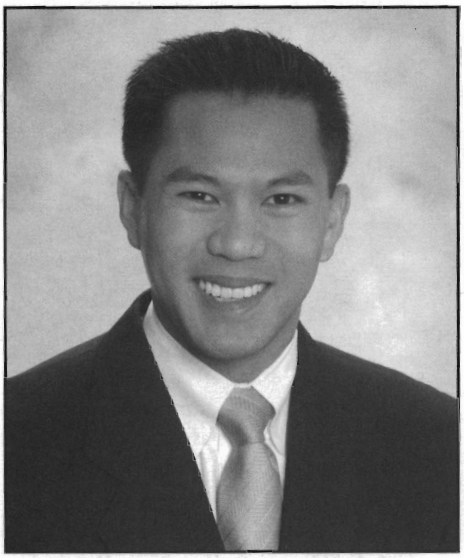
The Moving Picture



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THE WGA STRIKE: LESSONS FOR IP AND ENTERTAINMENT LAWYERS

I hope you've all survived the recent Writers Guild of America strike without having to endure too many television show re-runs and without giving up faith in the entertainment industry. After 100 days of picketing and demonstration, on February 12, 2008, the members of the Writers Guild of America ("WGA") voted to end their strike against entertainment producers represented by the Alliance of Motion Picture and Television Producers ("AMPTP"). After the strike was resolved, WGA president Patric Verrone announced in a statement that the resolution gave writers 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."

What does the WGA strike and its resolution mean for intellectual property and entertainment lawyers, especially those of us here in California? In short, defining rights in the new media frontier to distribute entertainment content will be more important than ever. And careful negotiation to protect and carve up those intellectual property rights will be critical.

THE WGA STRIKE

So what was the fuss all about? In November, 2007, approximately 12,000 writers in the WGA both East and West, went on strike against the Hollywood producing establishment. Their strike targets were the film studios, television networks and other producers represented by the AMPTP.

What did the writers want? In particular, they 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 Internet distribution and mobile phones. Importantly, the WGA had not previously been guaranteed jurisdiction over new media distribution of content written by its members. New media was the most important issue motivating the strike, but not the only one. The WGA also wanted to obtain jurisdiction over reality television and greater jurisdiction over prime time animated shows.

The AMPTP argued that it was not possible to intelligently negotiate a contract for fairly allocating new media revenue at this point in time; that's because, the AMPTP believes, it is too early to evaluate what methods of new media distribution and business models will be successful, and what the revenue pie will look like down the road. (This is similar to an argument the producers made during the last WGA strike in 1988, about video cassettes and the then-still-burgeoning home video market).

THE RESOLUTION

The strike was ultimately resolved in February 2008 when the WGA recommended a new 3-year agreement with the AMPTP—the 2008 Minimum Basic Agreement ("MBA"). While the agreement is far more complicated, the WGA was successful in obtaining jurisdiction over new media in certain situations: (a) where the writing is written by a professional writer, (3) where the program is a derivative of an MBA-covered program or (3) if the production budget is above any of three thresholds: $15,000 per minute, $300,000 per program or $500,000 per series order. In addition, the WGA won higher residuals for new media distribution. Previously, writers were not compensated when their work streamed live on the internet and they received only 0.3% of distributors' gross receipts when a show sold online. Now they will receive between 2% and 3% for Internet streaming of content based upon their work, and their compensation for downloads has been doubled for residuals that sell more than 100,000 units.

But of course, the WGA did not win on all its demands and had to make certain concessions. For example, the residual payments for Internet streaming of entertainment content start only after a 17–24 day window, when TV shows can be streamed for promotional use with no residuals paid. In addition, the Guild ultimately dropped its demand for a higher share of revenue from DVDs. Nor did the Guild get jurisdiction over reality television or full jurisdiction over prime time animation.

IMPACT ON IP LAWYERS

The WGA strike and its outcome carry some important lessons for intellectual property and entertainment lawyers:

(1) Actively protect rights to new media distribution. Among the "bundle" of copyright owner rights is the right to distribute the work. The WGA strike reinforced that new media

platforms will be the key distribution vehicles of the future. Thus, it will be important for intellectual property lawyers to diligently evaluate and protect, when appropriate, their clients' rights to own or retain rights to distribute their works via new media platforms. This is true for lawyers representing both writers selling their works, and producers developing those written works into entertainment content.

(2) Carefully negotiate media distribution platforms by specifying the technological method of delivery. In deals to license, distribute or syndicate entertainment content, it is now critical to carefully define what media distribution rights the content owner is providing and reserving. For example, a decade ago, it might have been sufficient for a television program distribution agreement to state that the licensee was receiving rights to distribute the program via "the Internet." But in today's technology environment, that is somewhat ambiguous. Is "Internet" distribution intended to mean delivery via Internet streaming, downloading, Internet-protocol television, all of the above or even something else? What if a content distribution agreement refers to rights to broadcast or distribute via "radio" – does that mean just terrestrial broadcast radio, or also radio formats distributed via satellite and Internet technology? And even more modern contracts might refer to "wireless" forms of delivery, but there are increasingly new forms of wireless delivery – from traditional cellular technologies, to WiFi, WiMax and WiBro technologies. So using more traditional descriptions of media (television, radio, theatrical release) is now often insufficient. My suggestion: specify not just the **media**, but the **technological method of delivery**. Given the formulas in the WGA's new agreement with the AMPTP, carefully defining such distribution rights may have a material impact on the revenue pie for entertainment content is shared.

(3) Always think about how content distribution technologies and business models might change. The history of the WGA's 1988 strike and the 2007–2008 strike make clear that it can be difficult to predict what will be the money-making entertainment distribution platforms of tomorrow. But that is why IP and entertainment lawyers should even be more vigilant in keeping options open for their clients to maximize revenue opportunities, as new media technologies and business models come and go. Awareness of the evolving technology and business markets, and flexibility in dealmaking are thus key.

As for me, I'm hoping that writers and producers will be able to quickly get out some original television programming—especially of the scripted kind. And then I'm hoping that this new programming will be wildly successful on new media platforms, so that everyone will be satisfied, at least for the time being, with their respective pieces of the new media revenue pie. ▪

The author thanks his colleagues at Foley & Lardner LLP, Carole Handler and Marina Depietri, for their contributions to this piece.

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Indemnity

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28. *Waits v. Frito-Lay, Inc.*, 978 F.2d 109 (9th Cir. 1992).
29. *Waits*, 978 F.2d at 1105–06.
30. *Saforo & Associates, Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999).
31. *Saforo & Assocs.*, 991 S.W.2d at 123; *See also Baltz v. Walgreen Co.*, 198 F.Supp. 22 (W.D. Tenn. 1961) (evidence that appellant secured indemnification relevant to whether he knowingly and willfully violated injunction); *DSC Communications*, 929 F.Supp. at 244 (indemnity also admissible "where it is relevant to the issue of damages or punitive damages").
32. *Brainard v. Cotner*, 59 Cal.App.3d 790, 794–96 (1976); *see also Blake v. E. Thompson Petroleum Repair Co.*, 170 Cal.App.3d 823, 831–32 (1985); *Garfield v. Russell*, 251 Cal.App.2d at 278.
33. *See In re Hanford Nuclear Reservation Litig.*, F.3d, 2007 WL 2302365 (9th Cir. 2007) (though excluding evidence because bias not at issue in that case, recognizing that "[e]vidence of indemnification is generally inadmissible but may be used to show prejudice or bias of a witness.")
34. *See, for example, Plancarte v. Guardsmark, LLC*, 118 Cal.App.4th 640 (2004).
35. *Plancarte*, 118 Cal.App.4th at 647–48.