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Write On

By Jonathan Handel

As everyone knows, the Writers Guild of America has negotiated and ratified a new deal with the studios. Was it a good deal, and what are the terms? It's a complex deal: 50 pages of contract language, amending a 650-page collective bargaining agreement. The most notable terms relate to new media — specifically, the Internet and cell phones.

Background

The deal came after a long and bitter strike. Writers and many others in the entertainment industry lost money and, in some cases, jobs and even houses. In general, the deal is good but not great: The union got many new provisions regarding new media, but the compensation and residuals formulas for these areas are not high, and the coverage has gaps. (Residuals are payments that union members receive when content is reused in certain ways, such as when a movie or TV show is released on DVD.)

For those reasons, the deal has been sharply criticized by some people and has been met with reluctant acceptance by many. It's true that the dollar amounts involved are low. For example, ad-supported streaming of a one-hour TV show (such as on hulu.com or ABC.com) yields a residual to the writer that's only \$1,300 in the first year. The number is less for a half-hour show; and, in either case, after the first year of streaming, the formula changes to a percentage of the distributor's gross receipts, meaning the sums that the distributor receives from the Web site operator. It's hard to say how large that amount might turn out to be, but probably not much, because most people want to watch an episode while it's fresh, not a year later.

Another cogent example is paid downloads of movies, such as from iTunes. In

this area, which is referred to as Electronic Sell-Through or download-to-own, the residual is a percentage of distributor's gross, but the percentage isn't high. On a typical \$10-to-\$15 download, the residual payable to the writer would range from less than 3 cents to less than 7 cents per download. This may not be appreciably different from the 4 cents per unit that is often cited for DVD sales, although comparison is difficult, because the exact number depends on whether the title is new or library, on sales volume and on the differing wholesale prices (margins) involved. In any case, industry observers anticipate that movie downloads will grow very slowly over the next few years and, by 2012, will account for at most 5 percent of total home video sales by volume.

So, if the dollar amounts and sales volumes are so low, did the writers have to strike? Unfortunately, they probably did, although one can never prove a what-if. But recall that what the studios presented in July 2007 was a package of massive rollbacks in traditional media — including the virtual elimination of all residuals — coupled with nothing in new media except a three-year study. Add to that a proposal that would have allowed studios to eliminate writers' credits in advertising, which would have undercut their professional stature at no gain to the studios, and one has to wonder whether the studios intended to force a strike, then reach a deal first with the Directors Guild of America (which is in fact what happened).

In that light, the strike should be considered a qualified success. The writers suffered no rollbacks in traditional media, instead achieving a foothold in new media. They also achieved a few improvements over the parallel terms obtained by the directors union (whose leverage was, in turn increased by the writers' strike).

These gains did come at a terrific cost to writers, as well as actors, directors, crew members and the L.A. economy generally, and some writers (and others) will never make up the income lost during the strike. However, the new media provisions of the contract have to be looked at as a long-term investment for the union; the DVD residual formula, hated by writers because it yields a miniscule residual per unit, dates to 1984-85, and the new media provisions may have a similarly long shelf life. Thus, a final reckoning of the gains and losses probably will not be possible for at least a decade.

New Media

One of the biggest areas of the new deal is that the agreement covers much video content written for new media, but it has to be written for a studio or a production company that's signed on to the agreement (a "signatory company"). Content written for Silicon Valley startups, or for a friend's video posted on YouTube, is not covered.

Not all content is covered, even if it meets these criteria. To be covered, one or more of the following must apply: (a) the writer is a "professional writer," which means he or she has scripts or stage plays that have been produced or has a published novel; (b) the content is based on an existing TV show (regardless of the production budget for the content); or (c) the production budget for the content is above certain thresholds. How or if derivative works based on theatrical or direct-to-video product are covered is unclear, because (b), as noted, applies to TV shows.

If the content is covered, then the writer generally has to be paid at least certain minimums. For derivative works, relatively low compensation minimums apply, on a per-minute basis, with a floor of two minutes' compensation. For original works, compensation is negotiable.

Also, the writer generally has to receive credit on-screen or on the Web site, generally has to receive residuals if the content is made available for longer than certain set periods, and certain other aspects of the agreement may apply.

In addition, for new media content based on an existing TV show, if the writer introduces a new character that is then used as the basis for a new TV series, then separated rights may apply. For original works, certain separated rights may apply if separation of rights would have applied had the work been written for free television.

What, you may ask, are separated rights? The answer is notoriously complex. Indeed, the union's own booklet on the topic is 40 pages. In general, though, the concept is that the writer retains certain rights in the script even though the ownership, including copyright, has been transferred to the studio or production company. For instance, the studio may have to make payments every time the new character appears in an episode of the new TV series.

Residuals

If a movie or TV program is made available on new media, the writer generally has to be paid residuals. The same is often true if clips of the content, rather than the entire movie or TV show, are made available. The formulas for these residuals are extremely complex and depend on whether the content is made available through paid downloads or ad-supported streaming, whether the content is a movie or a TV show, and on other factors, such as the date the movie or show was written or produced.

As a general matter, many of the residuals formulas are based on distributor's gross. Some formulas, however, are fixed dollar amounts. One formula, notoriously, is stated as a percentage of distributor's gross, but the distributor's gross is then deemed to be a fixed number, rendering the formula's gross-based aspect illusory. The union reports that this was the best it could get, and at least (it says) paves the way for further improvement in the next round of ne-

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t i a t i o n
three years
from now.
Significantly,
the union also at-
tained provisions
that increase the
transparency, and
auditability, of the
new media provisions
of the new deal.

What's Next?

The strike was a qualified success. The writers faced down six multinational media conglomerates and achieved a foothold in new media. Where they go from here — and where new media goes — is anybody's guess. We'll probably see contentious negotiations again in three years, when the contract is up for renewal.

A more immediate concern, though, is the actors. Their collective bargaining agreement expires in just four months, but negotiations have not begun. There are signals that it, too, will be a difficult negotiation. Will there be another strike come

June 30? Hopefully not, but already, studios are refusing to greenlight most movies whose production would extend past mid-June. It's been a bumpy year for Hollywood labor, and the ride's not over.

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