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# The WGA Strike

## Picketing for a Bigger Piece of the New Media Pie

BY CAROLE E. HANDLER, JAMES D. NGUYEN, AND MARINA DEPIETRI

On February 12, 2008, after 100 days of picketing and while this article was on its way to print, the membership of the Writers Guild of America ("WGA or Guild") voted to end the strike against producers represented by the Alliance of Motion Picture and Television Producers ("AMPTP"). The vote to end the strike was overwhelming, with 92.5 percent of voting writers in support.<sup>1</sup> WGA President Patric Verrone made the following announcement:

The strike is over. Our membership has voted, and writers can go back to work. This was not a strike we wanted, but one we had to conduct in order to win jurisdiction and establish appropriate residuals for writing in new media and on the Internet. Those advances now give us a foothold in the digital age. Rather than being shut out of the future of content creation and delivery, writers will lead the way as TV migrates to the Internet and platforms for new media are developed.<sup>2</sup>

Guild members will vote to ratify the provisional three-year contract with the AMPTP and the votes will be tallied at the Guild membership meetings on February 25, 2008.<sup>3</sup> The 2008 Minimum Basic Agreement ("MBA") heralds several victories for Guild members including increased wages for each year of the contract. Most importantly, the WGA's terms give the Guild jurisdiction over new media in the following situations: (1) where the writing is written by a professional writer, (2) where the program is a derivative of an MBA-covered program or (3) if the budget is above any of three thresholds: \$15,000 per minute, \$300,000 per program, or \$500,000 per series order. Previously, writers were not compensated when their work streamed live on the Internet and they received only 0.3 percent of distributors' gross receipts when a show sold online.<sup>4</sup> Now they will receive between 2 percent and 3 percent for streaming, and their compensation for downloads has doubled for residuals that sell more than 100,000 units.<sup>5</sup>

These gains, however, were not obtained without concessions on the part of writers. The residual payments for streaming start only after a 17–24 day window, when TV shows can be streamed for promotional use with no residuals paid.<sup>6</sup> The Guild also dropped its demand for a higher share of money from DVDs as well as attempting to get jurisdiction over reality television and animation.<sup>7</sup>

A review of blogs such as <http://unitedhollywood.blogspot.com/2008/02/upcoming-ratification-vote.html> indicates that writers have mixed feelings regarding the success of the strike. Nonetheless, after a difficult three months, thousands of working writers are glad that they can finally go back to work.

\* \* \*

Almost 20 years since the last industry strike in 1988, the entertainment industry was embroiled in yet another major labor-management battle: a strike by the Writers Guild of America ("WGA or Guild") against the entertainment producers represented by the Alliance of Motion Picture and Television Producers ("AMPTP"). The issue, once again, was how to divide the entertainment revenue pie, particularly in the area of new media distribution, among those who contribute to its creation. After three months, the parties finally reached a tentative solution that recognizes streaming and Internet distribution as new sources of revenue that must be shared with the artistic community—whatever their ultimate importance.

The WGA strike launched with enthusiastic beginnings last November, when celebrities vigorously walked picket lines in Rockefeller Center and at the major Hollywood studios to demonstrate their solidarity. Since then, the strike has witnessed more chastened but persistent activism. Through the many emotional highs and lows, the WGA strike has affected all aspects of the entertainment industry in immediate ways, but more importantly, in important structural ways that impact the parties' futures. Significant film and television projects were jetti-

soned; at least one major awards show (the 2008 Golden Globes) was reduced to a mere 30-minute press conference; and many ancillary businesses, from costuming to catering, that thrive on full production, were brought to a standstill. Personal, as well as professional, relationships have been strained.<sup>8</sup> Despite statements by the WGA leadership that the tentative deal recently negotiated is not perfect, strike fatigue and an overwhelming sense that the price of continuing dissension has come to outweigh its benefits is leading to labor peace.<sup>9</sup>

In this unique industry, in which diverse interests depend on one another but compete for their respective revenue shares, there are no simple answers. What we can lay out are the issues, the arguments each side has advanced for increasing its share of the revenue pie at the expense of the other, and perspective on the longer term effects of the strike.

#### THE PARTIES' POSITIONS

On November 5, 2007, approximately 12,000 workers, mostly in the motion picture and television field, went on strike against the Hollywood producing establishment. On one side is the WGA, both East and West; on the other, the film studios, television networks and other producers represented by the AMPTP.<sup>10</sup> The main issues of contention between the parties were the proper division of revenue in the areas of residuals from home video sales, new media technology, animation, and reality television.

Specifically, the writers sought to double their residual payments from DVD sales and rentals, and obtain a cut of the revenue flow from new media platforms such as the Internet and mobile phones. As the WGA's contracts currently stand, the Guild is not guaranteed jurisdiction over new media exploitation of content. Given the increasing popularity of content distribution through new media technologies and the publicity new media has received as an important source of expected future revenue as major studios enter these markets, it is not surprising that jurisdiction over the digital realm has become a central issue for debate. They also sought jurisdiction over reality television.

While new media was the biggest driver of the strike, there were other issues at stake. One was jurisdiction over prime-time animated shows. Although the WGA does have some contracts for animation prime-time television shows like *The Simpsons*, the Guild would like greater jurisdiction in that area as well. In addition, reality television is also a big concern for writers, given the producers' increasing reliance on this less-costly format (over the last five seasons, the number of reality television shows has increased dramatically).

Producers, on the other hand, have largely sought to maintain the status quo. With respect to DVD sales, they claim to need their present revenue share to offset the ever-rising marketing and production costs of filmed and televised entertainment. With respect to Internet streaming, they argue it is merely another form of promoting shows rather than a significant source of revenue. The producers argue that it is not possible to intelligently negotiate a contract for fairly allocating new media revenue before it is clear what the method of successful new media distribution, business models, or the total revenues involved will be—in short, the writers' demand, because premature, should be rejected.

During the 1988 strike, producers made a similar argument with regard to videocassettes, which have since morphed into DVDs. At that time, the WGA negotiated what it now perceives to be an unsatisfactorily low percentage for writers with the belief that once the business models were more developed, it could renegotiate with the AMPTP. From the Guild's perspective, this renegotiation never happened. Once successful home video business models were worked out, the costs of producing videos and DVDs went down, and revenues went up (with what writers considered an unfairly generous profit at their expense for the producers); however, the WGA was not invited to come back to the table to renegotiate what it believes would be a fairer share of those profits. Given that past experience, the writers have been loathe to entertain the same argument about "prematurity" again in 2008.

This contentious history highlights an important reality and explains at least part of the reason why the WGA and AMPTP were unable to reach a quick agreement. The distrust engendered by the past, combined with the rapid pace of industry change and new technology growth, severely hampered negotiations. One logical way to deal with the uncertainty surrounding new media revenues might have been to enter a short-term agreement in which the financial terms can be evaluated one or two years down the line. However, the truth is that even temporary solutions are hard to undo because that would entail one side having to give concessions to the other in the future.

#### SHORT-TERM EFFECTS OF THE STRIKE

The future is more obscure than entertainment industry observers would like it to be. Presently, both sides are experiencing severe impacts. Writers, of course, have to deal with all of the same issues that other workers face when they go on strike, such as not being able to pay rent and experiencing foreclosures on their homes. Writers that also work as directors and/or producers (known as "hyphenates" because they are writers-directors-producers) are in a particularly tricky situation. Although they are technically allowed to perform their "non-writing" duties during the strike, and in fact are contractually obligated to do so, there is, of course, considerable disagreement over the definition of "non-writing" duties in a relatively seamless industry. For example, the WGA has stated that "writing services" include cutting production footage for time; making changes in technical or stage directions; reassigning lines because of cast changes, and making casual, minor adjustments in dialogue or narration just before or during a shoot. On the other hand, the AMPTP believes those are all "nonwriting" services that hyphenates should still be allowed (and potentially required) to perform during the strike.

The studios and television networks also took a hit, with many announcing layoffs. The major talent agencies also felt the heat, and some of the agencies have even asked their employees to take a reduction in compensation. Many contracts between production companies and their staff contain a force majeure clause—a typical provision in a writer or staff agreement that is triggered

by a force majeure event, which often includes strikes, if the event continues for a period of typically five to eight weeks. At the end of that time period, the producer (or employer) typically has the right to suspend and/or extend or terminate the agreement. Conversely, a force majeure clause often gives staff members the right to give notice after that stated period of time and if they are not reinstated in their jobs, they have the right to terminate. These force majeure clauses are the basis on which producers or employers gave their staff pink slips.

The strike affected more than the immediate parties involved. For example, it led the Television Critics Association to cancel its 2008 press tour and the Hollywood Foreign Press Association to cancel the 2008 Golden Globe Awards ceremony, which was instead replaced by a press conference. The Golden Globes is probably the most visible victim of the strike thus far. As a result of its cancellation, the Hollywood Foreign Press will not receive its normal \$6 million

## PUBLIC SUPPORT FOR THE WRITERS COULD HAVE QUICKLY ERODED IF THE STRIKE PERSISTED FOR TOO LONG.

in broadcast license fees, and NBC will not get its normal \$15–20 million in advertising revenues. In addition, ancillary businesses, such as the fashion industry which depends on publicity from awards shows, were financially affected. The Los Angeles Economic Development Corporation estimates that the cancellation of the Golden Globes cost the Los Angeles local economy roughly \$80 million. In a period of incipient recession, this is certainly cause for concern.

### THE INTERIM AGREEMENTS

An important strike tactic for the WGA, and one that was also used during the 1988 strike, has been to sign interim deals with producers—i.e., temporary agreements that allow Guild writers to keep working during the strike and which are likely to be superseded once the WGA and AMPTP reach a deal. During this current strike, the first interim agreement the WGA signed was with David Letterman's company, Worldwide Pants, allowing both CBS late night shows—*The Late Show with David Letterman* and *The Late Late Show with Craig Ferguson*—to return to production with their writing staffs. Thereafter, the WGA reached interim agreements with other companies including United Artists, The Weinstein Company, Spyglass Entertainment, MRC, Jackson Bites, Mandate Films, Sidney Kimmel Entertainment, Marvel Studios, Lionsgate, and RKO.

These interim agreements allowed the WGA to meet two crucial goals. First, they made the WGA appear reasonable. That is critical for the WGA's ability to make future deals, as well as to mitigate claims that their chief negotiator David Young's level of experience (which some criticize as being low) and more traditional labor background obstructed an agreement. Second, the interim deals provided work for WGA writers. This helps diminish the economic impact from the strike and maintain writers' morale. The interim agreements also made sense for companies that want to continue to work on projects that were put on hold as a result of the strike.

It is also important to note that during the 1988 strike, many independent production companies were "burned" by having signed an interim agreement that ended up being less favorable than what was ultimately negotiated by the AMPTP. To avoid this outcome, it was critical for independent companies to have a "favored nations" provision in their agreements with the AMPTP indi-

cating that the WGA will eventually give the independent company the same final deal the WGA ends up negotiating with the AMPTP.

### THE AGREEMENT WITH THE DGA

While the WGA was striking, one of its sister guilds, the Directors Guild of America ("DGA"), was able to reach a new agreement with the AMPTP. On January 17, 2008, after three months of informal discussions, the DGA's 50-member Negotiations Committee and the AMPTP concluded a tentative agreement on the terms of a new three-year collective bargaining agreement. A condition of the tentative WGA agreement is that the writers be able to state that they received better terms. This DGA agreement established an important precedent in the industry, allocating a share of the revenues from new media to director members. DGA's president Michael Apted stated that even though the negotiations were very difficult and "required real give and take on both sides . . . [the parties] managed to produce an agreement that enshrines the two fundamental principles [they] regard as absolutely crucial to any employment and compensation agreement in this digital age: First, jurisdiction is essential. Without secure jurisdiction over new-media production—both derivative and original—compensation formulas are meaningless. Second, the Internet is not free. We must receive fair compensation for the use and reuse of our work on the Internet, whether it was originally created for other media platforms or expressly for online distribution."<sup>11</sup>

Some highlights of the new DGA agreement include: (1) increased wages and residual bases for each year of the contract, (2) DGA jurisdiction over programs produced for Internet distribution, (3) a new residuals formula for paid Internet downloads that doubles the rate currently paid by employers, and (4) residual rates for ad-supported streaming and use of clips on the Internet.

There is no doubt that the agreement with the DGA has affected the terms of the agreement between the WGA and AMPTP. In reaching this agreement with the DGA, the AMPTP actually calculated the value of giving similar terms to the other guilds when it made

its offer to the DGA. Although other guilds are not necessarily going to accept the same terms, this does suggest that the AMPTP is committed to the terms it reached with the DGA.

As to PR, writers have garnered the most favorable public reaction. However, given the constantly evolving picture, public support for the writers could have quickly eroded if the strike persisted for too long. If, for example, additional award shows, particularly the Academy Awards, continue to get cancelled or severely limited, the public may have started to blame the writers. Also, the public is not yet affected by significant television show deprivation as a result of the strike, but if people cannot watch their favorite television shows, they may begin to react negatively against the writers. From a PR perspective, the tentative peace is indeed timely.

#### LONGER-TERM EFFECTS

Regardless of who feels they get the better end of any final deal, the WGA strike will produce some long-term effects. The 2008 television season and the development of new projects will be diminished. Instead of the vast number of shows generally produced, shows from this season will likely be brought back. More significantly, television networks are likely to produce fewer pilots. The result will be a substantial decrease in the impact and use of promotional tools like upfronts and press junkets.

In a time with new technologies delivering entertainment to the consumer on demand, and increasing vertical integration of the industry itself, the strike will also impact the way business is conducted in the future. For example, the 1988 strike radically changed the development structure of television. At that time, there were many so-called "creative executives" within the studios; today, there are far fewer. Another outcome of the 1988 strike was that the industry initiated the "spec" system under which the writers, producers, and directors (hyphenates) develop a project and then bring it to studios on a spec basis for purchase. As was the case after the 1988 strike, the current way of doing business is likely to change in multiple and unpredictable ways.

Yet, the greatest potential danger to the industry has to do with television viewers and advertisers. Unlike today's varied and multifaceted media market, in 1988 the main distribution platform was analog television. Once the 1988 strike ended, virtually all viewers and advertisers eventually returned. Today, there are at least a half-dozen significant ways to deliver entertainment content, many of which are under much greater control of the user and the individual writer than the studios/producers; and many of these new platforms are extremely attractive to advertisers. After the current strike, it is unclear how many viewers and advertisers will return to television on the same basis as in the past.

Meanwhile, new media platforms have benefited from the strike. YouTube's audience, for example, grew 18 percent in the two months after the current strike started.<sup>12</sup> Although some of this growth can be attributed to writers who are driving people to viral videos that address the substance of the debate, some of the growth can also be attributed to the audience looking for alternate ways to view entertainment. Further, some writers have decided to come together to create virtual distribution companies and outlets. Should these new media platforms continue to explode, it will be hard to determine whether permanent growth will be a result of the strike or simply a natural growth of the YouTube and user-generated content culture. But the WGA strike is contributing to this trend; the longer it lasts, the more difficult it may be to recapture both television viewers and advertisers.

Hopefully, the hardships that both sides will have faced once the strike is over will teach everyone a valuable lesson—the entertainment industry is a symbiotic enterprise in which diverse groups and interests need one another and must compromise. Constant good faith dialogue between the executives on each side is essential to prevent the current situation from repeating itself as the industry undergoes further structural change and technological explosions. Otherwise, both sides and consumers will suffer and, contrary to industry tradition, there can be no fairytale Hollywood ending—no matter which parties are left with a piece of the pie that fills their appetite. ❖

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