc/A9XM-DSA2>]; see also *Credits*, DIRECTORS GUILD AM. <https://www.dga.org/The-Guild/Departments/Credits> [<https://perma.cc/CY5W-WG8S>] (outlining several of the credit provisions under the DGA agreements).

45. See *Directors Guild of America Basic Agreement of 2014*, DIRECTORS GUILD AM. 109–10, <https://www.dga.org/-/media/E98E71412E1F4BB5B94AE0843C5CD8DE.pdf> [<https://perma.cc/M4PZ-4EP7>].

46. Thomas Harlander, *What Ever Happened to Alan Smithee, Hollywood’s Worst Director?*,

Although the DGA's primary MBA only covers projects shot on film, not for live television, analogous provisions can be found in many other DGA contracts, including its individual network agreements.⁴⁷ In addition to ensuring its members are adequately compensated for their work, SAG is concerned with protecting actors' rights. It uniquely protects its members through provisions for SAG clearance before an actor may begin any work on a film and requiring that the producer or studio pay a deposit prior to the start of production as "security" for the payment of all performers under their jurisdiction.⁴⁸ SAG further has its Global Rule One which applies worldwide and states that "[n]o member shall render any services or make an agreement to perform services for any employer who has not executed a basic minimum agreement with the union."⁴⁹

The WGA has the most unwieldy MBA of the three agreements, where "[s]eparated rights and residuals are among the most important, and least understood, aspects of the WGA Basic Agreement."⁵⁰ While residuals are seen across the guilds, separated rights is a provision unique to writers and is due to the industry-wide standard of "work made for hire."⁵¹ This practice takes all ownership of the work away from the writer, except when the WGA determines that a writer meets the qualifying criteria to retain some exploitation rights in his or her work.⁵² This is just the high-level view as this concept is much more complex than described here. While these provisions by no means cover everything the guilds have fought for, "[w]ith almost a century's worth of experience and expectation in receiving credit, residuals, and a minimum compensation, the guilds will be forces to be reckoned with against

L.A. MAG. (June 4, 2018), <https://www.lamag.com/culturefiles/alan-smithee> [<https://perma.cc/PD4Q-JNZ8>].

47. *Directors Guild of America Basic Agreement of 2014*, *supra* note 45, at 12; *see also Network Agreements*, DIRECTORS GUILD AM., https://www.dga.org/Contracts/~link.aspx?_id=A-6228D0AD1504AEC9ED044E3BE793415&_z=z [<https://perma.cc/8GGB-JCNT>].
48. *Financial Assurances: Security Deposits*, SAG-AFTRA, https://www.sagaftra.org/files/sa_documents/fa_securitydeposits.pdf [<https://perma.cc/HG9U-P86W>].
49. *What Is Global Rule One?*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/global-rule-one> [<https://perma.cc/U29Z-VAWU>].
50. Catherine L. Fisk, *Screen Credit and the Writers Guild of America, 1938–2000: A Study in Labor Market and Idea Market Intermediation* 36 (Nov. 16, 2010) (unpublished manuscript), http://www.law.nyu.edu/sites/default/files/ECM_PRO_067662.pdf [<https://perma.cc/T4X4-AKDR>].
51. U.S. COPYRIGHT OFF., *CIRCULAR 09, WORKS MADE FOR HIRE* (2012), <https://www.copyright.gov/circs/circ09.pdf> [<https://perma.cc/YS7X-SFBD>] (explaining the legal definition of a "work made for hire").
52. *See id.*; WRITERS GUILD OF AM., W., *UNDERSTANDING SEPARATED RIGHTS: ANSWERS TO YOUR QUESTIONS, AND THEN SOME* (2000), https://www.wga.org/uploadedfiles/know_your_rights/SeparatedRights.pdf [<https://perma.cc/68R8-CNSD>].

technology-turned-entertainment companies that try to wrest control over these aspects of their labor.”⁵³

2. Residuals and New Use Payments

“While residuals and new use payments are “common” amongst the three guild agreements, “[t]he concept of residuals is unique to the entertainment industry collective bargaining agreements.”⁵⁴ As television became popular, actors in both television and theatrical works became concerned they were missing out on all the money studios were making from the reruns of their performances. Much to the studios chagrin, the initial push by SAG led to its members, and eventually DGA and WGA members, being paid residual payments for the reuse of their work.⁵⁵ Today, residuals are pervasive in the entertainment industry and are of the utmost importance to talent who do not have longstanding employment contracts.⁵⁶

Residuals are compensation paid for use of a work beyond its initial use, and typically “are calculated on a formula related to the original compensation paid for the service,” without regard to profitability.⁵⁷ Unlike residuals, new use payments apply to uses in a subsequent “window” of exploitation and are “based on the revenue derived from the new use.”⁵⁸ In Hollywood, a “window” refers to periods of exhibition or exploitation of a work, or essentially additional opportunities to make money off the work, traditionally beginning in theaters for a film and ending many years later with licensing on free tv.⁵⁹ Both residuals and new use payments rely on unpredictable formulas and are areas “where many of the industry’s disputes arise.”⁶⁰

Although residuals are a fairly customary industry practice, that is where the “standard” ends. While there have been efforts to standardize provisions to allow for uniformity in administration, “there is not total consistency in the interpretation of these provisions on either the union or producer/distributor side.”⁶¹ Qualification for residuals and the definition of initial use, including type of use, varies along with the formula used to calculate residual payments, making it

53. Kim, *supra* note 4, at 24.

54. Fabrick, *supra* note 2, at 32–33.

55. Kim, *supra* note 4, at 13–14.

56. *See id.*

57. Fabrick, *supra* note 2, at 33; *see Residuals Survival Guide*, WRITERS GUILD AM. WEST, <https://www.wga.org/members/finances/residuals/residuals-survival-guide#1> [<https://perma.cc/96HW-BARY>]; *see also Residuals*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/residuals> [<https://perma.cc/KW6U-RZKW>].

58. Fabrick, *supra* note 2, at 33.

59. *See Now Playing . . . and Playing . . . and Playing*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/hollywood/business/windows.html> [<https://perma.cc/43L6-GZHD>].

60. Fabrick, *supra* note 2, at 33.

61. *Id.*

difficult for both sides of the equation to fully understand the impact of residuals on a given project.⁶² For example, if a series is a huge hit, like *Friends*, and goes into syndication, those writers and actors will make a large sum of money from residual payments, but if the series is cancelled after the first season, residuals will be insignificant or likely never even earned. Residuals tend to be controversial because it is difficult “to think of any union contract outside the entertainment industry where after employees are paid for their labor in creating a product, additional money is paid to or for the benefit of those same employees because of the continued use of the product they make.”⁶³

While MBAs provide for residuals, each guild has its own specific requirements and many times the terms are negotiated independently, as is done by Netflix, who is not a signatory through the AMPTP.⁶⁴ Today, actors, directors, and credited writers can earn residuals for their work on most types of content, like free TV, cable TV, streaming, new media, and theatrical.⁶⁵ Unsurprisingly, not long after new media’s foray into the industry, the guilds had to again fight for the right to receive residuals for original new media content, like Netflix original series, as well as reuse of preexisting content on new media. Following a 2007 strike lasting around one hundred days, the WGA became the first, and led the way for the DGA and SAG, to earn residuals for content streamed online.⁶⁶

Yet, this was only the beginning. As new media continued to contribute to a flood of content, the television industry saw seasons shrink from the typical twenty to twenty-two episodes down to about eight to ten.⁶⁷ Although a fewer number of episodes generally means higher production quality (think

62. *See id.*

63. *Id.* at 32.

64. Dominic Patten, *Chill on Rumors of Netflix Side Deal as WGA Strike Authorization Looms*, DEADLINE (Apr. 24, 2017 1:14 PM), <https://deadline.com/2017/04/writers-guild-netflix-side-deal-not-happening-wga-strike-1202076414> [https://perma.cc/M3LJ-4AGD] (Despite the predominant role Netflix and Amazon now play in production, “[t]he Big 6 are running things and keeping Netflix and Amazon out of the room”); *see also* Cynthia Littleton, *WGA Negotiations Set Stage for Streaming Giants to Have a Bigger Role*, VARIETY (May 9, 2017, 7:00 AM), <https://variety.com/2017/digital/news/wga-negotiations-netflix-amazon-hulu-1202419150> [https://perma.cc/J4GD-HJ6J] (“Amazon is a member of the AMPTP; Netflix is not.”).

65. *See Screen Credits Manual*, WRITERS GUILD AM. WEST https://www.wga.org/uploadedfiles/credits/manuals/screenscredits_manual10.pdf [https://perma.cc/SK5Y-MFD2] (“Writing credit is given for the act of creation in writing for the screen. This includes creation of plot, characters, dialogue, scenes and all the other elements which comprise a screenplay.”); *see also Residuals Survival Guide*, *supra* note 57; *Residuals*, *supra* note 57.

66. *2008: Writers’ Strike Ends After 100 Days*, HISTORY: THIS DAY IN HISTORY (Nov. 13, 2009), <https://www.history.com/this-day-in-history/writers-strike-ends-after-100-days> [https://perma.cc/B3MJ-SDLN].

67. Wilkinson, *supra* note 6.

Game of Thrones and *The Crown*⁶⁸ compared to a typical broadcast series like *Grey's Anatomy*), it also means less money for writers who are paid on a per episode basis, having “a pronounced effect on their total compensation.”⁶⁹ In 2017, the WGA pushed back and was able to get increased compensation “for writers on short seasons . . . [and] increased residuals for made-for-pay TV programs and programs made for high budget subscription video on demand.”⁷⁰ Over the last decade, residuals have been one of the guilds’ most hard fought for provisions, and likely will continue to be a topic of debate in the years to come. “[A]lthough the WGA did recognize the potential future of writing in digital media, the guild could not have foreseen the swift and dramatic shift created by streaming in the television world—an issue that gave Hollywood a feeling of déjà vu this past year.”⁷¹

II. AN EVOLVING INDUSTRY

Beginning with the rise of the internet in the 1990s, changes in the way content is distributed illustrate “a gradual shift from the relationship between Hollywood and technology to a much broader shift to the merging of media, technology, and entertainment.”⁷² Although the traditional Hollywood studios have been resistant and wary of new technologies, consumers have taken a liking to the “enhanced choice, convenience, and customization” of the evolving media landscape.⁷³ Over time, and most noticeably throughout the last decade, the entertainment industry has seen advances in types of content, but most relevant to this Comment, modes of content exhibition and distribution. Beginning with broadcast networks leading to cable networks and then to premium subscription-based content producers and distributors like HBO and Showtime, the landscape has broadened in terms of choice. While the advent of VCRs, DVDs, and DVRs have had an impact on the industry, today’s most pressing issue is how will new media, like content viewed over the internet or on a cell phone, and the rise of new direct-to-consumer model streaming services impact the industry from a financial standpoint.

68. Emily Price, *Amazon’s ‘Lord of the Rings’ Will Be the Most Expensive Television Show Ever Made*, FORTUNE (Apr. 6, 2018), <http://fortune.com/2018/04/06/lord-of-the-rings-amazon-most-expensive> (“Netflix’s series *The Crown* is currently the most expensive television show ever made, at a cost of roughly \$157 million.”).

69. Wilkinson, *supra* note 6.

70. Dave McNary, *Writers Guild of America Members Ratify New Three-Year Contract*, VARIETY (May 24, 2017, 2:11 PM), <https://variety.com/2017/film/news/writers-guild-of-america-ratify-contract-1202443445> [<https://perma.cc/EF2P-HF8G>].

71. Kim, *supra* note 4, at 16.

72. THE NETFLIX EFFECT: TECHNOLOGY AND ENTERTAINMENT IN THE 21ST CENTURY 3 (Kevin McDonald & Daniel Smith-Rowsey eds., 2016).

73. *Id.* at 7.

The history that has led to this point in the entertainment industry is long, complicated, and riddled with precedent-making litigation.⁷⁴ Although the concern of this Comment is not on the legality of streaming, or new media, distribution, or how we have gotten to this point, it is important to acknowledge that there are numerous outside influences on the evolving media landscape. Today, we have various modes of consuming content, including traditional television sets, cell phones, laptops, tablets, and DVD players among various other yet to be known technologies, such as internet-connected glasses. We also have a range of means to obtain such content, such as traditional theatrical exhibition, physical sales, free and pay TV exhibition, along with the internet-based electronic sell-through (EST, for example iTunes and Amazon purchases) and video-on-demand (VOD), which includes subscription video-on-demand (SVOD, for example Netflix and HBO Now) and transactional video-on-demand (TVOD, for example cable company rentals and iTunes/Amazon rentals). What has complicated matters in the industry, especially in relation to guild agreements, is that “[n]ew technologies do not necessarily kill [old] media” when people upgrade or add additional means of obtaining content, and thus add an additional consideration when drafting and negotiating guild agreements.⁷⁵

A. *Netflix’s Rise as a Studio*

In 2007 as Netflix began expanding from its initial 1998 DVD-by-mail model and moving into a more pronounced SVOD service by licensing content from major studios and networks, the “Big Six” media companies at the time (Disney, Fox/News Corp., NBC/Comcast, Warner/HBO, Viacom/Paramount, and Sony) began developing their own VOD platforms to combat Netflix’s rise in membership.⁷⁶ In 2013, once Netflix’s *House of Cards* was awarded the first Primetime Emmy Award for a web-based content provider and Netflix started morphing into a studio, the major media companies began to worry.⁷⁷ In addition to being the first internet-based platform to produce high-quality original content, Netflix asserted its dominance by breaking the traditional models of film and television distribution in two distinct ways.

First, Netflix changed “the distribution model to on-demand TV and birth[ed] the concept of binge-watching,” by releasing whole seasons on one

74. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 564 U.S. 417 (1984) (upholding legitimate uses of VCR recordings as noninfringing use under U.S. Copyright law); see also *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (holding that retransmission of copyrighted audiovisual works is considered a “performance” under the U.S. Copyright Act).

75. CHUCK TRYON, *ON-DEMAND CULTURE: DIGITAL DELIVERY AND THE FUTURE OF MOVIES* 13 (2013).

76. See Cynthia Littleton, *How Hollywood Is Racing to Catch up with Netflix*, VARIETY, <https://variety.com/2018/digital/features/media-streaming-services-netflix-disney-comcast-att-1202910463> [<https://perma.cc/9AXH-NNZY>].

77. THE NETFLIX EFFECT, *supra* note 72, at 3.

date, versus the traditional episode-per-week model.⁷⁸ Netflix's success in this model in no way meant the death of the traditional broadcast or cable TV models, but rather that more avenues of viewing were available to consumers and more consideration needed to be taken into contracting across the industry.⁷⁹ SVOD platforms, like Netflix, are "known to drop a new series on a Friday night with all the confidence that its viewers will not only tune in, but also likely complete the whole series in a matter of hours."⁸⁰ With its entrance into original series, "Netflix began looking more like a traditional cable channel, albeit one without a linear broadcast schedule, a perception that [the] Netflix CEO has emphasized."⁸¹

Second, just as Netflix has introduced a new distribution model for television, it also has begun to challenge the traditional model of theatrical release. While the major studios largely panned premium video on-demand (PVOD), in which films are released on VOD platforms either simultaneously or shortly-thereafter a theatrical release at a premium price) as a failure, Netflix has employed a somewhat similar model of film distribution.⁸² Netflix made its first foray into the release of original films in 2015, and has since continued to either purchase completed films or enter into deals with prominent talent, including its multimovie deal with Adam Sandler's Happy Madison Productions, for direct-to-consumer "premiere" releases.⁸³ While initially Netflix staged either no or very limited theatrical releases for its original films, industry criticism has reportedly drawn Netflix into wider theatrical releases before adding them to their SVOD library, like it has done for *The Irishman*.⁸⁴ Despite the film being

78. Ashley Rodriguez, *Ten Years Ago, Netflix Launched Streaming Video and Changed the Way We Watch Everything*, QUARTZ (Jan. 17, 2017), <https://qz.com/887010/netflix-nflx-launched-streaming-video-10-years-ago-and-changed-the-way-we-watch-everything> [<https://perma.cc/Z6AF-TBZS>]; see *Binge-Watch*, THE MERRIAM-WEBSTER DICTIONARY (7th ed. 2016) (the definition of binge-watch is "to watch many or all episodes of (a TV series) in rapid succession").

79. See Ben Goldsmith, *How Netflix and 'Original' Series TV Are Rescripting the Business of Television*, THE CONVERSATION MEDIA GROUP (Feb. 24, 2016, 2:04 PM), <https://the-conversation.com/how-netflix-and-original-series-tv-are-rescripting-the-business-of-television-53802> [<https://perma.cc/6XYC-MFJE>].

80. Steph Grassullo, *How Streaming Changed the Entertainment Industry and What the Future Holds*, POP INSIDER (May 22, 2018), <https://thepopinsider.com/features/streaming-services-changed-the-entertainment-industry-ways-people-watch-tv> [<https://perma.cc/4BLP-28KQ>].

81. TRYON, *supra* note 75, at 33.

82. *Id.* at 39.

83. David Ng, *Netflix Will Produce Four More Feature Films with Adam Sandler*, L.A. TIMES (Mar. 24, 2017, 11:40 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-adam-sandler-netflix-20170324-story.html> [<https://perma.cc/C75U-7ETY>].

84. See Charles Bramesco, *Is Netflix About to Change How it Releases Original Movies?*, GUARDIAN: CULTURE (Aug. 31, 2018, 11:13 AM), <https://www.theguardian.com/film/2018/aug/31/netflix-release-model-oscar-films-alfonso-cuaron> [<https://perma.cc/HE7Q-T9U9>].

Netflix's most substantial theatrical release to date, controversy still remained over its limited release and shortened 26-day theatrical window, with some British theater chains turning down the film in order to uphold the standard 90-day theatrical window.⁸⁵ While this move may be seen as substantiating the traditional theatrical release distribution model, Netflix will still release most films directly on its platform, continuing to impact the status quo of the industry.⁸⁶ Further, some argue that the "global reach of some SVOD services" like Netflix could enable independent filmmakers "to overcome limited cinema releases and piecemeal international sales."⁸⁷ The impact of Netflix's model has prompted longstanding distributors to "reconsider the relative values of streaming and theatrical rights," something that will persist, despite increased theatrical releases.⁸⁸

What remains to be true is that Netflix has continued to blur the lines between what is television and what is film, with a lead actor in *House of Cards*, quipping in reference to binge-watching, "Is thirteen hours watched as one cinematic whole really any different from a film?"⁸⁹ While television has historically been less esteemed than film, Netflix caught on to what HBO did in the 1990s, differentiating its serial offerings from television in general and creating content that is of the same, if not better, production value than film.⁹⁰ Yet, legendary Hollywood director Steven Spielberg has been critical of Netflix original films, categorizing them as TV movies not worthy of Academy Award recognition.⁹¹ While his outspoken criticism of Netflix films has fizzled, Spielberg still desires to protect "what he likes to call the 'motion picture theatrical art form,'" and with Netflix receiving its first picture nomination for

85. Nick Vivarell, 'The Irishman' is Netflix's Biggest Theatrical Release at Home and Abroad, VARIETY (Nov. 22, 2019, 6:06 AM), <https://variety.com/2019/film/news/the-irishman-martin-scorsese-netflix-biggest-theatrical-release-despite-controversy-1203412994> [<https://perma.cc/RZ3J-4GR6>].

86. See Bramesco, *supra* note 84; see also Brent Lang, Studios Expected to Push for Early Home Release in 2019 (EXCLUSIVE), VARIETY (Nov. 16, 2018, 12:28 PM), <https://variety.com/2018/film/news/studios-movies-early-home-release-1203030705> [<https://perma.cc/278H-3486>] ("As it currently stands, most theatrical releases are not available in the home until roughly 90 days after they premiere in multiplexes."). But see Sarah Whitten, Netflix Is Leaving Millions on the Table by Not Giving 'The Irishman' a Wide Theatrical Release, CNBC (Nov. 7, 2019, 3:14 PM), <https://www.cnbc.com/2019/11/07/why-netflix-isnt-giving-scorseses-the-irishman-a-wider-release.html> [<https://perma.cc/ZK8J-SXQ6>] (*The Irishman's* larger theatrical release is likely due to (i) the specific request of its director, Martin Scorsese, and (ii) Oscar eligibility requirements.).

87. Goldsmith, *supra* note 79.

88. *Id.*

89. Chuck Tryon, *TV Got Better: Netflix's Original Programming Strategies and Binge Viewing*, 2 MEDIA INDUSTRIES 104, 104 (2015).

90. *See id.*

91. David Sims, *Steven Spielberg's Netflix Fears*, ATLANTIC: CULTURE (Mar. 27, 2018), <https://www.theatlantic.com/entertainment/archive/2018/03/steven-spielbergs-netflix-fears/556550> [<https://perma.cc/MPJ2-M8AM>].

Roma in 2019, for which it was a frontrunner, it is clear this is not the end of the industry's wariness of Netflix as an Academy Award contender.⁹² Despite some in the industry criticizing Netflix's categorization as a studio, it remains the "gorilla in the room" because of its "luck in remaking itself first from an online video store to a streaming service, then from a service to a studio."⁹³

An example of the impact Netflix has had on the industry can be seen through the resurgence of studios' discussions about early release to VOD "as a way to combat piracy and capitalize on expensive advertising campaigns publicizing a picture's debut in theaters."⁹⁴ In 2017, studios and major theater chains were close to an agreement that would allow movies to be released to VOD much sooner, but since that time, Disney has emerged as a vocal ally of the theatrical exhibition business.⁹⁵ Somewhat contrary to their support of traditional theatrical exhibition, Disney already has and will likely continue to release several high-budget movies directly on its streaming service, Disney+.⁹⁶ Likewise, the reported push for shorter exclusive theatrical release windows by Warner Brothers and Universal Pictures shines light on the Netflix problem. With both studios planning to delve into branded streaming platforms, to differentiate themselves in a competitive market, "these companies will need to offer premium content to customers and making theatrical releases available earlier to subscribers could be critical."⁹⁷

B. *Major Media Mergers*

At the same time Netflix entered into original programming, the media landscape began to change drastically. "Online SVOD services [were] increasingly commissioning and purchasing content for premiere screenings, rather than simply operating as aggregators of content from other sources."⁹⁸ As more ways to watch a growing amount of quality content emerged, studios and media companies needed to find a way to compete, mainly by getting bigger.⁹⁹ Lionsgate's \$4.4 billion acquisition of Starz, completed in 2016, offered a

92. See Brooks Barnes, *Blockbuster Battle Between Steven Spielberg and Netflix Fizzles*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/business/media/steven-spielberg-netflix-academy-awards.html> [<https://perma.cc/GN7D-ABBT>]; see also Tara Bitran, *Oscars: 'Roma' Lands Netflix its First Best Picture Nom*, HOLLYWOOD REP. (Jan. 22, 2019, 6:06 AM), <https://www.hollywoodreporter.com/news/roma-makes-history-as-first-best-picture-oscar-nom-netflix-1177013> [<https://perma.cc/JD28-VJ9L>].

93. THE NETFLIX EFFECT, *supra* note 72, at 4.

94. Lang, *supra* note 86.

95. *Id.*

96. See *id.*

97. *Id.*

98. Goldsmith, *supra* note 79.

99. Dawn Chmielewski, *Hollywood's Merger Mania: Inside the Studios' "Size Anxiety," Scramble to Match Silicon Valley*, HOLLYWOOD REP. (Jan. 11, 2017, 6:00 AM), <https://www.hollywoodreporter.com/features/hollywoods-merger-mania-inside-studios-size-anxiety-scramble-match-silicon-valley-963241> [<https://perma.cc/8Q7Q-AE99>].

preview of what was ahead “as media companies rush[ed] to combine to gain leverage in their negotiations with such digital distributors as Amazon, Apple, and Google parent Alphabet.”¹⁰⁰ Quoting Shari Redstone, Vice Chair of both the Viacom and CBS boards, “[S]cale really matters . . . it matters to the consumer, who wants to choose an array of content . . . and it matters for leverage when you’re negotiating deals.”¹⁰¹ In addition to leverage, studios are looking to “amass a must-have collection of movies and TV shows that distributors can’t ignore when assembling new packages of programming,” assuring relevancy and access to consumers.¹⁰²

By early 2018, the \$85 billion merger of AT&T and Time Warner, now called WarnerMedia, left analysts predicting more near-term vertical acquisitions, mergers of a content producer and a content distributor, “leading to a troubling level of consolidation among already big business that could potentially eliminate what few independent players remain.”¹⁰³ The Department of Justice had similar concerns, suing to block the deal, arguing that the merger would result in less competition and higher prices.¹⁰⁴ In defense of the claim, the companies argued that “the proliferation of high speed internet access” has led to “tectonic changes” in the industry, where “vertically integrated entities like Netflix, Hulu, and Amazon” thrive, while traditional revenues decline.¹⁰⁵ On February 26, 2019, the Court of Appeals denied the DOJ’s appeal of the District Court’s decision, and the DOJ announced that it would not appeal further.¹⁰⁶

Following the AT&T and Time Warner deal and a bidding war between Disney and Comcast, Disney and 21st Century Fox (Fox) merged in a \$71.3 billion deal.¹⁰⁷ In contrast to the earlier merger, the Disney-Fox deal predominantly results in horizontal integration, leading to a “smaller number of big-name companies control[ling] a greater portion of TV shows and films, potentially altering where—and how—we see our favorite series or actors.”¹⁰⁸ In addition to Disney’s curated branded entertainment, Disney owns a multitude of

100. *Id.*

101. *Id.*

102. *Id.* This Comment, written before the announcement of the Disney-21st Century Fox Merger or any future CBS-Viacom merger, alludes to generational shifts in power at these specific companies as adding to the “sense of change in the wind.” *Id.*

103. Richard Levick, *The AT&T-Time Warner Merger: Is Bigger Better?*, FORBES (Jul. 10, 2018, 3:56 PM), <https://www.forbes.com/sites/richardlevick/2018/07/10/the-att-time-warner-merger-is-bigger-better/#7117b64269b4> [<https://perma.cc/7J6K-VAP3>].

104. *See U.S. v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018).

105. *Id.*

106. *See U.S. v. AT&T Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

107. Edmund Lee, *How Mega-Mergers Are Changing the Way You Watch Your Favorite Shows and Movies*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/interactive/2018/07/27/business/media/mergers-streaming.html> [<https://perma.cc/8TEL-ZE9T>].

108. *Id.*

highly-profitable franchises including the Marvel cinematic universe, *X-Men*, and *Star Wars* to name a few. While there has been a somewhat delineated divide “between creators on one end and distributors at the other . . . those divisions are breaking down.”¹⁰⁹ This means more exclusivity in distribution of content in a market rife with means to obtain content, especially given the current merger-frenzied environment. In a demonstration of this trend, and despite the DOJ’s appeal of the AT&T-Time Warner merger, these new media conglomerates have begun making plans for their own SVOD platforms, Disney+ and HBO Max from WarnerMedia.

It is not likely that this trend will end with these two mergers and the guilds will either have to continue fighting the change or give in. Before the Disney-Fox deal was finalized, the WGA opposed the merger and called it a “relentless drive to eliminate competition” by “substantially increasing the market power of a combined Disney-Fox corporation.”¹¹⁰ Further, despite Comcast’s losing bid, many industry insiders surmise that it will likely make a play for something else in the near-future.¹¹¹ In fact, December 2019 saw the completion of the CBS-Viacom merger, returning the companies to the combined entity they were prior to their 2006 split.¹¹²

C. *Apple TV+, Disney+ and Others*

While Hulu, now under Disney’s full operational control¹¹³, and Amazon Prime already have sizeable membership bases and award-nominated original content, several other content distributors plan to come into the streaming space with not only a platform, but also original content.¹¹⁴ This push is moti-

109. *Id.*

110. *WGA Opposes Disney-Fox Deal*, WRITERS GUILD AM. WEST (Dec. 14, 2017), <https://www.wga.org/news-events/news/press/2017/wgaw-opposes-disney-fox-deal> [<https://perma.cc/46X3-43R3>].

111. Lee, *supra* note 107.

112. Cynthia Littleton, *CBS and Viacom Complete Merger: ‘It’s Been a Long and Winding Road to Get Here’*, VARIETY (Dec. 4, 2019, 1:36 PM), <https://variety.com/2019/biz/news/cbs-viacom-merger-complete-redstone-bob-bakish-1203424316> [<https://perma.cc/S3U3-C6R8>].

113. See Todd Spangler, *Disney Assumes Full Control of Hulu in Deal with Comcast*, VARIETY (May 14, 2019, 6:09 AM), <https://variety.com/2019/digital/news/disney-full-control-hulu-comcast-deal-1203214338> [<https://perma.cc/EVX4-NQJQ>].

114. See Brian Raftery, *For the First Time, All Three Streamers Are Oscar-Bound*, WIRED: CULTURE (Dec. 18, 2018, 8:00 AM), <https://www.wired.com/story/netflix-hulu-amazon-oscar-shortlist> [<https://perma.cc/8BBR-7HDZ>] (“And while several Netflix and Amazon entries are included [in the Academy’s shortlist of potential Oscar nominees], the most notable entries come from a service that’s never before been a contender: Hulu.”); Ellis Clopton, *Storming the Emmys: Netflix, Amazon and Hulu Edge Out Networks*, VARIETY (July 13, 2018, 6:00 PM), <https://variety.com/2018/tv/news/emmys-netflix-amazon-hulu-streaming-data-1202872238> [<https://perma.cc/BH24-NQPD>] (“If trends continue and Hulu and Amazon become even a fraction as prolific as Netflix has been in rolling out content, cable will see itself falling [to] second place [in total Emmy Nominations] in an

vated in part by the popularity of streaming-only programming, such as Hulu's *The Handmaid's Tale*, Amazon Prime's *The Marvelous Mrs. Maisel*, and Netflix's *Stranger Things*, along with competition from "devices that sit in people's hands that capture their attention every 15 minutes," a concern expressed by John Stankey, CEO of WarnerMedia.¹¹⁵

While plans have been in the works for quite some time now, Apple has budgeted a reported \$1 billion on its initial projects for its streaming platform, Apple TV+, and has signed on to the WGA's MBA, advancing its position as a producer of original content.¹¹⁶ In a win for the guild, Apple agreed on terms for programming that is offered online to consumers for free, something that is not covered in the current MBA and has to be negotiated on a writer-by-writer basis.¹¹⁷ The WGA has acknowledged that Apple's steps in tackling consistent terms for free-to-consumer content will certainly have an effect on negotiations when the current contract expires in 2020.¹¹⁸

In October of 2018, AT&T announced its plans for the now-named HBO Max SVOD service featuring WarnerMedia's films and television shows.¹¹⁹ The WarnerMedia library includes the *Harry Potter* franchise, television shows like *Friends*, and HBO hit programming.¹²⁰ While set to launch in May 2020 at a higher than average cost of \$14.99 per month, there still remains confusion as to how HBO Max will coexist with WarnerMedia's current streaming platforms, which include HBO Now and HBO Go.¹²¹ While HBO Max will feature a vast variety of titles from the WarnerMedia library as well as original content, with several films and 50 original series planned within its first year of service, how this platform plans to break through the increasingly crowded

era where consumers are cutting the cord in favor of online video platforms."); see also Dan Reilly, *A Guide to All the New Streaming Services that Want Your Money*, VULTURE (Nov. 5, 2019), <https://www.vulture.com/2019/11/new-streaming-services-2019-2020.html> [https://perma.cc/9XXK-XCX7].

115. Edmund Lee & Brooks Barnes, *WarnerMedia Plans to Unveil Streaming Service by End of 2019*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/business/media/warner-media-streaming.html> [https://perma.cc/2SFZ-73FH].

116. See Joe Otterson, *Star Power, Image Concerns Drive Apple's Original Content Strategy*, VARIETY (Sept. 24, 2018, 1:29 PM), <https://variety.com/2018/tv/news/apple-original-content-strategy-1202944153> [https://perma.cc/RB3T-AC5G]; Dave McNary, *Apple Signs Writers Guild of America Contract on Programming*, VARIETY (June 7, 2018, 1:25 PM), <https://variety.com/2018/digital/news/apple-signs-writers-guild-contract-programming-1202836232> [https://perma.cc/BDT9-45SV].

117. McNary, *supra* note 116.

118. *Id.*

119. Lee & Barnes, *supra* note 115.

120. *Id.*

121. See Ed Martin, *WarnerMedia at TCA: Kevin Reilly Explains HBO Max to Confused Critics*, MEDIAVILLAGE: ED MARTIN REP. (Jan. 18, 2020), <https://www.mediavillage.com/article/warnermedia-at-tca-kevin-reilly-explains-hbo-max-to-confused-critics> [https://perma.cc/YGU6-QWNS].

streaming market is still uncertain.¹²² It is likely that WarnerMedia will follow Disney's strategy in producing its own original content and by distributing content exclusively on its own platform once existing license agreements lapse.¹²³

Several of these license agreements are with NBCUniversal which is also developing an SVOD service with a unique strategy to keep customers tied to their cable subscriptions.¹²⁴ Set for widespread launch in July 2020, the platform, named Peacock, will most closely resemble rival Hulu, which offers both an ad-supported and ad-free tier of service.¹²⁵ To lure subscribers, like other platforms, Peacock will offer new original content, classic NBCUniversal titles as well as live programming, which is where it plans to stand out from the crowded streaming field.¹²⁶

Most prominent, and likely the most disruptive of these new SVOD services is Disney+, which launched on November 12, 2019 at a competitive \$6.99 per month.¹²⁷ Prior to the Fox merger, Disney already owned a lot of profitable content, and it does not plan to renew licensing agreements on that content, including its current lucrative deal with Netflix, or what it gained in the merger once they expire.¹²⁸ Further, Disney has reacquired the rights to ensure that the full *Star Wars* film franchise will be available on Disney+ within the first year of its launch, further alluding to its plans to keep its content exclusively on its own SVOD platform.¹²⁹ In addition to its existing content, Disney has and will con-

122. See Tracy Brown, *Everything You Need to Know About HBO Max*, L.A. TIMES (Oct. 29, 2019, 4:53 PM), <https://www.latimes.com/entertainment-arts/tv/story/2019-10-29/hbo-max-shows-movies-price-launch-date> [<https://perma.cc/39XK-X5ML>].

123. See Anthony D'Alessandro, *'Harry Potter' Pics Won't Be on HBO Max in Near Future—TCA*, DEADLINE (Jan. 15, 2020, 3:39 PM), <https://deadline.com/2020/01/harry-potter-fantastic-beasts-movies-hbo-max-1202831996> [<https://perma.cc/EHG9-9L63>] (When HBO Max launches, J.K. Rowling's Wizarding World films, which include *Harry Potter* and the *Fantastic Beasts* spinoffs, will be notably absent and will not be featured on the platform until NBCUniversal's exclusive deal lapses in 2025.).

124. See *id.*; Natalie Jarvey, *NBCUniversal Unveils Peacock Launch Date, Pricing Tiers*, HOLLYWOOD REP. (Jan. 16, 2020, 1:00 PM), <https://www.hollywoodreporter.com/live-feed/nbcuniversal-unveils-peacock-launch-date-pricing-tiers-1270476> [<https://perma.cc/T2QJ-XYEW>] (Among other benefits to certain cable subscribers, “[a] premium version of the service featuring double the amount of programming will be available for free with advertising for certain cable subscribers, including those signed up for Comcast” cable, which like NBCUniversal, is wholly-owned by Comcast Corporation.).

125. Jarvey, *supra* note 124.

126. *Id.*

127. See Tim Goodman, *Critic's Notebook: Disney+ Price Point Just Made the Streaming Wars Really Hurt*, HOLLYWOOD REP. (Apr. 12, 2019, 7:55 AM), <https://www.hollywoodreporter.com/bastard-machine/critics-notebook-disney-price-point-ups-streaming-wars-ante-1201579> [<https://perma.cc/M6CD-3GFN>].

128. Brent Lang, *Disney Earnings Top Projections Thanks to 'Incredibles 2,' Theme Parks*, VARIETY (Nov. 8, 2018, 1:17 PM), <https://variety.com/2018/biz/news/disney-earnings-1203023458> [<https://perma.cc/WB2Y-6VUL>].

129. See Dade Hayes, *Entire 'Star Wars' Franchise Will Be on Disney+ Within its First*

tinue to produce original content, series and films, to be released exclusively on its Disney+ platform.¹³⁰ In its quest for exclusivity, Disney initially plans to use Hulu to distribute adult-oriented content, Hulu's own original series, and content from three of the broadcast networks and FX, while Disney+ will have more family-friendly content.¹³¹

Last, and least developed at this point, is content designed specifically for mobile viewing. Quibi, standing for "quick bites," a streaming-video platform made to be watched on smartphones only, has already raised a billion dollars, despite not being slated for launch until April 2020.¹³² The platform is the brainchild of Meg Whitman, former CEO of eBay and Hewlett-Packard, and Jeffery Katzenberg, former chairman of Walt Disney Studios and CEO of DreamWorks Animation. Targeting the 25–35 year-old market, Quibi is planning to distribute content "as feature-length films, two hours or longer, that unfold in eight-or-so-minute chapters," similar to act breaks of traditional TV shows.¹³³ Despite Katzenberg quipping that "'What [they're] setting out to do falls somewhere between improbable and impossible,'"¹³⁴ by bringing together these Silicon Valley and Hollywood powerhouses, the odds of success, from a personnel standpoint and their ability to attract A-list talent, are stacked in their favor. While their approach to content production and distribution is unprecedented, its existence alone is sure to have an impact on the industry. On the whole, the seemingly endless release of high-quality original content on ever-evolving platforms demonstrates the power of streaming content and the shift it is creating in the industry.

Year, DEADLINE (Apr. 11, 2019, 4:38 PM) <https://deadline.com/2019/04/star-wars-franchise-coming-to-disney-within-first-year-after-launch-1202594388> [<https://perma.cc/3PYU-R6QF>].

130. See *id.*; see also *New Star Wars and Marvel Series Announced for Disney+ Streaming Service*, WALT DISNEY CO. (Nov. 8, 2018), <https://www.thewaltdisneycompany.com/new-star-wars-and-marvel-series-announced-for-disney-streaming-service> [<https://perma.cc/7NR2-63VX>].

131. See Mike Sorrentino & Joan E. Solsman, *Disney Plus: Everything to Know About Disney's Streaming Service*, CNET (Mar. 3, 2020, 9:10 AM), <https://www.cnet.com/news/disney-plus-streaming-service-everything-to-know-europe-uk-launch> [<https://perma.cc/DWG5-FJ8K>].

132. See Shelia Marikar, *Katzenberg and Whitman: Hollywood's New Odd Couple*, FORTUNE (Jan. 23, 2019, 3:30 AM), <http://fortune.com/longform/katzenberg-whitman-hollywood-mobile-streaming-quibi> [<https://perma.cc/SK92-TEYQ>]; Ashley Rodriguez, *Jeffrey Katzenberg's Vision for the Future of TV is Snackable Movies*, QUARTZ: STREAMING WARS (Mar. 9, 2019), <https://qz.com/1569423/jeffrey-katzenbergs-quibi-to-offer-snackable-movies-on-phones> [<https://perma.cc/557W-2H8P>].

133. Rodriguez, *supra* note 132.

134. *Id.*

III. ANALYZING GUILDS IN THE HOLLYWOOD OF TODAY AND TOMORROW

While it is clear that the entertainment industry has changed drastically over the past ten years, the same cannot be said for change in guild membership, structure, negotiation strategy, and its contracts. The guilds have generally been supportive of new technologies and have added additional contracts to cover new types of content and distribution models, but have the guilds been proactive enough to ensure clarity or are they behind in a game of catch-up? While the changing tides have a minor effect on the DGA, WGA and SAG members have seen, and likely will continue to see areas of guild coverage in need of improvement. Likewise, the production and distribution sides are also affected by archaic MBAs, which will likely work to raise the costs of production to the point it may even be stifled. From a studio standpoint, in addition to the need to better compete in the growing market, are mergers and the new models of content distribution additionally working to keep residual payments, which increase production costs, at bay?

A. *Guild Agreements in Today's Industry Model*

“[T]he plethora of new media has obviously touched every aspect of production in the entertainment industry and has become an important and often contentious part of the collective bargaining process for the guilds when negotiating against the AMPTP.”¹³⁵ The guilds have made strides to update their current agreements and negotiate new contracts covering new types of production and distribution models, but the effort has been slow. The DGA first addressed exploitation of new media in 2002, with “a sideletter covering pay-per-view and subscription exhibition via the Internet. In 2008, the DGA negotiated formulas for electronic sell-through, ad-supported streaming, and the reuse of made for new media productions.”¹³⁶ Then in 2017, the DGA negotiated an unprecedented improvement to its 2014 formula for high-budget dramatic made-for-SVOD content.¹³⁷ In its last round of negotiations, the DGA also obtained the right to negotiate with Netflix over terms for feature-length high-budget SVOD programs.¹³⁸

135. Kim, *supra* note 4, at 19.

136. *History of Residuals*, DIRECTORS GUILD AM., <https://www.dga.org/The-Guild/Departments/Residuals.aspx> [https://perma.cc/8HYZ-6URG].

137. *Id.*

138. Jonathan Handel, *WGA Deal Decoded: Big TV Gains but Movie Writers Have Less to Celebrate*, HOLLYWOOD REP. (May 2, 2017, 7:39 PM), <https://www.hollywoodreporter.com/news/wga-deal-addresses-problems-could-raise-cost-sag-aftra-deal-999819> [https://perma.cc/4LK4-5FHV]; see *DGA Membership Ratifies New Contract by Overwhelming Margin*, DIRECTORS GUILD AM., <https://www.dga.org/News/PressReleases/2017/170125-DGA-Membership-Ratifies-New-Contract-by-Overwhelming-Margin.aspx> [https://perma.cc/ZPZ4-5PVB] (These negotiations, which began on December 5, 2016, led to the DGA's current contract which runs through June 30, 2020).

SAG's "New Media Agreement," established in 2014 and updated in 2017, specifically covers SVOD, which has not been integrated into its theatrical and television agreements, like the other guilds have done. Because SAG represents the largest number of members across a vast area of the entertainment industry, it has the most agreements of the three guilds. Yet, SAG still does not have an agreement covering the specific Netflix model of film distribution, leaving them and others free to contract under whichever agreement they find most fitting (theatrical, new media, etc.) until the guild raises a red flag. Further, SAG's Global Rule One prevents its members from performing on popular non-SAG signatory platforms, like YouTube. With the recent attempts to unionize creators of online content (e.g., bloggers and YouTube personalities), it is apparent that the possibilities in this realm are just beginning.¹³⁹

The WGA is the farthest ahead of the three guilds, perhaps due in part to its past history of arduous yet effective strikes. Its current single-document MBA, negotiated in 2017, provides for increased basic compensation and residuals across the new media platforms, accounting for many of the concerns of TV writers, while leaving screenwriters closer to the status quo.¹⁴⁰ Despite feverish pushback, the WGA succeeded in getting its members significant residual increases for SVOD programming, a win that SAG and DGA also hope to achieve.

B. *Distribution Models' Effect on Back-End Revenue and Residual Payments of Guild Members*

The guilds' push to receive higher payment on residuals is due in large part to the increasingly blurred definition of reuse and the lessened subsequent revenue opportunities. Determining residual payments and anticipated revenue was much easier in a time where we were "wedded to the broadcast schedule or dependent upon proximity to a video store."¹⁴¹ There were fairly standard rules for reuse and when residuals kicked in, but technological advances have allowed us to break out from the schedule and watch programming at our leisure. It is clear that going forward, there won't be a "single delivery model that [will] dominate the home and mobile markets, leading to complications in how

139. See Julia Alexander, *YouTubers' First Organizing Attempt, the Internet Creators Guild, Is Shutting Down*, VERGE (July 11, 2019, 1:07 PM), <https://www.theverge.com/2019/7/11/20688929/internet-creators-guild-shutting-down-hank-green-youtube-copyright-claims-monetization> [<https://perma.cc/24RM-EFDR>] (describing the three-year rise and fall of the Internet Creators Guild); see also Jordan Summers, *YouTube Answers Union's Calls for More Transparency and Fairness*, OBSERVER (Oct. 18, 2019, 10:03 AM), <https://observer.com/2019/10/youtube-meeting-youtubers-union-jorg-sprave> [<https://perma.cc/3WTU-X62U>] (describing YouTubers' most recent organization efforts and the pushback by YouTube's parent company, Google).

140. Handel, *supra* note 138.

141. TRYON, *supra* note 75, at 3.

movies [and television] are distributed and exhibited.”¹⁴² Research has shown that as generations have grown up with streaming, it has become their predominant means of obtaining content and shows no signs of slowing down.¹⁴³

Further, as more producers begin to distribute their own content in a direct-to-consumer model, there will be less money coming in as license fees, affecting the numbers going into the residual formula. The persistent availability of movies through various VOD services has altered the value of DVD and EST sales, as seen through the decline in “urgency to own copies of individual films, taking away one of the primary sources of income for moviemakers” and profit participants.¹⁴⁴ Additionally, the perpetual availability of content on Netflix makes it “difficult to sell that content to other distributors, such as cable channels, thus devaluing one of the primary distribution windows: ‘Once you put it on Netflix, you really can’t sell it anywhere else.’”¹⁴⁵

Disney as an example, will release its forthcoming movies in theatres for the usual three to four-month time frame and then license to make them available for sale or rent through EST and physical sales.¹⁴⁶ This is where the longrunning model stops. Instead of next “licensing to premium pay or ad-supported services, a Disney movie will go to [Disney+]” or possibly Hulu, depending on the movie’s rating.¹⁴⁷ “This is a radical change from the current practice of all the major studios as well as the mini-majors in the U.S.”¹⁴⁸ This results in Disney giving up over \$150 million of license fees on a hit movie in “exchange for a hoped-for profit margin on subscription revenue that domestically will run around \$6 to \$8 per subscriber per month.”¹⁴⁹

While this bet may pan out well for Disney, it is unclear how it will affect new use and residual payments relying on license fees. Furthermore, since Disney will essentially be licensing to itself, it is uncertain whether this will result in lower-than-average license fees. Perhaps Disney will use a similar model to that of Netflix who has been employing this model for some time but has kept its formulae secret to the industry. It is conceivable that the recent \$179 million arbitration ruling, including \$128 million in punitive damages, against Fox for its “cavalier attitude” towards its “intentional acts of fraud and malice” in its payment of licensing fees to its corporate sibling for the series “Bones” will motivate the industry to be more transparent with their

142. *Id.* at 31.

143. See Laura Albert, *Gen Z Is All About Streaming*, Civic Sci. (May 12, 2016), <https://civicscience.com/gen-z-streaming> [<https://perma.cc/QDU2-JT6M>].

144. TRYON, *supra* note 75, at 3.

145. *Id.* at 33.

146. Ziffren, *supra* note 10.

147. *Id.*

148. *Id.*

149. *Id.*

accounting.¹⁵⁰ If upheld, “the damages award would rank among the largest judgments in favor of profit participants in Hollywood history.”¹⁵¹

Conversely we may find an answer through the 2017 lawsuit, *Kirkman v. AMC Film Holdings LLC*, which will have courts weigh in on how to deal with licensing deals in vertically integrated companies, in this case, AMC Studios as the producer and AMC Network as the distributor.¹⁵² The complaint points to the fact that AMC “was effectively negotiating [licensing fees for *The Walking Dead*] with itself . . . [and] alleges that the company ended up lowballing the fees, ultimately taking money from the creator’s pockets in the process.”¹⁵³ It further points to licensing deals made between other producers and AMC Network that were negotiated at much higher rates.¹⁵⁴ With more mergers likely on the horizon, it’s plausible that this case will only be the first in the fight for talents’ share of profits.

C. *Distribution Models’ Effect on Production Costs via Residual Payments*

Historically, the general impact of the guild’s mission has increased the cost of a production in several ways, specifically through minimum pay scales and requiring the payment of residuals, the effect of which have become more pronounced.¹⁵⁵ Because residuals are not based on profits, even if a film loses money, producers still have to pay residuals for each reuse.¹⁵⁶ But, residuals are a necessity “because talent—especially actors, writers, and [television] directors—survive on them between gigs. . . . Without these payments, the industry’s professional talent base would evaporate.”¹⁵⁷

Ignoring the rise of the direct-to-consumer model for a moment, residuals must be paid for television reruns, on demand plays (after a negotiated period

150. See Gene Maddaus, *Fox Ordered to Pay \$179 Million to ‘Bones’ Profit Participants*, VARIETY (Feb. 27, 2019, 10:41 AM), <https://variety.com/2019/biz/news/fox-bones-arbitration-emily-deschanel-179-million-1203150879> [<https://perma.cc/QSZ7-7HGX>].

151. *Id.*

152. See *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. filed Aug. 14, 2017).

153. Erik Kain, *What Robert Kirkman’s Lawsuit Against AMC Could Mean for the Future of ‘The Walking Dead’*, FORBES (Sept. 10, 2017, 2:50 PM), <https://www.forbes.com/sites/erikkain/2017/09/10/what-robert-kirkmans-lawsuit-against-amc-could-mean-for-the-future-of-the-walking-dead/#16ad049b421d> [<https://perma.cc/Z4MP-AC4H>].

154. *Id.* (“Lionsgate was earning \$4 million per episode of *Mad Men* by the end of its run, whereas the much more popular *Walking Dead* is only paying \$1.87 to \$2.4 million per episode now, which is not much more than the \$1.45 million per episode way back in Season 1.”).

155. MOORE, *supra* note 3, at 66–67.

156. Su Fang Tham, *Mo Money, No Problems: A Producer’s Guide to Residuals*, FILM INDEP. (Feb. 12, 2018), <https://www.filmindependent.org/blog/mo-money-no-problems-producers-guide-residuals> [<https://perma.cc/JCR5-7Q9U>].

157. Catherine L. Fisk, *The Writer’s Share*, 50 SUFFOLK U. L. REV. 621, 623 (2017) (quoting JONATHAN HANDEL, *HOLLYWOOD ON STRIKE!: AN INDUSTRY AT WAR IN THE DIGITAL AGE* 473 (2011)).

of time) and off license fees for physical sales and rentals, all types of VOD, and EST to name a few. This list will continue to grow; it is still unknown how the increasing number of distribution platforms and exhibition opportunities will affect the ultimate amount of residual payments over time. However, with the continued increase in residual amounts paid and the growing number of distribution avenues, one would begin to wonder when producers will hit a cost prohibitive zone. Residuals for writers “have been booming, increasing every year since 2009,” yet most of the increase has been seen in television and new media.¹⁵⁸ As writers’ earnings continue to decline due to the changing media landscape, to help stabilize incomes, the guild might make an argument for adjusted “residuals formulae to give [writers] a larger share of the reuse pie.”¹⁵⁹

There are several viewpoints to consider here. From a television standpoint, consumer habits might change along with the influx of content and reuses will decline, but perhaps they won’t. Maybe these megamergers will continue to lead to more direct-to-consumer distribution as a way of leveling off the growing pot of residuals, but perhaps it won’t. This is a lot of conjecture and only time will tell how this will play out. What remains to be true is that residuals aren’t going anywhere and the battle between the guilds and the AMPTP is just waiting for the next round of contract negotiations to begin.

IV. HOW CAN GUILDS ADAPT?

Given the history of the guilds in Hollywood, it is quite apparent that the guilds and their members have the upper hand in future negotiations, and studios will have an uphill battle if they try to counteract the implication of the emergence of new media and paying residuals on a growing number of distribution platforms. As it stands, the guild agreements work to increase the cost of production, are fractured, and are highly tailored to different roles within the industry. As the media landscape grows and becomes littered with additional distribution channels, this will only further complicate the very convoluted dealings between the guilds and content producers.

However, as we are beginning to see, more producers may retreat into a direct-to-consumer model as a cost-saving measure. In addition to the threat of lower licensing fees, as alleged in *Kirkman v. AMC Film Holdings LLC*, this model removes several windows of exploitation from the residual calculation.¹⁶⁰ This may result in talent seeing fewer residual payments, the exact

158. David Robb, *Is TV Writers Income in Decline? Fact-Checking WGA Leaders’ Claims in Pre-Negotiations Manifesto*, DEADLINE (Feb. 17, 2017, 10:40 AM), <https://deadline.com/2017/02/writers-guild-tv-wga-contract-negotiations-1201914404> [<https://perma.cc/3FCN-VGD6>].

159. *Id.*

160. See Complaint at 3, *Kirkman v. AMC Film Holdings LLC*, No. BC672124 (Cal. Super. Ct. filed Aug. 14, 2017) (“As a consequence, when the production company and the network are part of the same conglomerate, as AMC Studios and AMC Networks are

opposite of what the guilds have fought so hard for. From a talent perspective, perhaps less back-end revenue opportunities mean that minimum initial compensation should be higher. This would not only generally assist talent in the loss of some residuals and new use payments, but may also help talent who work on less successful films or television shows, that are subject to less reuse and thus lower residual payments. The path forward in Hollywood's current business model is not a definitive one; it requires complex analyses and speculation to even begin to come to a practical solution.

The guilds should explore some ideas including the consolidation of agreements, increased standardization across guilds, and larger up-front payments to talent in lieu of residuals, as is happening at Netflix where star talent are being lured by much larger salaries in exchange for not sharing in any upside.¹⁶¹ Currently, SAG has over ten agreements just to cover television and theatrical production, in addition to many others covering different forms of content like new media, audiobooks, and commercials.¹⁶² On the other hand, the DGA and WGA have far fewer agreements, with many accounting for different content, like low-budget and high-budget productions, within the same agreement. Because each guild signatory production will likely have different talent represented by each of the three guilds, a DGA director, WGA writer, and SAG actor, it becomes time-consuming and expensive to ensure compliance with each guild requirement.

On the agreements side, the sheer number of specialized contracts makes it difficult to ensure that a producer is contracting under the appropriate terms. With the evolving types of production and distribution, it is becoming harder to neatly place a project into a definitive bucket, allowing for freedom of interpretation until the guild challenges the categorization and withholds approval. While there likely is a good amount of malfeasance by means of loopholes, there are likewise several instances of errors that occur in good faith. The fading distinction between television and theatrical has made it practical to rework definitions and consolidate some television production and film agreements. Yet, these delineations will need to be determined through a mutual agreement amongst content producers, distributors, and the guilds. This blurring will only continue to grow as a result of mergers and "the deregulation of media ownership [which have] produced conditions in which a single

here, there is a powerful financial incentive to keep the lion's share of the profit at the network level and not pay a fair-market-value license fee to the production company—thereby depriving profit participants . . . of their fair share of the series' profits.”)

161. See Justin Kroll & Brent Lang, *Leonardo DiCaprio, Margot Robbie and More 2019 Star Salaries Revealed*, VARIETY, <https://variety.com/2019/film/news/celebrity-salaries-leonardo-dicaprio-margot-robbie-dwayne-johnson-will-smith-1203200508> [https://perma.cc/XF5D-MPRU].

162. See *Contracts & Industry Resources*, *supra* note 33.

organization might include a cable company, a movie studio, cable channels, and a wide range and other media holdings.”¹⁶³

With Netflix, the leader in new media distribution, poised to become the next big media conglomerate,¹⁶⁴ guilds may also be under increased outside pressure to adapt. For example, it does not seem proper to have a Netflix original movie governed by a new media contract instead of a theatrical agreement. Nor does it make sense to have several different theatrical contracts, the use of which depends on the film’s initial distribution platform. The guilds have been playing catch-up through a number of channels, one being the negotiation of specific agreements outside of the typical three-year collective bargaining process, like the WGA’s virtual reality side letter to its MBA.¹⁶⁵ In order to prevent such measures in the future, the industry needs to be better able to settle on contract terms based on production costs and process, instead of mainly focusing on distribution method, which is becoming increasingly insignificant.

To ensure better compliance across the industry, it would be in the guilds’ best interests to consolidate agreements as much as possible and create consistency across guild agreements. While it is not feasible to have major points of standardization amongst the guilds themselves, the guilds could better serve their members by attempting some harmony, making industry execution easier. Many concerns within each guild’s membership, like residuals and minimum working conditions, echo across the industry and can serve as a starting point in making a push for consistency. The guilds already look to each other when negotiating with the AMPTP, basing their discussions on what the previous guild asked for and won, as seen with the WGA’s 2017 contracts, which essentially were “the same deal the DGA got in their [2016] negotiations.”¹⁶⁶

Maybe we revert back to the days when the WGA “considered residuals to be a betrayal of their ideal that writers should own their scripts and lease them to studios,” doing away with residuals altogether.¹⁶⁷ In effect, writers would no longer create “works-made-for-hire,” instead producers would pay for all uses, including the initial use, and “[w]riters would share in the profits

163. TRYON, *supra* note 75, at 8.

164. See Paul Bond, *Is Netflix Now the Eighth Big Media Conglomerate?*, HOLLYWOOD REP. (Apr. 17, 2018, 1:14 PM), <https://www.hollywoodreporter.com/news/is-netflix-now-eighth-big-media-conglomerate-1103485> [<https://perma.cc/VQ9S-SMVV>].

165. See Dave McNary, *Film News Roundup: Writers Guild Warns Members on Non-Union Virtual Reality Projects*, VARIETY (Nov. 6, 2017, 6:11 PM), <https://variety.com/2017/digital/news/writers-guild-warns-members-on-virtual-reality-projects-1202608557> [<https://perma.cc/CDG3-6N2Q>].

166. David Robb, *Streaming Services Will Pay a Lot More Residuals Under New WGA Pact*, DEADLINE (May 11, 2017, 3:11 PM), <https://deadline.com/2017/05/streaming-service-residuals-new-writers-guild-contract-gains-netflix-amazon-hulu-1202090397> [<https://perma.cc/25AW-9SQQ>].

167. Fisk, *supra* note 157, at 622.

when a film became a huge success in its theatrical run.”¹⁶⁸ This idea could be reworked to better apply to actors and directors. It remains indisputable that the increasing variety of distribution methods along with alterations in viewing practices has dramatically altered the Hollywood economy, yet it is uncertain whether guilds have correspondingly adapted.¹⁶⁹ Given the resulting change in Hollywood business practices, it makes sense to reevaluate historical guild practices. Despite my recommendation, this scenario is highly unlikely, as writers, in particular, have and likely will continue to strike “in order to protect residuals, as distribution through new technologies . . . threatens to undermine their rights.”¹⁷⁰

Lastly, I would look to the WGA to be the guild to start this charge, not simply because writers create a more tangible form of intellectual property, namely a script, but because its membership has historically been the most outspoken and has exhibited a penchant for effective striking.¹⁷¹ As a recent example, following the first ever vote to authorize a strike at a digital news site, the WGA boosted its representation of digital content creators by ratifying its first union contract with the editorial staff at Thrillist.¹⁷² Further, as a testament to the strength and perseverance of the WGA and its membership, I would be remiss to not mention the ongoing heated negotiations between the guild and the Association of Talent Agents (ATA), over a WGA-proposed updated code of conduct banning packaging fees and agency-affiliated production entities.¹⁷³ With negotiations at a standstill, the WGA ordered its members to fire agents who would not sign-on to the code of conduct and subsequently filed suit against four major agencies.¹⁷⁴ Without deeply diving into this complex issue, the WGA’s April 17, 2019 complaint against the four major agencies—WME, UTA, CAA, and ICM Partners—cites the agency practices at issue as a breach

168. *Id.*

169. TRYON, *supra* note 75, at 30–31.

170. Fisk, *supra* note 157, at 623.

171. See Kim, *supra* note 4, at 17.

172. See Dave McNary, *Thrillist Staff Ratifies First Union Contract Through Writers Guild of America*, VARIETY (Oct. 11, 2018, 3:19 PM), <https://variety.com/2018/digital/news/thrillist-staff-ratifies-first-union-contract-writers-guild-1202977520> [<https://perma.cc/V38E-LLJA>].

173. See Chris O’Falt, *Writers vs. Agents: 12 Things You Need to Know to Understand the WGA-ATA Standoff*, INDIEWIRE (Apr. 12, 2019, 5:27 PM), <https://www.indiewire.com/2019/04/writers-agents-wga-ata-writers-guild-of-america-association-of-talent-agents-1202057979> [<https://perma.cc/4CDE-U2S8>] (explaining that packaging essentially is when “agencies bundl[e] a project/script with talent from its ranks to sell a movie or TV show” in exchange for a tiered fee system to be paid by the producer to the agency).

174. See David Robb, *WGA Sues Big Four Agencies over Packaging Fees; Read WGAW Board’s Message to Members—Update*, DEADLINE (April 17, 2019, 4:22 PM), <https://deadline.com/2019/04/writers-guild-sues-agencies-packaging-fee-fight-1202597518> [<https://perma.cc/YZT4-KUW8>].

of fiduciary duty and unfair competition laws.¹⁷⁵ The WGA later dismissed its own lawsuit and instead answered and filed counterclaims in the federal antitrust cases CAA, WME, and UTA brought against the guild, which claim the guild is “engaging in an ‘unlawful group boycott.’”¹⁷⁶ Given the pending lawsuits and firm positions on both sides, all negotiations remain at a standstill with no resolution in sight. Notably, however, as of January 2020, after reaching deals with the WGA, the guild has approved more than 70 agencies to represent its members.¹⁷⁷ While this dispute does not have much relevance to this analysis or impact guild provisions in any way, the conflict has an overall impact on the industry, on the relations between the guilds—especially if production is impacted—and may serve to guide WGA negotiations with the AMPTP in 2020.

In contrast, both the DGA and SAG have a reputation of being quieter than the WGA and are less likely to spearhead change. While the guilds have supported each other during respective strikes, only one other industry group, the Teamsters, which represents animal handlers, drivers, couriers, and the like, has language in their contracts allowing some members to honor other guild picket lines.¹⁷⁸ Otherwise, guild members generally are required to honor their work commitments regardless of an allied guild’s strike, as was the case in 2007 when SAG instructed its members to continue work and support striking WGA members on their own time.¹⁷⁹ SAG still exhibited a strong show of support during the 2007–2008 WGA strike by sending representatives to attend negotiations and telling them that, “[y]our fight is our fight.”¹⁸⁰ Furthermore, given SAG’s vast and diverse membership, it likely would be difficult for leadership

175. See Complaint, *Writers Guild of Am., W., Inc. v. WME Entm’t*, No. 19SMCV00725 (Cal. Super. Ct. filed Apr. 17, 2019).

176. David Robb, *WGA Drops Lawsuit Filed in State Court Against Big 4 Agencies, Consolidates Claims in Federal Court—Update*, DEADLINE (Aug. 19, 2019, 3:19 PM), <https://deadline.com/2019/08/wga-withdraws-talent-agency-lawsuit-state-court-caa-wme-uta-1202671876> [<https://perma.cc/LTB4-KHW9>]; see also *William Morris Endeavor Entm’t, LLC v. Writers Guild of Am., W., Inc.*, No. 2:19-cv-05465-AB-FFMx, 2020 U.S. Dist. LEXIS 17917 (C.D. Cal. Jan. 26, 2020).

177. See Dave McNary, *APA Reaches Deal with Writers Guild of America*, VARIETY (Jan. 21, 2020, 4:23 PM), <https://variety.com/2020/film/news/apa-deal-writers-guild-of-america-1203475114> [<https://perma.cc/3PPE-AHAM>].

178. See Carl DiOrio, *Actors Get WGA Ground Rules*, HOLLYWOOD REP. (Oct. 25, 2007, 5:00 AM), <https://www.hollywoodreporter.com/news/actors-get-wga-ground-rules-153303> [<https://perma.cc/VWV7-YA67>]; see generally *Motion Picture & Theatrical Trade Division*, TEAMSTERS, <https://teamster.org/divisions/motion-picture-theatrical-trade> [<https://perma.cc/ZL7Z-XNAN>].

179. See DiOrio, *supra* note 178.

180. Nikki Finke, *SAG To WGA: “Your Fight Is Our Fight”*, DEADLINE (Dec. 16, 2007, 10:07 PM), <https://deadline.com/2007/12/sag-to-wga-your-fight-is-our-fight-4443> [<https://perma.cc/A23W-XWBR>].

to place a large focus on changing their approach to film and television production. Thus, the WGA is the best positioned to lead the charge for change.

CONCLUSION

It appears that we are speedily racing towards a breaking point where guild members do not believe they are getting a fair share of profits and producers see business being stifled because of increasing costs, namely from residual payments. With the growing number of distribution methods and the direct-to-consumer model serving to inversely affect costs on the producer and guild sides, it remains to be seen whether or not the guilds will continue their ongoing fight for residual payments or begin to adapt to the new Hollywood business model. Yet, it is certain that the guilds will feel more pronounced effects from the evergrowing number of standalone and supplemental SVOD platforms. It is further possible that as a result of major media mergers, these conglomerates will place increased pressure on the guilds to change in order to reduce costs and simplify contract compliance across the industry. The guilds' reliance on their outdated stance will likely disservice their members if content producers and distributors continue to evolve in response to the changing media landscape while the guilds progress at a glacial pace. There are several wide-reaching avenues for change that can be implemented without the need to adhere to the conventional three-year bargaining process, including the consolidation of agreements, increased standardization across guilds, and larger up-front payments to talent in lieu of residuals. These actions should help combat some of the studios' pressure to cut costs and allow for clearer guidance and better compliance across the industry.

