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Bernadette A. Safrath
Touro Law Center

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Cover Page Footnote

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HOW IMPROVEMENTS IN TECHNOLOGY HAVE AFFECTED THE ENTERTAINMENT INDUSTRY: WRITERS AND ACTORS FIGHT FOR COMPENSATION

*Bernadette A. Safrath**

The rise in the use of technology, and the creation of new media, has left the entertainment industry at a loss as to how to compensate the creative minds that are starting to work in new media. The rise in new media, a predominant factor in the 2007-2008 writers strike and this year's almost-strikes of the two actors' guilds, has forced the entertainment industry to adapt to the changes in technology, and create compensation plans for those that work in new media.

I. INTRODUCTION

Hollywood seems like a glamorous world to outside observers. Behind the scenes, however, the creative bodies of Hollywood's entertainment industry function similarly to employees in other industries. Writers and actors are protected by unions who bargain on their behalf.¹ The result of this bargaining leads to contracts dictating how writers and actors are to be compensated for their work.²

* J.D. 2010 Touro College, Jacob D. Fuchsberg Law Center.

¹ See Screen Actors Guild, Mission Statement, <http://www.sag.org/about-us/mission-statement> (last visited Nov. 12, 2008); AFTRA, What is AFTRA?, <http://www.aftra.com/aftra/whatis.htm> (last visited Nov. 12, 2008); WRITERS GUILD OF AMERICA, WEST, WHO WE ARE, GUIDE TO THE GUILD (2009), http://www.wga.org/uploadedFiles/who_we_are/fyiwho.pdf; Writers Guild of America, East, What We Do, [http://www.wgaeast.org/index.php?id=319&tx_ttnews\[tt_news\]=174](http://www.wgaeast.org/index.php?id=319&tx_ttnews[tt_news]=174) (last visited Nov. 12, 2008).

² WRITERS GUILD OF AMERICA & ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS THEATRICAL AND TELEVISION, 2004 MINIMUM BASIC AGREEMENT (2004), http://wga.org/uploadedFiles/writers_resources/contracts/MBA04.pdf [hereinafter 2004 MINIMUM BASIC AGREEMENT]; SCREEN ACTORS GUILD, 2005 CONTRACT SUMMARY: THEATRICAL MOTION PICTURES AND TELEVISION (2005), <http://www.sag.org/files/documents/theatrical-tv.pdf> [hereinafter SAG 2005 CONTRACT SUMMARY]; AFTRA, NETWORK TV

Writers are protected by the Writers Guild of America, West (“WGAW”) and the Writers Guild of America, East (“WGAE”), collectively the Writers Guild of America (“WGA”).³ Actors are protected by the Screen Actors Guild (“SAG”) and/or the American Federation of Television and Radio Artists (“AFTRA”).⁴ Every three years, the contracts between the writers and actors and the Alliance of Motion Picture and Television Producers (“AMPTP”) expire and must be renegotiated.⁵

Writers have always sought compensation based on profits from new entertainment mediums. The most recent dispute was about the growing popularity of new media technologies (e.g. content appearing on the Internet), which led to the 2007-2008 Writers Strike.⁶ Actors, too, are feeling under-compensated from this growing medium of new media. AFTRA and SAG have requested that a residuals plan for new media be added to their newest contracts.⁷

Contract negotiations for writers and actors have always come to an impasse when discussing compensation for programs created for the newest technologies, whether it is DVDs or the rising new media.⁸ It is time for the AMPTP to take notice; to learn the new and growing technology that is new media, because it is the future of entertainment. Writers and actors must be compensated for all their work and the AMPTP must properly compensate them from profits generated by new media. Just as the AMPTP finally understood that DVDs were a new, though now greatly successful, technology, they must now recognize that new media is only going to become more

CODE, 2007-2010 RATES (2008), http://www.aftra.org/contract/07_10_Netcode_Rate_Sheet.pdf [hereinafter AFTRA RATE SHEET].

³ Writers Guild of America, East, What We Do, *supra* note 1; WRITERS GUILD OF AMERICA, *supra* note 1.

⁴ Screen Actors Guild, *supra* note 1; AFTRA, *supra* note 1.

⁵ 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at 27; SAG 2005 CONTRACT SUMMARY, *supra* note 2; AFTRA RATE SHEET, *supra* note 2.

⁶ Todd Leopold, *Changing Media Landscape Takes Center Stage in Strike*, CNN.COM, Nov. 8, 2007, http://www.cnn.com/2007/SHOWBIZ/TV/11/08/strike_impact/index.html.

⁷ Screen Actors Guild, Why SAG is Holding the Line, http://www.sag.org/files/documents/Holding_The_Line.pdf (last visited Sept. 9, 2009).

⁸ See AFTRA, History, <http://www.aftra.org/aftra/history.htm> (last visited Sept. 11, 2009) (noting occurrence of strike in 1980 by members of AFTRA and SAG over compensation for videocassettes and pay TV); Marc Norman, *Happy Ending for Writers*, SALON.COM, Feb. 15, 2008, <http://www.salon.com/ent/feature/2008/02/15/strike/> (noting the occurrence of “[s]trikes in 1985 and 1988 over the New Media of its day, payments for reuse on VHS tapes and later DVDs” by the WGA).

prevalent. Further strikes will only be avoided when the AMPTP allows these advances to continue, and creates a compensation plan for this new medium. The industry has not suffered from the growth in videocassette, DVD, or Blu-ray sales, in fact, it has expanded.⁹ The next medium for viewing movies and television programs is the Internet. This can only benefit the industry, expanding audiences for content that now streams all over the world, just as it did when the medium expanded from radio to television to videocassette and DVDs. The AMPTP must look at how new media created profitable markets in the past and embrace this technology. The rise in new media will bring further success to the television and motion picture industries.

II. NEW MEDIA

New media, also called “digital media” or “rich media,” is a new and growing medium for writers and actors.¹⁰ The rapid development of new media in recent years has spurred a demand for standards that will recognize its continued growth in the future.¹¹ Just as union standards had to meet the compensation demands of past technology, such as the radio in the 1930s or television in the 1950s, union standards now must also meet the standards of this new media technology.¹²

New media material includes television programs and movies that are broadcast over the Internet.¹³ Additionally, television studios advertise their Internet programs on BlackBerry, Verizon’s V Cast, and the iPhone.¹⁴ These “Smartphones” receive media text messages,

⁹ Sharon Waxman, *Studios Rush to Cash In On DVD Boom; Swelling Demand for Disks Alters Hollywood’s Arithmetic*, N.Y. TIMES, Apr. 20, 2004, at E1; See also WGA Contract 2007 Proposals, http://www.wga.org/subpage_member.aspx?id=2485 (last visited Nov. 17, 2008) (“Industry analysts predict that home video will continue to be a very important revenue stream for years to come.”).

¹⁰ American Federation of Television & Radio Artists, New Media Special Report, http://www.aftra.com/aftraflash/07_12_20rm.html (last visited Nov. 17, 2008) [hereinafter AFTRA Special Report].

¹¹ See *id.* (noting that AFTRA is working to implement standards for new media).

¹² *Id.*

¹³ Screen Actors Guild, New Media Glossary, <http://www.sag.org/content/new-media-glossary> (last visited Nov. 17, 2008) [hereinafter SAG New Media Glossary]; Writers Guild of America, West, New Media Bulletin, Frequently Asked Questions, http://www.wga.org/subpage_member.aspx?id=2469 [hereinafter WGA New Media Bulletin].

¹⁴ Chet Wesley, *Smartphones, The Future of TV?*, SUITE101, May 25, 2008, http://mobile.technology.suite101.com/article.cfm/smartphones_smart_ads_smart_move.

play media and connect to the Internet.¹⁵

New media also includes television shows that are sold on iTunes.¹⁶ In addition to the shows that can be purchased on iTunes, television networks, including ABC and NBC, have made full episodes of their shows available online for the viewer's convenience.¹⁷ Moreover, the private company Comcast created Fancast.com, which provides full episodes of hundreds of shows, including many that are no longer on the air.¹⁸ Additionally, cable companies, like Verizon and Cablevision, provide "on demand" capabilities for their set-top boxes, meaning viewers can watch many programs, commercial-free, at any time.¹⁹

Writers' and actors' unions have now requested compensation and residuals for their work in new media.²⁰ They want a greater share of the residuals from the so-far unknown profits of new media.²¹ The actors of SAG, who are still in negotiations with the AMPTP, are also requesting residuals from new media.²² Although the exact revenue that will be generated is speculative, a method of compensation must be put in place.

The AMPTP has historically been a step behind when it comes to media technology. It is the unions that have shown the AMPTP the success of the mediums, from radio in the 1930s to television in the 1950s, and in more recent decades, DVD sales.²³ The AMPTP should trust that the creative bodies in the entertainment industry know what mediums will be successful. People are no longer just watching TV. They are using their cell phones and the

¹⁵ SAG New Media Glossary, *supra* note 13.

¹⁶ WGA New Media Bulletin, *supra* note 13.

¹⁷ ABC.com, Full Episode Player, <http://abc.go.com/player/> (last visited Nov. 13, 2008); NBC Video Library, <http://www.nbc.com/Video/library/full-episodes/> (last visited Nov. 13, 2008).

¹⁸ Fancast Home Page, <http://www.fancast.com> (last visited Nov. 17, 2008).

¹⁹ Optimum Online, Free On Demand, http://www.optimum.com/io/on_demand/free/index.jsp (last visited Nov. 17, 2008); Verizon FiOS TV, Interactive Media Guide, <https://www22.verizon.com/Residential/FiOSTV/MediaGuide/MediaGuide.htm> (last visited Nov. 17, 2008).

²⁰ Sam Schechner, *This Writers' Strike Feels Like a Rerun From 1988*, WALL ST. J., Nov. 12, 2007, at B1.

²¹ *Id.*

²² Screen Actors Guild, Contract 2008 Update, Aug. 15, 2008, <http://www.sag.org/negotiations-up-date>.

²³ AFTRA Special Report, *supra* note 10; Waxman, *supra* note 9, at E1.

Internet to get access to television shows and movies.²⁴ Writers and actors deserve to be compensated for, or receive residuals for, all work done for new media.

III. THE WRITERS GUILD OF AMERICA

A. What is the Writers' Guild?

The WGA began in 1954 as a labor union recognized by the National Labor Relations Board ("NLRB").²⁵ The WGAE and the WGAW are affiliated unions and work together to negotiate collective bargaining agreements or minimum basic agreements for their member writers.²⁶

B. The 2004 Minimum Basic Agreement

The WGA contracts are the result of collective bargaining negotiations with the AMPTP.²⁷ The contract, a Minimum Basic Agreement ("MBA") for motion picture and television writers, lasts three years, usually from November 1 to October 31.²⁸ In addition to the MBA, there are additional contracts, including standard contracts, as well as contracts that now provide compensation for writers working in new media.²⁹

The MBA provides protection for motion picture and television writers, including compensation for their work.³⁰ There are set minimum rates that writers must be paid. For example, a non-primetime writer working on a high budget sixty-minute show must be paid \$8431.00 per story and \$14,602.00 per teleplay or script.³¹ If a writer did both a story and a teleplay, the network would get a

²⁴ See WGA New Media Bulletin, *supra* note 13 (noting use of Internet and cell phones to access video media and rising revenues created by streaming and downloading from new media sources).

²⁵ Writers Guild of America, East, A Brief History, [http://www.wgaeast.org/index.php?id=285&tx_ttnews\[tt_news\]=499&tx_ttnews\[backPid\]=-1&cHash=f86b0e24df](http://www.wgaeast.org/index.php?id=285&tx_ttnews[tt_news]=499&tx_ttnews[backPid]=-1&cHash=f86b0e24df) (last visited Sept. 9, 2009).

²⁶ *Id.*

²⁷ See generally 2004 MINIMUM BASIC AGREEMENT, *supra* note 2.

²⁸ *Id.*

²⁹ Writers Guild of America, West, Contracts & Compensations, <http://www.wga.org/content/default.aspx?id=1027> (last visited Nov. 17, 2008).

³⁰ See 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at 71-113.

³¹ *Id.* at 88.

bargain rate, having to pay only \$21,078.00.³² Additionally, writers receive 0.3% in DVD residuals for the first \$1 million in sales and 0.36% for anything sold thereafter.³³ As a result, a writer gets less than a nickel for each DVD that is sold.³⁴ This was one of the contentious issues during the 2007 negotiations.³⁵ The writers felt that five cents was not sufficient and requested that the percentages be doubled to 0.6% and 0.72% per DVD sold.³⁶

A search of the Table of Contents of the 2004 MBA finds that there was no mention of new media or compensation for anything created outside of motion pictures and television.³⁷ At the time the 2004 MBA came into effect, new media was still in its early stages. The dramatic growth of the technology since 2004 made it obvious that new media compensation would have to become a part of the 2007 MBA.³⁸ On October 22, 2007, when negotiations with the AMPTP reached an impasse—particularly on the issue of new media technology—the guild members voted to authorize a strike.³⁹

Although the AMPTP continued to voice its concerns that new media was not a viable market, one of the AMPTP companies, Paramount, spoke about the early revenue being generated, giving the WGA the ammunition it needed to continue the new media fight.⁴⁰ A spokesperson for Paramount, Tom Lesinski, said, “[t]here is a revenue being created today. It’s not a lot, but we’re not losin[g] money.”⁴¹ If profits existed back then, no matter how small, a formula should have been created to provide the writers with the compensation they deserved.

³² *Id.* at 89.

³³ WGA Contract 2007 Proposals, *supra* note 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at i-xii.

³⁸ See WGA Contract 2007 Proposals, *supra* note 9.

³⁹ Posting of The N.Y. Times to The N.Y. Times Media Blog, <http://tvdecoder.blogs.nytimes.com/2008/02/12/the-100-day-writers-strike-a-timeline/> (Feb. 12, 2008, 22:37 EST) [hereinafter The 100-Day Writers’ Strike].

⁴⁰ The Media Pundit, Paramount Admits Streaming Profits at CES, <http://www.media.pundit.net/2008/01/paramount-admits-profits-at-cs.html>. (Jan. 9, 2008 13:45 PST).

⁴¹ *Id.*

C. The Strike

1. *The Cause*

With the 2004 MBA set to expire on October 31, 2007, the WGA began negotiating a new contract with the AMPTP.⁴² There were several issues that the parties were unable to reach agreement on—mainly DVD residuals and new media technology. Therefore, on October 22, 2007, the WGA voted to strike as soon as the 2004 MBA expired on October 31.⁴³ The WGA had proposed an increase of DVD residuals because the then-current percentages of 0.3% and 0.36% had been initiated in 1985 and had not been increased in twenty-three years.⁴⁴ In response to the WGA's proposal, the AMPTP claimed that the lack of increase was justified, because DVD sales pay for the "rising marketing and production costs" of big budget films that barely break even at the box office and that once DVD sales are available for download (as easy as music), DVD sales will rapidly decline.⁴⁵ However, this reasoning is unsound. Even back in 2004, the box office brought in \$1.78 billion and DVD revenue was \$4.8 billion.⁴⁶ DVD sales have created an influx of revenue from people looking for films that were unsuccessful at the box office, but became cult classics on videocassette, and cancelled TV shows that people want to watch from beginning to end.⁴⁷

One of the issues that led to the 1988 Writers Strike was whether the release of movies and television shows on videocassette would destroy the movie industry.⁴⁸ When dealing with the compensation issue back then, the AMPTP reasoned that, since "the environment [was] uncertain," writers would be taken care of at a later date.⁴⁹ Twenty years later, however, the writers are still only getting four cents per videocassette, DVD, or Blu-ray sold.⁵⁰ While

⁴² The 100-Day Writers' Strike, *supra* note 39.

⁴³ *Id.*

⁴⁴ WGA Contract 2007 Proposals, *supra* note 9.

⁴⁵ Richard Verrier, *Writers Guild Votes 90% in Favor of Strike*, L.A. TIMES, Oct. 20, 2007, at C-1; Waxman, *supra* note 9, at E1.

⁴⁶ Waxman, *supra* note 9, at E1.

⁴⁷ *Id.* at E1.

⁴⁸ Walaika Haskins, *Writers Strike: New Media: Old Scores*, TECHNEWSWORLD, Nov. 6, 2007, <http://www.technewsworld.com/story/60181.html?wlc=1249241944>.

⁴⁹ *Id.*

⁵⁰ *Id.*

the release of videocassettes was unknown territory at the time, sales have skyrocketed since then, and the industry is obviously successful.⁵¹

The same can be said of the digital media industry now. While it is still in its infancy, new media has already proved to be popular and successful. Internet streaming and downloads created a revenue of \$99 million for movie companies, plus \$133 million to television studios like ABC, NBC, and CBS.⁵² By 2011, that revenue is predicted to reach \$1.8 billion, generated from Internet movies and \$950 million for downloads of television shows.⁵³ While the increase is speculative, it seems unfair that the AMPTP claims there is no revenue when initial revenue was already revealed by Paramount—an AMPTP company.⁵⁴

Because of the likely increase in revenue, the WGA also proposed that the TV minimums be put in place for Internet writing and other new digital technologies.⁵⁵ The Internet, the WGA believed, was becoming television, and the WGA wanted to minimize the differences between writing for television and writing for the Internet to ease the transition as the Internet became a more prevalent location for watching programs.⁵⁶ The AMPTP argued that it was too early to establish payment formulas for writers whose work was available online, because the technology was rapidly changing and the AMPTP was still dealing with an “uncertain business model[.]”⁵⁷ Karen Harris, a writer for the ABC soap opera *General Hospital*, commented in an interview with soap opera related website, *Daytime Confidential.com*, that the AMPTP was adamant that there was no business in producing for the Internet.⁵⁸ The AMPTP was against any forward movement into new media because it did not know how it would work and it did not know how to do it.⁵⁹ However, even as the AMPTP argued this, it was already collecting

⁵¹ *Id.*

⁵² *Id.*

⁵³ Haskins, *supra* note 48.

⁵⁴ See Paramount Admits Streaming Profits, *supra* note 40.

⁵⁵ WGA Contract 2007 Proposals, *supra* note 9.

⁵⁶ *Id.*

⁵⁷ Verrier, *supra* note 45, at C-1.

⁵⁸ Podcast: D.C. #286: Karen Harris & Life in General Interview, <http://daytimeconfidential.com/2008/08/dc-286-karen-harris-life-in-general-interview> (Aug. 18, 2008, 15:20 PST).

⁵⁹ *Id.*

revenue from media streaming on the Internet.⁶⁰

The conflict over the new media issue arises when one party (the WGA) is sure of new media's success, while the other party (the AMPTP) fears the unknown and "does not want to become a business school case study on how to not deal with negotiations."⁶¹ John Bowman, the WGA negotiation chair, explains the AMPTP fears that it will agree to compensate writers for new media at a certain percentage, for example 2.5%, and then later learn that the percentage should have been considerably higher at 10%, or much lower at only 0.25%.⁶² However, these fears are exaggerated. Even if a scenario close to this comes to pass, the figures can be adjusted accordingly during the next contract negotiation period in three years. In the meantime, the AMPTP has to start somewhere and, at the very least, offer a compromise.

2. *100 Days*

When no deal was forthcoming between the WGA and the AMPTP, the Guild planned to strike on November 1, 2008.⁶³ By November 7, writers had stopped writing and networks were forced to revise their schedules.⁶⁴ December 3, 2007 saw many networks running out of new episodes—filling the primetime schedule with repeats and reality television.⁶⁵

It was not until January 22, 2008 that the WGA and the AMPTP began to have informal discussions about resuming negotiations for a new contract.⁶⁶ On February 2, 2008, a breakthrough between the parties was announced and it seemed that even the issue causing the most trouble, digital distribution (new media), was moving toward a resolution.⁶⁷

On February 12, 2008, the writers voted to approve the new

⁶⁰ Paramount Admits Streaming Profits, *supra* note 40.

⁶¹ Haskins, *supra* note 48.

⁶² *Id.*

⁶³ The 100-Day Writers' Strike, *supra* note 39.

⁶⁴ *Id.*

⁶⁵ *Id.*; David S. Morgan, *Reruns Begin as Writers Strike Sinks in*, CNN, Nov. 6, 2007, <http://www.cbsnews.com/stories/2007/11/05/entertainment/main3450938.shtml>.

⁶⁶ WGA, *Producers Set to Begin Informal Talks*, UNITED PRESS INT'L, Jan. 22, 2008, available at http://www.upi.com/Entertainment_News/2008/01/22/WGA_producers_set_to_begin_informal_talks/UPI-98791201048779.

⁶⁷ Michael Cieply, *Progress Toward Ending Hollywood Strike*, N.Y. TIMES, Feb. 3, 2008 at A12.

contract and end the strike.⁶⁸ The 100 day ordeal had finally ended, but not without leaving its mark on the entertainment industry.⁶⁹ Its effects would be felt for a long time.⁷⁰

3. *The Resolution*

Michael Winship, President of the WGAE, called the contract “groundbreaking.”⁷¹ On February 10, the day after the tentative deal had been announced, guild members started voting, and by February 12, the WGAE and the WGAW voted by a margin of 92.5% to end the strike and 93.6% to approve the contract.⁷² The biggest victory for the WGA was the inclusion of new media rights in the new contract, and according to WGAW President Patrick Verrone, “[the] contract [was] a new beginning for writers in [a] digital age.”⁷³

The AMPTP had finally agreed to provide compensation for content created for new media, and also to give residuals for film work after 1971 and television work after 1977 that is now being re-used on the Internet.⁷⁴ It is possible that the AMPTP hoped the resolution with the WGA would lead to success with the actors’ guilds, as their contracts would be expiring on June 30.⁷⁵ The AMPTP was pleased that the entertainment industry was finally back in business and issued a statement that its goal was “to produce the highest-quality entertainment products without any further interruption.”⁷⁶

⁶⁸ The 100-Day Writers’ Strike, *supra* note 39; Carl DiOrio, *WGA Members Approve Contract*, THE HOLLYWOOD REPORTER, Feb. 27, 2008, http://www.hollywoodreporter.com/hr/content_display/news/e3i9bc8e6a8d007f627adfe7196ef6275d2.

⁶⁹ See The 100-Day Writers’ Strike *supra* note 39.

⁷⁰ Dave McNary, *WGA Strike Costs CA \$2.1 Billion*, VARIETY, June 5, 2008, available at http://www.variety.com/index.asp?layout=print_story&articleid=VR1117986933&categoryid=2821.

⁷¹ DiOrio, *supra* note 68.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ DiOrio, *supra* note 68.

D. The 2008 Minimum Basic Agreement

1. *Did it Resolve the Concerns at Issue During the Strike?*

The complete MBA is not yet available to the public, but the Schedule of Minimums provides the basic compensation information for television, as well as information about new media productions.⁷⁷ The 2004 MBA provided that writers who completed a story for a high budget sixty-minute, non-primetime program would receive \$8431.00.⁷⁸ The 2008 Schedule of Minimums was increased to \$8726.00 and also provided for annual increases of 3% to 3.5%; therefore, by 2009 the minimum would be \$9031.00 and by 2010, \$9347.00.⁷⁹ Payment for teleplays increased from \$14,602.00 to \$15,113.00 to start, and would increase to \$15,642.00 in 2009 and \$16,189.00 in 2010.⁸⁰ There were still “bargain rates” for writers that wrote story and teleplay, but it increased from \$21,078.00 to \$21,816.00, and would further increase to \$22,580.00 in 2009 and \$23,370.00 in 2010.⁸¹

For the first time, new media was a part of the Writers Guild MBA.⁸² According to the Schedule of Minimums, a Derivative New Media program is a program that appears in the new media medium that is derived from an already existing television show.⁸³ Webisodes and “extras” for the Internet keep fans interested in these popular shows, and provide a lot more entertainment in addition to the weekly thirty minute or sixty minute television show.⁸⁴ The 2008 MBA finally provides compensation for the Internet; the content that

⁷⁷ See WRITERS GUILD OF AMERICA, SCHEDULE OF MINIMUMS - 2008 THEATRICAL AND TELEVISION BASIC AGREEMENT, available at http://wga.org/uploadedFiles/writers_resources/contracts/min2008.pdf [hereinafter WGA SCHEDULE OF MINIMUMS].

⁷⁸ 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at 88.

⁷⁹ See WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 11; DiOrio, *supra* note 68.

⁸⁰ See 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at 88; See also WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 11.

⁸¹ See 2004 MINIMUM BASIC AGREEMENT, *supra* note 2, at 89; See also WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 11.

⁸² Compare WGA SCHEDULE OF MINIMUMS, *supra* note 77, at i (listing new media under television compensation) with 2004 MINIMUM BASIC AGREEMENT, *supra* note 2 at ii-iii (not listing new media under television compensation).

⁸³ See WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 28.

⁸⁴ See *id.* (indicating the payment due to writers for derivative new media programs, in addition to the weekly thirty or sixty-minute shows).

writers create for their television shows are divided into three categories: Dramatic Programs, Comedy and Daytime Programs and All Other Types.⁸⁵ The MBA also defines the circumstances for which an Original New Media Program would be covered.⁸⁶ A writer will be covered under the 2008 MBA if the “actual cost of the production” is more than \$15,000.00 per minute, a single production is over \$300,000.00, or a single order of a series is over \$500,000.00.⁸⁷ Additionally, even if a production does not fall into one of those categories, a writer can negotiate to be covered by the MBA.⁸⁸ The MBA also provides a residual formula for the re-use of traditional programs in new media format and new media programs, both in a traditional media format and new media format.⁸⁹

Many have commented on the progress that the WGA made with this contract, including the President of the WGAE, Michael Winship, who said, “[t]he success of this strike is a significant achievement not only for ourselves but the entire creative community, now and in the future.”⁹⁰ Leslie Moonves, CEO of CBS Corp., commented that, “[i]t was a fair deal . . . and it recognizes the large contribution that writers have made to the industry.”⁹¹ Lastly, the WGAW President, Patrick Verrone, said, “[t]his is the best deal this guild has bargained for in [thirty] years.”⁹²

While the 2008 MBA made significant strides in new media compensation, the WGA, unfortunately, had to sacrifice its desire for increased compensation from DVD revenue.⁹³ The WGA should not have been forced to trade the request for DVD revenue in exchange for the new media revenue it received. Both were issues that should have been addressed in the 2008 MBA. The inclusion of new media should not have been at the expense of improved DVD revenue

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 32-33.

⁹⁰ *Strike Over, Hollywood Writers Head Back to Work*, CNN, Feb. 13, 2008, <http://www.cnn.com/2008/SHOWBIZ/TV/02/13/writers.strike/index.html>.

⁹¹ *Id.*

⁹² Associated Press, *Leaders of Striking Writers Accept Studios' Deal*, MSNBC, Feb. 10, 2008, <http://www.msnbc.msn.com/id/23074826/>.

⁹³ See Carl DiOrio, *Striking Writers Will Resume Talks with Studios*, REUTERS, Nov. 19, 2007, <http://www.reuters.com/article/industryNews/idUSN1841313820071119> (illustrating that in the hope for movement in compensation for new media, negotiations regarding DVD residuals were withdrawn).

compensation.

The 2008 MBA is a good start in creating the new media market; however, the agreement does have its flaws. Writers are provided compensation minimums if the actual cost of production of an original episode appearing in new media is above \$300,000, but many of the new media productions currently being produced are very low cost because writers are often providing the funding themselves and many other people involved, including actors, are donating their services.⁹⁴ Therefore, writers creating low-cost original new media productions will not be properly compensated, because their work is not covered under the new agreement.

2. *What New Issues Might Arise in 2011?*

Despite its success, the WGA will still be looking for more on May 1, 2011, when the current contract expires and the WGA takes up negotiations with the AMPTP once more.⁹⁵ Some writers are still unhappy with the contract, complaining that low budget new media programs are not covered under the 2008 MBA, and that networks were given “too long a promotional window” for new media shows before residuals are paid to writers.⁹⁶ The WGAW President Patrick Verrone said the contract was “not all that we hoped for, and it is not all we deserve.”⁹⁷

One goal that the WGA did not achieve during negotiations was an increase in revenue to writers working in animation and reality television, which the guild chose to give up because it wanted to focus more on the bigger problem of new media.⁹⁸ Now that the new media issue has been resolved, it is likely that the animation and reality television issues will be back on the negotiation table in

⁹⁴ See WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 28 (indicating that writers of original new media programs are not covered by the 2008 MBA unless the production cost of an original episode is over \$300,000).

⁹⁵ See Richard Verrier, *WGA Members OK 3-Year Contract*, LA TIMES, Feb. 27, 2008, available at http://www.cencom.org/uploadedFiles/Cencom_Home/Programs_and_Events/Event_Notifications/LA%20Times%20WGA%20members%20OK%203%20Year%20Contr act.pdf.

⁹⁶ *Id.*

⁹⁷ *Strike Over, Hollywood Writers Head Back to Work*, *supra* note 90.

⁹⁸ *Id.*

2011.⁹⁹

Another issue that has been a problem in the past, and will most likely be in the headlines during 2011 negotiations, is DVD residuals.¹⁰⁰ During the strike, the WGA hoped for movement in compensation for new media, so it took its proposal for increasing DVD residuals off the negotiation table.¹⁰¹ With the residuals formula having been established in 1985,¹⁰² and so far unchanging, in 2011 it will be more than twenty-five years without an update. Because an increase in DVD residuals was taken off the table by the WGA this time, the WGA will likely fight even harder on that issue during the 2011 negotiations, and they should not back down.¹⁰³ The residuals formula needs to be updated, especially because DVD revenue is reaching close to \$5 billion annually.¹⁰⁴ The pennies that the writers are given is not enough.

Even though great strides were made with this contract, new media will likely still be a prominent issue in 2011. *Variety* reporter Cynthia Littleton says, “the principles are now in the contract, and as the new media business grows, they will monitor it on both sides of the table.”¹⁰⁵ However, “the battle will likely erupt again down the line.”¹⁰⁶ New media technology is an ever-changing medium and, as Littleton says, “[i]n 2011, when they next negotiate a contract, it could also be very interesting. There could be a whole other round of fighting.”¹⁰⁷

While new media is now included in the WGA’s 2008 MBA, it is covered only minimally because the AMPTP is still unsure of the success of the medium.¹⁰⁸ The DVD residuals formula was not

⁹⁹ See *id.* (stating that the goal for increased revenue for writers in animation and reality television was not achieved in order to move negotiations forward and get “people back to work”).

¹⁰⁰ WGA Contract 2007 Proposals, *supra* note 9 (indicating that the DVD residual formulas were established in 1985 and have remained unchanged).

¹⁰¹ DiOrio, *supra* note 93.

¹⁰² See WGA Contract 2007 Proposals, *supra* note 9.

¹⁰³ See DiOrio, *supra* note 93 (noting the demand for increasing DVD residuals was done in an effort to further other negotiations).

¹⁰⁴ Waxman, *supra* note 9, at E1.

¹⁰⁵ Margot Adler, *Shows May Have Uneven Return from Writer Strike*, NPR, Feb. 11, 2008, <http://www.npr.org/templates/story/story.php?storyId=18886422>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See WGA Contract 2007 Proposals, *supra* note 9.

changed in this MBA and has not been changed since 1985.¹⁰⁹ Therefore, it is likely that the new media compensation provided in the 2008 MBA could go unchanged for many years, even when the revenue from the medium reaches billions of dollars.¹¹⁰ However, this problem can be prevented. The AMPTP should monitor new media revenue over the next three years and plan to adjust the compensation formula in accordance with the profits brought in by new media, whether they are higher or lower than speculated. Additionally, compensation plans need to include all original new media productions, regardless of cost. Writers for low budget productions deserve just as much protection from the MBA as writers for multi-million dollar productions. While the compensation may vary by production cost, the protection provided must remain the same.

It is time for the AMPTP to look back at history and use those past experiences to properly compensate the writers. Radio did not destroy the written word. Television did not destroy radio. Videocassettes and DVDs did not destroy the movie industry. The movie studios still earn \$16.3 billion in revenue from the box office; it seems that they have not lost any money.¹¹¹ Not only have the movie studios not lost any money, but they have actually earned an additional \$17 billion from DVD rentals and sales.¹¹²

The improvements in technology have only served to make the movie and television industry more money.¹¹³ Box office revenues and DVD rental and sale revenue have not decreased despite the multi-million dollars earned from Internet streaming and downloading.¹¹⁴ The creation of new media technology does not take away revenue from any current mediums.¹¹⁵ Actually, it provides a

¹⁰⁹ *Id.*

¹¹⁰ Haskins, *supra* note 48.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *Digital Revolution Takes on Movie Industry*, PHYSORG, Apr. 4, 2006, <http://www.physorg.com/news63371606.html> (explaining that new digital technology causes production costs to decrease).

¹¹⁴ Mike Masnick, *NY Times Buys Bogus Movie Industry Complaints About Piracy*, TECHDIRT, Feb. 5, 2009, <http://www.techdirt.com/articles/20090205/0319043658.shtml> ("People are plenty willing to pay to go to the movie theater if you give them a good reason to do so.").

¹¹⁵ See *id.* (stating that television series downloads do not take away money from networks, and in fact, downloaders are more likely to watch the shows on television and buy the DVDs later).

new stream of revenue that can only benefit the industry.¹¹⁶

IV. THE ACTORS' UNIONS

A. American Federation of Television and Radio Artists

AFTRA is a labor union that represents 70,000 performers in the entertainment industry.¹¹⁷ AFTRA negotiates and enforces the numerous collective bargaining agreements that provide minimum salaries for working actors.¹¹⁸

On April 30, 2008, AFTRA announced that members ratified a new Television Code; the hope was to include some of the provisions into their new contract, as the old one was set to expire on June 30, 2008.¹¹⁹ The Code was negotiated between AFTRA's Negotiating Committee and the various networks and producers.¹²⁰ The most important improvements were a general salary increase and the inclusion of new terms for both the production and re-use of material created for new media.¹²¹

AFTRA's President, Roberta Reardon, called it a "groundbreaking agreement" that "establishes AFTRA jurisdiction in the dynamic area of New Media."¹²² The New Media provisions in the contract were similar to those set in the Television Code from a few months prior, as well as the new WGA agreements, providing coverage for original new media programs with production costs of \$15,000 per minute, \$300,000 for an entire program, or \$500,000 for a series of programs.¹²³ The agreement was almost identical to that between the WGA and the AMPTP several months earlier.¹²⁴ The AMPTP did not want to provide anything to AFTRA that did not

¹¹⁶ *See id.*

¹¹⁷ AFTRA, *supra* note 1.

¹¹⁸ *Id.*

¹¹⁹ AFTRA, AFTRA Members Ratify Network Television Code, Apr. 30, 2008, http://www.aftra.com/press/pr_2008_4_30_netcode_results.html (last visited Sept. 9, 2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² AFTRA, AFTRA Reaches Tentative Agreement with AMPTP on Primetime Television Contract, May 28, 2008, http://www.aftra.org/press/2008_05_28_pt_agreement.html (last visited Sept. 9, 2009).

¹²³ *See* WGA SCHEDULE OF MINIMUMS, *supra* note 77, at 28.

¹²⁴ *See id.*

already appear in the WGA's 2008 MBA.¹²⁵ However, approval would prove difficult, because SAG lobbied to convince AFTRA members not to approve the contract.¹²⁶

Despite the interference from SAG, on July 8, 2008, AFTRA members ratified the new contract with the AMPTP.¹²⁷ AFTRA's president, Roberta Reardon, was pleased with her members' "ability . . . to recognize a solid contract when they see it."¹²⁸ In the face of the "disinformation campaign" that SAG had launched with the hopes that the AFTRA contract would not be ratified, the members recognized that the contract included "substantial gains . . . in both traditional and new media."¹²⁹ Since AFTRA brokered the deal, SAG was left without much ammunition for its own negotiations with the AMPTP; therefore, a strike authorization for SAG was unlikely.¹³⁰

B. Screen Actors Guild

Like AFTRA, SAG is a labor union for actors.¹³¹ Actors were tired of working unrestricted hours, being obligated to binding seven-year contracts, or being told who to marry and what political views they were permitted to have.¹³² Finally, in 1933, a group of actors rebelled, risked their careers, and created SAG.¹³³ However, it was not until 1937 that the studios accepted SAG and signed a contract with the guild.¹³⁴

With a new "sense of empowerment," the actors were able to obtain better working conditions.¹³⁵ However, studios still owned the actors, and because studios would not compete against each other for

¹²⁵ See *id.*

¹²⁶ Vanessa Juarez, *Actors Discuss Potential SAG Strike at Hollywood Meeting*, ENT. WKLY., July 2, 2008, <http://hollywoodinsider.ew.com/2008/07/actors-meeting.html>.

¹²⁷ Tim Surette, *AFTRA Approves Contract, Strike Squashed?*, TV.COM, July 9, 2008, <http://www.tv.com/story/11467.html>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Screen Actors Guild, <http://www.sag.org/history> (last visited Aug. 3, 2009).

¹³² Ken Orsatti, *How SAG Was Founded: The Actor's Road to Empowerment*, SAG.ORG, 1995, <http://www.sag.org/node/22> (last visited Sept. 9, 2009).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

the actors, the actors could not choose roles or build careers.¹³⁶ In 1948, the Supreme Court declared that the studios were violating anti-trust laws and ordered that they be broken up.¹³⁷ SAG actors were finally free to negotiate their own contracts—as they do today—taking into account the changing technology of the twenty-first century.¹³⁸

SAG's previous three-year contract expired on June 30, 2008; however, unlike AFTRA, SAG was unable to broker a deal with the AMPTP, and its actors are currently working without a contract.¹³⁹ Initially, after negotiations between the parties broke down, the AMPTP decided to finalize its deal with AFTRA, rather than continue fruitless discussions with SAG.¹⁴⁰ While no action was taken for a strike at that time, SAG continued to hold out for a better contract than AFTRA's, which SAG called "weak."¹⁴¹

Now, months later, SAG is still without a contract, negotiations with the AMPTP continue to fall apart, and, while they hope to avoid it, the possibility of a strike is looming.¹⁴² SAG continues to fight for coverage in new media that exceeds what AFTRA and the WGA received. Nine billion videos are viewed online every month, and the Internet continues to be the media outlet of the future, providing numerous opportunities for actors.¹⁴³ SAG has been asking for: (1) reasonable minimums for actors' work in content made-for new media; (2) reasonable residuals for actors' work in content made-for new media; (3) reasonable residuals for actors' work in content moved over from traditional media to new media; and (4) reasonable protections and compensations for actors'

¹³⁶ *Id.*

¹³⁷ Orsatti, *supra* note 132.

¹³⁸ *Id.*

¹³⁹ Jeff Leins, *SAG Contract Expires Today . . . Strike?*, NEWSINFILM.COM, June 30, 2008, <http://newsinfilm.com/?p=2159> (last visited Sept. 9, 2009).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Screen Actors Guild, Important Message Regarding Mediation, Nov. 22, 2008, <http://www.sag.org/important-message-regarding-mediation> (last visited Sept. 9, 2009).

¹⁴³ Nikki Finke, *First News About SAG-AMPTP Talks: CEOs to Wait out SAG Until Mid-July*, DEALINE.COM, Apr. 24, 2008, <http://www.deadline.com/hollywood/exclusive-news-about-sag-amtp-talks/> (citing Screen Actors Guild, SAG Contract Report – Number 2 – New Media, Apr. 24, 2008, <http://www.sag.org/contract-2008-tvtheatrical-negotiations> (last visited Nov. 26, 2008)).

work moved over from new media to traditional media.¹⁴⁴

The AMPTP has, thus far, refused to agree to any contract with SAG that contains any provisions that are greatly different from its agreements with AFTRA and the WGA.¹⁴⁵ Despite AFTRA and the WGA signing contracts with the AMPTP including the new media provisions, SAG remained steadfast that the deals were not good enough.¹⁴⁶ Though the AMPTP repeatedly rejected SAG's additional terms, SAG refused to compromise.¹⁴⁷ In this case, the AMPTP is not being unreasonable. It has already made agreements with the WGA and AFTRA that are virtually the same—as far as the provisions for new media.¹⁴⁸ SAG should not expect anything different. Any action by SAG to strike will not produce the desired result. The AMPTP will never agree to any deal substantially different from the WGA and AFTRA agreements, nor should the AMPTP be expected to.

On November 23, 2008, the AMPTP issued a statement expressing its disappointment that mediation between the parties had failed.¹⁴⁹ The AMPTP believes that SAG has been looking for an excuse to strike all along and “manipulated the mediation process” to achieve that result.¹⁵⁰ The AMPTP stands firm that SAG's position is unrealistic and believes that SAG is not justified in insisting that it deserves a better deal than those previously negotiated with AFTRA and the WGA.¹⁵¹ The AMPTP has made it clear that it will not agree to give SAG anything more than it gave to the other unions, and SAG has nothing to gain by choosing to strike.¹⁵² The deals with the WGA and AFTRA include introductory provisions for new media, which is

¹⁴⁴ *Id.* (citing Screen Actors Guild, SAG Contract Report – Number 2 – New Media, Apr. 24, 2008, <http://www.sag.org/contract-2008-tvtheatrical-negotiations> (last visited Nov. 26, 2008)).

¹⁴⁵ Letter from J. Nicholas Counter III, President, Alliance of Motion Picture & Television Producers, to Alan Rosenberg, National President, Screen Actors Guild, and Doug Allen, National Executive Director, Screen Actors Guild (Sept. 29, 2008), *available at* http://digitalmedialaw.blogspot.com/2008_09_01_archive.html.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Post of Nikki Finke to Deadline Hollywood Daily Blog, <http://www.deadline.com/hollywood/aftra-deal-with-amptp-wont-affect-sag/> (May 28, 2008 08:11 PDT).

¹⁴⁹ Letter from Alliance of Motion Picture & Television Producers to its members (Nov. 23, 2008), *available at* <http://www.sagwatch.net/2008/11/amptp-to-its-members-sag-out-of-touch-with-reality/> (last visited Sept. 9, 2009).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

to be expected because new media is new to the industry.¹⁵³ The next three years should see growth in new media, in which case the next contracts will include more compensation for writers and actors.¹⁵⁴ However, until then, SAG should not expect any special treatment from the AMPTP. The AMPTP should stand firm and deny any of SAG's requests for provisions substantially different from those appearing in the WGA and AFTRA contracts.

Only time will tell if SAG will finally compromise or if another strike as devastating as the WGA's will occur. As of February 21, 2009, SAG's Board of Directors voted, by a seventy-three percent majority, to reject the February 19, 2009 "last, best and final offer" from the AMPTP.¹⁵⁵ Based on the past experience with DVD residuals, it is understandable that SAG wants to ensure better compensation from new media revenue. New media has already proven to be extremely profitable and the actors, like the writers, deserve more than a few cents of the millions and billions of dollars that the industry receives.¹⁵⁶ However, based on the AMPTP's agreements with the WGA and AFTRA, it is unlikely that SAG will receive anything different in SAG's agreement.

While the actors do deserve better compensation, SAG must realize that the WGA and AFTRA have accepted what the AMPTP provided this time around. SAG will not receive anything different, as that would be unfair to the WGA and AFTRA. SAG needs to protect itself by signing a new contract, and, until it does, its actors are working without any guarantees of compensation.¹⁵⁷ AFTRA and the WGA's 2008 MBAs are the first contracts that include any compensation for new media revenue.¹⁵⁸ Regardless of its success, new media is still in its infant stages. The AMPTP should take this

¹⁵³ Scott Sizemore, *Creating Content in the New Media Economy* (2008), <http://www.newmediaconsulting.com/New%20Media%20Growth%20and%20Content%20Creation.pdf>.

¹⁵⁴ *Id.*

¹⁵⁵ Screen Actors Guild, *Screen Actors Guild National Board of Directors Rejects AMPTP Last, Best and Final Offer*, Feb. 21, 2009, <http://www.sag.org/pressreleases/february-21-2009/screen-actors-guild-national-board-directors-rejects-amptp-last-best> (last visited Sept. 9, 2009) (internal quotations omitted).

¹⁵⁶ Seth Funk, *SAG Wants Actors to Share in Proceeds of New Media Distribution*, HRBEKLAW.COM, Apr. 2008, <http://www.hrbeklaw.com/lawyer-attorney-1301951.html> (last visited Sept. 9, 2009); see also Sizemore, *supra* note 153.

¹⁵⁷ Andrew Salomon, *On SAG's To-Do List, Unity Is Job One*, BACK STAGE, July 29, 2009, <http://www.backstage.com/bsa/news-and-features-news/on-sag-s-to-do-list-unity-is-job-one-1003998684.story>.

¹⁵⁸ DiOrio, *supra* note 68.

time to learn all it can about the new media technology and the possible profits new media can provide. At the same time, SAG, AFTRA, and the WGA should show the AMPTP that new media is a successful medium and will create enormous revenue, without decreasing the revenue from box office sales and DVD rentals and sales. In 2011, during the next negotiations with SAG, AFTRA, and the WGA, the AMPTP should be prepared to offer increased compensation for work done in new media.

C. How Maintaining Two Separate Unions has Damaged the Actors' Cause

It is possible that SAG's inability to broker a deal with the AMPTP is partly because it still remains a separate union from AFTRA. With two actors unions negotiating for similar, but different compensation, it is reasonable for the AMPTP to refuse to agree to better compensation for one union over the other. At the same time, because many actors are members of both unions, it seems counterproductive for AFTRA and SAG to continue as two separate entities. However, because of underlying conflict between the organizations, a merger is unlikely.¹⁵⁹

Since 1981, AFTRA and SAG have participated in "Phase One," a joint negotiation agreement that states that the two parties will work together when bargaining with the AMPTP.¹⁶⁰ Phase One was supposed to be the beginning of a merger of the two unions, but—by a small margin—votes in 1999 and 2003 were against merger.¹⁶¹ And since AFTRA opted out of Phase One to broker its own deal with the AMPTP in 2008, relations are further strained between the two unions.¹⁶²

Despite the tensions, a merger would be beneficial. SAG has left itself in a very weak position: "too eager to strike" and ignoring the fact that the AMPTP has settled with the WGA and AFTRA.¹⁶³ The AMPTP will not agree to a deal with SAG that is any different

¹⁵⁹ See Salomon, *supra* note 157.

¹⁶⁰ Lauren Horwitch, *Rank and File Actors Speak About SAG, AFTRA*, BACK STAGE, May 15, 2008, http://www.backstage.com/bsa/search/article_display.jsp?vnu_content_id=1003804328.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

from the deals with the WGA and AFTRA.¹⁶⁴ Therefore, SAG and AFTRA should take this opportunity to merge so they can work together to broker the strongest possible deal with the AMPTP in 2011.¹⁶⁵ If SAG and AFTRA merge and present a united front, the single union will receive equal—and likely better—compensation because the unions will no longer be working to undercut each other. This will benefit all actors, not just because they will receive better new media compensation, but because actors will no longer be limited in projects they can work on based on the union the actors belong to; all actors will be able to work in all areas and be properly compensated. A merger has been long overdue and will only benefit both SAG and AFTRA.

V. THE CONTINUING GROWTH OF NEW MEDIA AND WHAT IT MEANS FOR FUTURE UNION CONTRACTS

A. Writers' Movements in New Media

While the compensation for new media provided in the 2008 MBA is minimal, new media's inclusion in the contract is a step in the right direction. The WGA's fight for new media rights is important because "[t]hose advances now give [them] a foothold in the digital age."¹⁶⁶ The opportunity has been given for writers to explore new media, and now the issue cannot be ignored during the 2011 negotiations.

Even in the few months that new media compensation has been a part of the WGA's contract, writers have already taken great strides in working for the medium.¹⁶⁷ One example is the creation of Strike.tv, a website created during the strike by United Hollywood, one committee of the WGA.¹⁶⁸ Creator Peter Hyoguchi wanted to have a place to showcase web series created by writers who were not working during the strike.¹⁶⁹ The site is planning to host over forty

¹⁶⁴ See Letter from Alliance, *supra* note 149.

¹⁶⁵ See Salomon, *supra* note 157.

¹⁶⁶ Carole E. Handler et al., *The WGA Strike: Picketing for a Bigger Piece of the New Media Pie*, 25 ENT. & SPORTS L. 2, 2 (2008).

¹⁶⁷ Posting of Verne Gay to TV Zone, *The Writers Strike: Now, It's Really, REALLY Over* <http://www.newsday.com/entertainment/tv/tv-zone-1.811968/the-writers-strike-now-it-s-really-really-over-1.834774> (Feb. 26, 2008, 15:00 EST).

¹⁶⁸ Podcast: D.C. #286, *supra* note 58.

¹⁶⁹ Sandra Kofler, *TV Writers Strike Back*, TV GUIDE, Nov. 17, 2008, at 6.

series, created specifically for new media, from writers of the television shows *How I Met Your Mother* and *General Hospital*, and movies like *Die Hard*.¹⁷⁰

Professional writers are now taking the opportunity to show the AMPTP that new media is the next greatest outlet for entertainment and that work in that medium will only continue to grow.¹⁷¹ The Internet is creating jobs for writers because the possibilities for creation of new media programs are endless.¹⁷² For Strike.tv, there is virtually no limit; as long as the program is not pornographic, Strike.tv plans to air it.¹⁷³ In addition, unlike writers of television programs who are considered ‘work for hire’, meaning whoever the material is created for owns it, writers of new media can maintain ownership of their own work.¹⁷⁴

More movement in new media also includes the creation of Virtual Artists, a group of fifteen to twenty A-list screenwriters who are taking advantage of the Internet’s success as a media outlet.¹⁷⁵ These individuals have invested their own money to start a company that will create programs specifically for the Internet.¹⁷⁶ This is only the beginning. If all this progress has been made only months after the signing of a contract, one can only imagine the additional success that will come over the next three years.

B. The Continuing Effect of Growing Technology on the Entertainment Industry

Despite its fears, the AMPTP is going to have to listen to the writers and the actors in 2011 when negotiations begin on new collective bargaining agreements. No organization wants to be a case study because it made a mistake in negotiations.¹⁷⁷ Fortunately, the AMPTP can rely on past experience to minimize the chance for such a mistake. The AMPTP has feared changing the DVD residual formula for twenty years, and now writers are only paid four cents

¹⁷⁰ *Id.*

¹⁷¹ Podcast: D.C. #286, *supra* note 58.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Podcast: D.C. #286, *supra* note 58.

¹⁷⁷ Haskins, *supra* note 48.

per DVD sold, while actors are not in any better position.¹⁷⁸ The DVD industry provides billions of dollars in revenue.¹⁷⁹ The new media platform already generates millions and is predicted to reach billions by 2011.¹⁸⁰ The writers and actors deserve to be compensated for their contributions to the area of new media.

These improvements in technology over the past decades have not eliminated any sources of revenue in the entertainment industry.¹⁸¹ In fact, it has created a new stream of revenue.¹⁸² The success of DVD sales has not harmed box office revenues, which is still at many billions of dollars annually.¹⁸³ The same can be said for new media revenue.¹⁸⁴ As the new media technology improves, there will be an increase in new media revenue.¹⁸⁵ When the movie and television industry benefit from that influx of money, the creative bodies working in the industry, especially the writers and actors, deserve to receive an increase in salary. Why should the industry be able to earn seventeen billion in DVD revenue and over \$200 million in new media revenue while writers and actors accept pennies on the dollar?

The AMPTP needs to learn from its past mistakes. The WGA fought hard for what it wanted during this strike, which crippled the entertainment industry for over three months.¹⁸⁶ There is nothing stopping the WGA from striking again when its reasonable demands are not met. SAG has not officially called for a strike yet, but SAG has refused to accept anything less in compensation than it feels the union actors deserve.¹⁸⁷ The unions' demands are not unreasonable. Writers and actors work hard to provide entertainment and should be compensated accordingly.

For the AMPTP, fear of the unknown is no longer an acceptable excuse. At one time or another every new technology was

¹⁷⁸ See Roger Armbrust, *SAG, AFTRA AMPTP Walk*, BACK STAGE, Jan. 13, 2005 at 1; WGA Contract 2007 Proposals, *supra* note 9.

¹⁷⁹ Haskins, *supra* note 48.

¹⁸⁰ *Id.*

¹⁸¹ Paramount Admits Streaming Profits, *supra* note 40.

¹⁸² Masnick, *supra* note 114.

¹⁸³ See Haskins, *supra* note 48.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* (predicting continued increase of revenues due to Internet growth).

¹⁸⁶ Richard Verrier, *Writers Sign Off on New Contract*, L.A. TIMES, Feb. 27, 2008 at 2.

¹⁸⁷ AMPTP, MESSAGE TO THE COMPANIES REPRESENTED BY THE AMPTP (2008), http://www.amtp.org/files/AMPTP_message_to_companies_112308.pdf.

unknown. Each new medium, from radio to television, from the movie screen to videocassette and DVD, and now new media, has proved not only successful, but also extremely profitable.¹⁸⁸ This new profit can only benefit the entertainment industry, whether it is used to properly compensate writers and actors for their hard work and dedication, to continuously improve new media technology, or to be invested into new and creative television and movie productions. Whatever the decision, movement into new media technology will have positive effects on the industry. New media has demonstrated where the entertainment industry is going. Audiences for any outlet have been greatly expanded by the content being made available on the Internet.¹⁸⁹ It is these audiences that will make new media successful and will hopefully bridge the gap between the AMPTP and the unions, finding more even compensation plans for all involved.

VI. CONCLUSION

Improvements in technology have often been the cause for conflict between the AMPTP and the WGA, SAG and AFTRA.¹⁹⁰ Writers and actors have consistently been under-compensated when their materials appear in a new form, like videocassettes and DVDs. The AMPTP is often unsure of the success of a new medium and reacts by providing the lowest possible compensation, like four cents to writers per fifteen dollar DVD sold, a formula that has been unchanged in twenty five years despite the exorbitant profits of billions of dollars coming to the movie industry.¹⁹¹

And now, while the AMPTP has allowed for new media compensation in the newest agreements with AFTRA and the WGA, that compensation is still minimal at best, and was offered only when the unions' request for an increase in the four cents DVD residual was taken off the table.¹⁹² Writers and actors have always been the parties taking risks by creating in the new formats, like DVDs and

¹⁸⁸ See Haskins, *supra* note 48.

¹⁸⁹ See THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, INTERNET SAPPING BROADCAST NEWS AUDIENCE 1-2 (2001), <http://peoplepress.org/reports/pdf/36.pdf>.

¹⁹⁰ John Hazelton, *The Bill of Rights*, SCREEN INT'L, May 4, 2007, at 15-16, available at http://www.amptp.org/pdf/screen_international_050407.pdf.

¹⁹¹ Writers Guild of America, West, *The Latest Word -- Negotiations Update Index*, http://www.wga.org/subpage_member.aspx?id=2403 (last visited Nov. 9, 2009).

¹⁹² *Id.*

now new media, but have never seen the rewards.¹⁹³

New media has had a significant effect on the negotiations of the entertainment industry's unions and guilds.¹⁹⁴ While AFTRA and the WGA were satisfied with the introductory addition of new media terms in their contracts, SAG continues to hold out.¹⁹⁵ While it is unexpected that SAG will succeed in getting stronger new media protection in its contract, the AMPTP will have to prepare for more extensive new media coverage for all the guilds and unions for the next contract term.¹⁹⁶

Either way, great strides have already been made in new media, even in the few short months that writers and actors have begun working in that medium.¹⁹⁷ As the technology improves, the battle might once again be taken up for improved minimum compensation, as well as residuals, for programs created for or re-used in new media. The history has shown that new technologies have only served to help the entertainment industry. Over the next three years, the AMPTP, AFTRA, the WGA and SAG will all be watching how new media develops and will take note of the changes that will need to be made in the next round of contracts in 2011.¹⁹⁸

There will need to be changes made in 2011. The AMPTP needs to examine its profits and what it provides to writers and actors as compensation. As the popularity of new media increases, the stream of revenue from new media will also increase. Regardless of the AMPTP's fears about over-compensating the unions, the AMPTP needs to create new residual formulas for new media to ensure that all involved are being properly compensated. Writers and actors have been under-paid, in certain areas, for a long time. It is about time that the AMPTP takes notice of the hard work of writers, including how they have aided in the early success of new media.

¹⁹³ See Michael Cieply, *Studios in a Tentative Deal with TV Actors in One Union, but Uncertainty Remains*, N.Y. TIMES, May 29, 2008, at C3.

¹⁹⁴ See, e.g., The Latest Word, *supra* note 191; AMPTP, AMPTP Negotiations News, <http://www.amptp.org/negotiations.html> (last visited Nov. 9, 2009).

¹⁹⁵ See Screen Actors Guild National Board of Directors Rejects AMPTP Last, Best and Final Offer, *supra* note 155.

¹⁹⁶ Writers Guild of America, West, A Message from WGAW Executive Director David Young, <http://www.wga.org/content/default.aspx?id=3524> (last visited Nov. 9, 2009).

¹⁹⁷ David Moberg, *Actors Union Copies Writers' Script*, IN THESE TIMES, Mar. 20, 2008, <http://www.inthesetimes.com/article/3569>.

¹⁹⁸ Dave McNary, *SAG Talks to Start Early*, VARIETY, June 18, 2009, available at <http://www.variety.com/article/VR1118005129.html?categoryid=1066&cs=1>.

In 2011, new media will not be in its infancy anymore. New media is the future of the entertainment industry and is here to stay. New media will provide a constant stream of revenue. Some of that revenue needs to be provided to the writers and the actors who have helped the new media industry become successful and who keep the audiences coming back.

VII. AFTERWORD

Since the completion of this Comment, SAG finally reached an agreement with the AMPTP.¹⁹⁹ In a joint statement, the two organizations announced that a tentative deal had finally been reached on April 17, 2009.²⁰⁰ SAG's Board of Directors approved the agreement, which would then be voted on by SAG members.²⁰¹

After months of failed negotiations with the AMPTP, SAG was finally satisfied with the changes the AMPTP was willing to make.²⁰² Some of these changes include a "3% wage increase," as well as a 0.5% increase in pension and health contributions.²⁰³ Additionally, for the first time, the agreement includes provisions for new media protections.²⁰⁴ Although SAG fought for more new media coverage than AFTRA, SAG ultimately received the same new media provisions that other unions received.²⁰⁵

Finally, putting an end to the more than yearlong battle, SAG announced that its members ratified the agreement on June 9, 2009.²⁰⁶ Seventy-eight percent of SAG members voted in favor of the agreements, which became effective on June 10, 2009 and expire

¹⁹⁹ Press Release, Screen Actors Guild, Screen Actors Guild and the Alliance of Motion Picture and Television Producers Reach Tentative Agreement on TV/Theatrical Deal (Apr. 17, 2009), *available at* <http://www.sag.org/press-releases/april-17-2009/joint-sag-amptp-statement>.

²⁰⁰ *Id.*

²⁰¹ Press Release, Screen Actors Guild, SAG National Board of Directors Approves Tentative Television and Motion Picture Contracts and Recommends Ratification (Apr. 19, 2009), *available at* <http://www.sag.org/press-releases/april-19-2009/sag-national-board-of-directors-approves-tentative-television-and-motio>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Press Release, Screen Actors Guild, Screen Actors Guild Members Overwhelmingly Ratify TV/Theatrical Agreements (Jun. 9, 2009), *available at* <http://www.sag.org/press-releases/june-09-2009/screen-actors-guild-members-overwhelmingly-ratify-tvtheatrical-agreement>.

on June 30, 2011.²⁰⁷ While some SAG members were still unwilling to vote yes, hoping to force more negotiations, it was obvious that many “mid-range actors” who depend on their paychecks were being affected by the struggling economy.²⁰⁸ When the recession hit the entertainment industry, most SAG actors knew it was time to settle with the AMPTP.²⁰⁹ They had no leverage to bargain with and could not expect a better deal, consisting of more new media provisions, than the deal agreed to by the WGA and AFTRA.²¹⁰ Most actors are relieved that the contract was approved.²¹¹ They are looking forward to taking “advantage of the gains [the] negotiators won” and are pleased that the additional “unproductive” negotiation period has come to a close.²¹²

While some members feel that SAG inappropriately settled, many are relieved to be returning to work.²¹³ Either way, the battle will be taken up again in 2011, when the WGA, AFTRA and SAG contracts expire.²¹⁴ Hopefully, new media will become a more stable medium and its provisions more welcomed in the 2011 negotiations. Many SAG actors look forward to “negotiat[ing] alongside AFTRA” to guarantee the best deal for both actors’ unions.²¹⁵

In the end, it is interesting to note that the struggling economy has even reached Hollywood. SAG actors who hoped for further negotiation had to make sacrifices like many of us, on account of the recession.²¹⁶ Regardless, at least until 2011, the writers and actors’ unions are once again working under a contract.²¹⁷ However, this battle will be taken up again. As long as there are improvements in technology, writers and actors will continue to fight for compensation of their work in those new mediums. The AMPTP must now pay close attention to new media and its success in the entertainment industry, and it must be prepared to offer better compensation

²⁰⁷ *Id.*

²⁰⁸ John Scott Lewinski, *SAG Ratifies New Contract to Avoid Yet Another Hollywood Strike*, Jun. 10, 2009, <http://www.tvsquad.com/2009/06/10/sag-ratifies-new-contract-to-avoid-yet-another-hollywood-strike> (last visited Sept. 9, 2009).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Press Release, Screen Actors Guild, *supra* note 206.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Lewinski, *supra* note 208.

²¹⁷ Press Release, Screen Actors Guild, *supra* note 206.

provisions in 2011. SAG is already preparing “summit meetings” with the heads of the WGA, AFTRA and “the other talent unions” to prepare for 2011 negotiations; SAG President Alan Rosenberg wants to assure that everyone is ready “for the battle ahead.”²¹⁸ Until then, SAG members rejoin the entertainment workforce with the WGA and AFTRA.²¹⁹

²¹⁸ *Id.*

²¹⁹ *Id.*

