# *HAVE YOUR CAKE AND STREAM IT TOO*

*WHY STREAMING'S THREAT TO RESIDUALS WILL YIELD A SEA CHANGE, NOT JUST ANOTHER SHORT-TERM PANIC.*

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> *"With maybe one exception, every single above-the-line strike in this industry, since the inception of the unions in the 1930s, has been about residuals. Not about basic compensation. Not about pensions and health. Not about rollbacks. Not about underlying conditions. Residuals."* [1]

It is perhaps unsurprising that the film industry, built at the intersection of intellectual property and evolving technologies, has been shaped by its battles to sustain profit participation across new media. Residuals are a peculiar profit-sharing mechanism of hybrid legal status, birthed from market-driven needs of distributors and union defense of their creators' needs. Today, every film labor union depends in some measure on residuals,[2] and, as of 2018, annual residuals payments are estimated to be $2.5 billion.[3] They are clearly a lynchpin of an ever-changing industry and may soon be facing an existential challenge from streaming.

The rise of major streaming players has heralded: (1) a change in the fundamental business structure of the film industry; (2) a newly dominant medium that is incompatible with profit sharing based on "reuse;" and (3) division internally and externally of the industry's negotiating bodies in labor talks. These three compounding shifts exacerbate an already tense debate over the future of residuals that remain integral to the functioning of the film industry. While panic over a new threat to residuals is a story as old as the film industry itself, the rise of streaming platforms, and their capacity ability for continuous and ubiquitous content consumption, challenges the underlying framework of residuals and the film industry itself, demanding new answers to old questions.

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[1] Handel, Jonathan on *Hot Topics in Residuals*, Green Hanson Janks Podcast, December 2018.
[2] For above-the-line talent, actors, directors, and writers, as well as musicians, residuals are direct and sizeable portions of their annual income. For skilled and technical laborers, residuals are a critical mechanism to fund their pension plans.
[3] Handel, *supra* note 1.

## **What Are Residuals and Why Do We Have Them?**

### Residuals: Intellectual Property's Estranged Cousin

Though now an established cornerstone of compensation packages for film laborers, at their inception residuals were a novel invention. They offered entertainment contributors a "piece of the pie," without having to retain ownership of it. Residuals were legally differentiated from traditional intellectual property since the employee recipients, by definition, cannot retain actual ownership of the copyright or any related intellectual property rights. Furthermore, unlike a copyright, residual rights are not triggered on the initial use of work but pay only for reuse of the work.[4]

Residuals, as payments for contributions to creative works, may walk and talk like an intellectual property right, but it is their contractual nature and its separation of ownership from compensation that enables the entertainment industry to function in its current configuration.[5] In this respect, residuals can be cast as the only pseudo "intellectual property invented and perpetuated by organized workers acting through their labor unions."[6]

### So, Where Did Residuals Come From?

With the advent of recorded media, content redistribution overtook content presentation, threatening entertainment professionals' livelihoods. Recorded and replayed performances undercut the demand for industry labor, shifting the estimated potential value of work from nightly earnings to lifetime earnings. Residuals allowed ownership and control to remain consolidated in the production arm and created a tailored compensation mechanism to replace payments creators would have received through the supplanted performances.

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[4] Frisk, 622
[5] Adriane Porcin, Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry, 35 Hastings Comm. & Ent. L.J. 1, 27 (2012)
[6] Catherine L. Fisk, The Writer's Share, 50 Suffolk U. L. Rev. 621, 622 (2017).

Live radio was the first industry to employ a residuals scheme in the United States.[7] When coast-to-coast syndication became possible, performers began to do their live shows twice, once for each coastal time zone. Once recording these shows became possible and performers received one, not two, paychecks, performers' guilds demanded compensation for these rebroadcasts (or the reuse of their first performance) and were granted residuals.[8] As recording technology moved into other fields of live performance, like TV and film, their unions followed quickly, demanding similar dividends for redistributed works.

## The Path to Residuals Paved by Unions

Writers initially viewed residuals as a "betrayal of their ideal that writers should own their own scripts and lease them to the studios," which would require studios to pay for every use, including the initial one.[9] As creators of a copyrighted work, writers had hoped to retain ownership and to lease it to TV and film producers, receiving standard royalties for each use. However, the market would soon dash these desires.

Employee status for writers was critical to the operations of the film industry: studios sought to own the end product in order to edit and distribute it efficiently to growing audiences. The industry, as it operated then and now, could not function if works were leased to producers, as envisioned by early writers.

Furthermore, in order to harnass sufficient power to negotiate with the studios financing the burgeoning film industry, unionization was essential. Creators, including writers, had to self-define as labor producing works made for hire: in order to approach the negotiating table, unions ceded any ability to argue ownership of their works. As one law professor noted, "Ironically, writers had to insist on their status as labor --- employees eligible to form a union--- rather than independent creators in order to gain power as entrepreneurs entitled to profit sharing in their work." [10]

[7] Frisk, 621.
[8] Directors Guild of America, *Residuals*, https://www.dga.org/The-Guild/Departments/Residuals.aspx.
[9] Frisk, 622.
[10] Frisk, 647.

Film laborers gathered under the umbrella of their respective trades, and producers collectively organized as the Alliance of Motion Picture and Television Producers (AMPTP), providing a streamlined mechanism for negotiating the future of the evolving industry. As they currently exist, the labor unions are the Writers Guild of America (WGA), Directors Guild of America (DGA), Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA), American Federation of Musicians (AFM), and International Alliance of Theatrical Stage Employees (IATSE). These guilds negotiate with the AMPTP every three years over the Minimum Basic Agreement (MBA) that defines default payment structures, including residuals, for the creation and use of works. For negotiations on industry-wide matters like residuals in new media, it is traditionally the DGA that sets the benchmarks in negotiations with the AMPTP as their negotiations immediately precede the other guilds in the three-year cycles.

Without unionizing, and its implied concession of relinquished ownership, entertainment laborers would be more likely to be compensated as intellectual property creators, like video game, web design, or technology developers and designers.[11] It was through collective bargaining that creators were able to invent a pseudo-intellectual property and assure a mutually beneficial future in the industry.[12]

## The Wild West: Battles at the Frontier of Intellectual Property Rights

Throughout the ‘30s and ‘40s, writers lobbied in vain for a licensing model that would allow them to retain ownership. In the mid ‘40s, the growth of television led to a reduction in movie production and created a consensus across the industry about the need for a profit-sharing model to compensate for the reduced income to industry professionals.[13] In 1947, it was estimated that about 100 movies were reissued, undercutting demand for “at least [200] or 300 writers, a couple of hundred directors, and producers, and thousands of actors and skilled studio workers.”[14] This

[11] Frisk, 632.
[12] Kevin Leary, Technology, Residuals, and the New Threat to Hollywood Screenwriters, 13 Pitt. J. Tech. L. & Pol’y 1, 5 (2012).
[13] Frisk, 633
[14] Frisk, 633 (citing *Summary of Author’s League Licensing Committee report*), depriving all Hollywood workers, not just writers).

industry-wide threat of reuse unified groups from top-line talent to craft unions and would lead to cementing of residuals as a baseline principal.[15]

Initially, residuals were limited to reuse of TV programming, an industry more amenable to profit sharing as TV was not yet reliably profitable.[16] However, after a 1960 SAG and AFTRA strike over reuse of movies on TV,  the guilds were able to secure residuals for movies licensed to TV.[17] Similarly, residuals began as exclusive benefits for above-the-line talents like writers, actors, and directors, but eventually trickled down to technical and skilled laborers, such as those in IATSE, where residuals are a primary source of  funding the pension plan.

As more distribution and production companies entered the growing market, the increasingly competitive and diversified landscape divided priorities and goals, adding more tension to negotiations. The result was an interactive compensation scheme with "different pay scales and residuals formulae for different kinds of programs," an intimidatingly complex scheme that continues to this day.[18]

## The (Not So) Short and (More Bitter Than) Sweet Story of the Entanglement of Residuals and New Technology in Labor Strikes

### Cable and Home Video Conflicts (Pre-Internet)

The history of labor conflicts is intimately entangled, if not driven by, new technologies and their impact on residual incomes.[19] The emergence of "supplemental markets," like pay television and home video, dominated collective bargaining in the early '70s and extended

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[15] Frisk, 634
[16] Frisk, 639
[17] SAG-AFTRA Website, Residuals History, https://www.sagaftra.org/membership-benefits/residuals/history-residuals.
[18] Frisk, 641.
[19] Frisk, 623 ("In sixty years since [creation of residuals], writers continue to strike in order to protect residuals, as distribution through new technologies such as cable television, home video, and the internet threatens to undermine their rights.").

residuals to these markets in 1981. The advent of basic cable in the '80s resulted in another new residual income stream.[20]

However, the '80s were primarily defined by the continued fight over VHS and home viewing residuals. The guilds, negotiating "in the dark," could not anticipate how lucrative the home viewing market would be when VHS entered the market in the '70s. This initial failure led to a WGA strike in 1985 to increase residuals in the VHS market.[21] The strike yielded underwhelming increases, leading to further conflicts when the unsatisfactory percentages were applied to the even more lucrative DVD market in the '90s.

<u>Internet Negotiations Continue "in the Dark"</u>

David Letterman famously snickered at Bill Gates' proposal that the internet would change everything. The clip does not age well, but, at the time, his sentiment resounded across industries. In fact, the AMPTP approached the advent of the internet with an eerily familiar refrain: the new medium would be "merely another form of promoting shows rather than a significant source of revenue."[22] However, guilds remained dubious given the parallel to arguments made in VHS disputes, and, despite the fact that no one knew how these new mediums would impact the industry, players came to the negotiating table certain they needed to preemptively protect their piece of the fresh pie.

The 2000 SAG-AFTRA strike foreshadowed the coming bloodshed on the battleground of the internet, where "the prospect of online television was probably *the* core issue."[23] Advertisers of the Joint Policy Committee (JPC) refused to discuss internet residuals in negotiations as the industry at large had denied the union's jurisdiction over the internet. The guild viewed this as an existential threat that would have carved out an industry-wide "haven for

[20] Brief for Screen Actors Guild-American Federation of Television and Radio Artists, Directors Guild of America, Inc., Writers Guild of America, West, Inc. in Support of Petitioners, 30 (2013).
[21] Leary, 3 (1985 WGA goes on strike for share of VHS market or 1.5% of producer's take, but producers were doing 1.5% of net rather than gross, making it more like .3%).
[22] Carole E. Handler, James D. Nguyen, Marina Depietri, The WGA Strike – Picketing for a Bigger Piece of the New Media Pie, 25 Ent. & Sports Law. 2, 3 (2008).
[23] Craig J. Ackermann, E-Issues Take Center Stage: The 2000 SAG/AFTRA Strike, 8 Vill. Sports & Ent. L. J. 293, 307 (2002).

non-union, underpaid work."[24] Afraid to repeat their mistakes of past compromises on residuals, the guild settled the strike, ceding to JPC demands on the cable front in order to secure dominion online, albeit an uncertain one, fought "in the dark" with little understanding of how this new medium would develop.[25]

## The Strike to Nowhere

The 2008 WGA strike, estimated to have cost the state of California $2 billion dollars and 27,770 jobs,[26] was in many ways an extension of the 1985 disputes over home video residuals. The WGA was determined to increase residuals for DVDs and, most importantly, secure a foothold in streaming residuals for fear of "being duped as they once were with home video."[27] Unsurprisingly, as online media uses were still classified as "promotional" and thus outside of the guilds' jurisdiction for compensation, "new media was the biggest driver of the strike."[28] As in previous iterations, it was the uncertainty of the future of revenue on the internet that stalled negotiations and fomented a strike from which the industry, in some ways, has yet to recover.

While the WGA strike wrought turmoil, cancellations, and a forced hiatus in the film and TV industry, its leaders faced backlash from those who viewed the strike as an undue burden on those who relied on regular paychecks, especially those in other unions like IATSE where lower-paid workers valued residuals less since they are paid only into pensions. The WGA attempted to cast themselves as allies fighting a common war: "Should we fail, should the DGA fail, should SAG fail, then the members of the IATSE will discover what it really means to not get residuals. Their pension and health plans will disappear."[29]

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[24] Ackermann, 307 (quoting Screen Actors Guild, *SAG/AFTRA Commercials Strike 2000, Commercials Strike information, Know the Facts!, at* http://www.sag.org//strik/faq.html).
[25] Ackermann, 311.
[26] Leigh Blickley, *10 Years Ago Screenwriters Went On Strike and Changed Television Forever,* Huffington Post, *at* https://www.huffpost.com/entry/10-years-ago-screenwriters-went-on-strike-and-changed-television-forever_n_5a7b3544e4b08dfc92ff2b32.
[27] Leary, 9 (citing Tatiana Siegel, *Studios Pose Obstacles for Writers,* Variety (Feb 8, 2008, 1:53 PM)).
[28] Katie Mapes, *The 2008 Writer's Strike Explained,* The Harvard Law Record, February 22, 2008; Handler, 3.
[29] Craig Mazin and Matt Edelman, *Residual Rumble,* The Los Angeles Times, Dec. 12, 2007.

However, the devastating forced hiatus settled with more of a fizzle than a bang, achieving gains some believed were forthcoming regardless.[30] As one industry entrepreneur noted, "The studios may be cheap and unreasonable on certain issues, but they're not vicious."[31] Furthermore, despite the heralded success of recognized jurisdiction over new media, the WGA "didn't get anything close to what they wanted" in new media, and, as was standard practice, eventually adopted the DGA's deal.[32] If anything, the WGA made a massive concession on DVD sales for a meager presence online split between downloads and ad-support streaming, continuing a trend of alarmist grabbing for residuals where profit mechanisms were still uncertain.[33]

However, this havoc may be the true power of the strike, as the fear engendered still looms ominously over the industry. In subsequent years, the guilds seem to have leveraged the damage inflected as a threat to the AMPTP. As WGA representatives threatened a walkout during the 2017 negotiations: "The studios and networks know that we mean it and will do it if necessary, and that's a lesson from the 2007-2008 strike." Perhaps due to the still resounding impacts of the strike, the AMPTP ceded to WGA demands across the board.[34]

## THE THREE COMPOUNDING THREATS TO TRADITIONAL SET UP

The film industry is no stranger to new media upsets. In fact, given the technological medium through which it operates, Moore's Law, the principal that computing power doubles every two years, would expect continuous and dramatic shifts as developments speed through the marketplace. However, there are three interacting byproducts of film and TV streaming that make this new medium the most striking harbinger of fundamental change since the advent of recording technology.

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[30] Leary, 8.
[31] Matt Edelman, *Residual Rumble,* The Los Angeles Times, Dec. 12, 2007.
[32] David Macaray, *The 2007-08 Writers Strike,* Huffington Post, *at* https://www.huffpost.com/entry/the-200708-writers-strike_b_3840681.
[33] Mapes (noting writers' frustration that sacrificing an increase in DVD residuals was too large a concession for the meager online residuals, especially given that residuals for ad-support streaming would only be triggered after a 17-day window where many felt most of the watching occurred).
[34] Blickley.

## First, How Are Things Currently Done?

In the traditional landscape of film distribution that evolved alongside residuals, networks and film distributors purchase from studios the right to monetize content for a certain amount of time in exchange for paying some portion of the cost of production, with incremental increases in payouts if the content is successful. Most importantly, studios retain ownership of the product and can therefore continue to exploit the product in secondary markets, which can be immensely profitable.

As they retain ownership of the works, studios manage secondary markets outside of content's initial release, or the "back-end," and pay out residuals to unions. As such, the AMPTP, under which studios organize, negotiate with unions for minimum residual payouts for the MBA. The mechanism through which minimum residual payments are set is nightmarishly complex, with different payment schemes depending on the medium in which work was created and the secondary use to which it is being put. The varying metrics, short codes, and color coding on the "simplified" cheat sheet for industry professionals should come with a seizure warning.[35] However, the trend in the industry is for studios to simply pay out a percentage of the revenue from any back-end deals.

All the while, the industry is increasingly vertically consolidated: almost all major players are comprised of multiple studios and networks and distributors. Therefore, it is common for a network or distributor to license content from its own subsidiary. Unsurprisingly, it appears studios are happy to cut their parent company deals. However, where there is evidence that the studio failed to incorporate external demand for the content to undercut the cost, residual rights holders can have a cause of action for self-dealing and an orchestrated deflation of their residual payments. In fact, an arbiter recently awarded a $178.7 million judgement to two co-stars and producers of the Bones TV show who sued the Disney-owned Fox distributor for self-dealing and awarding below-market licensing fees to its related divisions. Though $128.5 million in punitive damages were eventually overturned, the shocking price tag revealed an industry-wide

[35] Jonathan Handel, 2018 Residuals Chart, http://www.jhandel.com/residuals.

sensitivity and intolerance for undercutting profit participation models in an age where profit-participation models are under threat.

## Shift #1: Shift in the Business Model

### *A New Way of Doing Business*

When Amazon and Netflix pioneered a model of offering production studios less (or no) risk up front, it did so in exchange for complete control of back-end profits. Whereas traditional networks and distributors would cover around 60-70% of production costs up front and allow production companies to retain control of the back-end, the Netflix "cost-plus" model pays production costs plus an additional bonus (generally around 30% of production) up-front to be able to own those back-end profit streams.[36] Furthermore, streaming sites like Netflix and Amazon are able to offer greater creative freedom to producers, as they do not use advertisers to monetize their content. In short, by sacrificing the potential windfalls that content creators can achieve from a hit, producers can create a show on their own terms with little up-front risk.

Netflix and Amazon do offer bonuses for length of stay on the platform, but the relative difference for success is staggering. For example, where a show's success could yield $2 million bonus on Netflix, it would pay out at least $20 million on a traditional network.[37] Furthermore, even Netflix's upfront premiums do not guarantee that a content producer will see a profit on the first season. Often Netflix deducts a fee for distribution despite relinquishing back-end profits, and production companies are still expected to pay out residuals to laborers, the costs of which have risen around 300% for streaming.[38] This means shows are more likely just to break even the first year, and at best will receive marginal benefits, even if the show is a massive success.[39]

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[36] Michelle Castillo, *Netflix Tries a Different Model for TV Shows, Paying More Up Front But Keeping More Later On Big Hits, Insiders Say,* CNBC, https://www.cnbc.com/2018/08/15/netflix-cost-plus-model-tv-shows-revenue-upside.html.
[37] Castillo.
[38] Castillo.
[39] Castillo ("But even that bigger up-front payment doesn't necessarily mean production companies take home profits after the first season. That's because, although Netflix buys the show, it typically deducts a fee for distributing the show and bakes this cost into the contract as an 'imputed license.' For many productions in the first season, this offsets the 30 percent premium over production costs that Netflix pays up front. This leaves the production company at break-even in the best cases, and most times it's still losing money the first year.")

*How Industry Is Reacting: Streamers Are Following Along*

While Netflix and Amazon may have pursued this new business model as a means of attracting and assuring long-term exclusive ownership of content on their platform, traditional media has begun to co-opt the model for different reasons.

Disney, with consolidated ownership of multiple legacy distribution and production arms, currently has the strongest grasp on market share. With the launch of their own streaming services, a shift to this new model allows Disney to lock up back-end markets. More importantly, it enables Disney to exploit content across any of its distribution arms without a separate deal for profit participants, preventing exposure to profit-participation litigation like it faced over Bones. Instead of having to pay profit participants based on the market value of a licensing deal, which imposes a legal responsibility to ensure proper valuation and no self-dealing, distributors would use a standardized "point" system that awards set residuals based on a show's success and longevity. For a complex and multi-pronged entity like Disney, using this model streamlines the capitalization of content across related platforms and could likely greatly reduce payouts to profit participants, including residuals recipients.

However, the industry is already warning that this could be an overreach: "It is a push that could raise legal issues, by shifting from paying talent a percentage of a show's profits to fixed cash amounts so studios can put series wherever they want without having to report to profit participants.[40] Though Amazon and Netflix have been employing this method in an astonishing number of deals, producers are now balking at the proposed model inversion not only because of Disney's greater ability to exploit the industry, but also because of the likely permanence of the shift if legacy distributors like Disney also buy into the model. As one entertainment lawyer described it, the purchaser "can run it 10,000 times on their [streaming] service and they can run it 10,000 times on their own network, they can sell tons of advertising, tons of subscriptions and you won't get any additional money."[41]

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[40] Nellie Andreeva, *Disney TV Studios Eyes New Profit Participation Model As Industry Continues to Pull Away From Traditional Backend Deals,* Deadline, July 8, 2019, https://deadline.com/2019/07/hollywood-profit-participation-tv-deals-changes-disney-streaming-services-1202641423/.
[41] Stephen Battaglio and Wendy Lee, *The End of the Backend? Disney Wants To Limit Profit Participation On Its New TV Shows,* LA Times, September 12, 2019, https://www.latimes.com/entertainment-arts/business/story/2019-09-12/disney-tv-shows-backend-profit-participation-changes.

Shift #2: Streaming Is Inherently Ill-suited for Residuals

Perhaps most obviously, streaming is inherently ill-suited for a back-end compensation model based on reuse. Streaming is not just a new medium, it is a new paradigm: where content producers may have been eager to capitalize on the secondary market licensing deals that could yield residual payments, streaming services are paying premiums to monopolize content within their own platform, which locks up back-end markets.

*How To Share Success*

For existing content from traditional studios that is licensed to streaming services, the residual payment mechanisms are relatively unaffected, as they can be paid as a percentage of the licensing fee. However, for content purchased for first use on a streaming service, players are still struggling to conceive of how "reuse" should be defined or triggered where content is continuously and idiosyncratically consumed.

The current formulas, negotiated by the DGA in 2014 and amended in 2017, are annual declining payments calculated based on the number of subscribers to the platform and the length of time on the platform.[42] As a show's viewership or success on the platform is largely irrelevant, residuals do not allow recipients to share in the success of a creation. Given the declining importance of a secondary-market, finding an appropriate way to compensate creators for success in streaming is even more important. However, even if unions wanted to lobby for increased profit sharing based on success within the platform, it is unclear what metrics could or should be used.

*Defining "Use" in an Idiosyncratic Black Box*

The "black box" of new media further complicates this as streaming platforms do not release consumer data beyond the occasional "self-serving marketing" metric. Traditionally, just

[42] Jonathan Handel, *Streaming TV's Ratings "Black Box" Could Lead To Hollywood Guild War,* The Hollywood Reporter, November 13, 2019, https://www.hollywoodreporter.com/news/streaming-tvs-ratings-black-box-could-lead-hollywood-guild-war-1254321.

continued use of content on a platform could yield immense windfalls for a successful show, as creators could point to viewership metrics. Now that streaming platforms can withhold these metrics, creators are left with little leverage to argue for licensing bumps after continued years on the platform.

Even if streaming services were to release data, there is no consensus on which metrics matter. Some argue for additional bonuses based on number of views, but even on this point it is unclear what counts as a "view:" is it triggered on playing the episode, consuming a certain percentage, or is completion of an episode required? Netflix defines a view as watching 70% of a movie or TV episode, while Nielsen triggers a view after six minutes.[43] One fix could be using total amount of time streamed. Another more sophisticated proposal, better tailored to revenue generated for the platform, would track the number of subscribers who sign up specifically for the content as well as how many users retain their membership to continue watching the show.

Industry representatives are split on the best path forward. While some maintain that viewership data is critical to career advancement and proper compensation, others argue that the lack of viewership data is actually a boon to talent. Agents can tout more "break out hits" and studios now grant greater value to industry awards and nominations. Plus, a success-agnostic payment system based on subscribers guarantees some payment so long as they remain on a platform. Furthermore, given the overcrowding of the space, it seems that the already slim likelihood of achieving a windfall-level hit will become more scarce.

### *Continued Confusion and Brewing Tensions*

The DGA, the anchor negotiator in the "pattern bargaining" system, has reportedly stalled its scheduled discussions with the AMPTP in an effort to better understand and strategize existing streaming residuals formulas.[44] If they succeed in negotiating a workable system, it will likely waterfall automatically to the above-the-line guilds (SAG-AFTRA and SAG). However, similar to progress made with application of residuals at their inception, the below-the-line guilds

[43] Handel, *supra* note 42.
[44] Handel, *supra* note 42 (reporting that the DGA has been "spearheading analysis of this issue for months" and keeping SAG-AFTRA more "in the loop" than usual.")

IATSE and AFM will have to re-fight the same battle with delayed (if any) applications. IATSE continues to fight for the residuals that keep its pension, while industry studio musicians face a "near extinction level event" as the AFM continues to be unable to secure any online residuals from the AMPTP.[45]

## Shift #3: Division of Negotiating Bodies

Further complicating the new media landscape is a uniquely fractured AMPTP, which increases union leverage. Unlike the golden era where Lew Wasserman could lead negotiations for a unified industry, it is exceedingly unlikely that major players would be comfortable entrusting the de-facto power broker of the industry with major decisions. AMPTP member interests are simply too divergent or in direct competition: newly consolidated studios are now more walled off and directly competing, Amazon hosts streaming as a tangential business to its core business, and Sony hopes to produce agnostically for all the members.[46] Competition and visions of the direction of the industry are simply too misaligned for cohesive interests or alignments on goals.

### *Netflix: Who Is That Bad Boy in the Corner?*

While the 2008 writers' strike devastated the entertainment industry, it was a "godsend" to Netflix: the forced hiatus meant viewers had to turn to Netflix's older content and allowed for a great expansion their online model.[47] In some ways, the strike catapulted Netflix into its current ground-breaking growth rates: in 2019, Netflix produced more original content than the entire 2005 TV industry.[48]

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[45] Jonathan Handel, *Streaming Is An Extinction Level Event,* The Hollywood Reporter, *at* https://www.hollywoodreporter.com/news/is-an-extinction-level-event-musicians-fear-livelihood-streaming-residuals-1246824

[46] Handel, *supra* note 42.

[47] Leary, 6-7.

[48] Gavin Bridge, *Netflix Released More Originals in 2019 Than the Entire TV Industry Did in 2005,* Variety, December 17, 2019, *at* https://variety.com/2019/tv/news/netflix-more-2019-originals-than-entire-tv-industry-in-2005-1203441709/ (reporting that Netflix created and released more original content in 2019 than entire TV industry did in 2005).

It seems Netflix may have retained an appreciation for the premium value of insulation from industry turmoil. For the first time, there is a major studio player negotiating with unions circumventing the AMPTP. Netflix cut a separate three-year deal with SAG-AFTRA this summer and is in negotiations with IATSE, [49] and the WGA has signaled a willingness to negotiate separately.[50] While Disney and other streaming AMPTP members run the risk of facing a performers' strike, Netflix, already the leading content producer, would be able to continue churning out content unabated.[51]

As the national executive director and chief negotiator for SAG-AFTRA noted, "I think it makes total sense for [Netflix] to want independent deals and to not worry about the possibility of industry labor strife that their competitors will have to be concerned about in upcoming negotiations."[52] Not only has Netflix bargained to insulate itself yet again from industry turmoil, but it appears that the guilds may be attempting to leverage the acquisition of a continued employment in the event of a strike ahead of their negotiations with the AMPTP.

## **What Lies Ahead for the Streaming (Film) Industry**

Residuals, or some incarnation of them, are likely here to stay. They are too integral to the functioning of the current system for those who depend on them or those who award them to allow them to slip away. As entertainment law expert Jonathan Handel notes, "The industry needs residuals because talent—especially actors, writers, and [television] directors—survive on them between gigs….Without these payments, the industry's professional talent base would evaporate."[53]

Future payments based on success is the cornerstone of how independent and fringe works get financed in the risk-averse industry. As a basic business precept, where a purchaser may be

[49] David Robb, *Netflix To Bargain with IATSE for First Companywide Film TV Contract,* Deadline, October 2019 *at* https://deadline.com/2019/10/netflix-to-bargain-with-iatse-for-first-companywide-film-tv-contract-1202769607/.
[50] Wendy Lee*, Netflix Stands Apart as Labor Drama Brews; Streamer's Go-it-Alone Dealings with Unions could Give it a Leg Up if Industry Disputes Hit*, LA Times, Nov 20, 2019.
[51] Handle, *supra* note 45.
[52] Lee, *supra* note 50.
[53] Frisk, 623 (quoting Jonathan Handel, *Hollywood on Strike!: an Industry at Warn in the Digital Age*, 7-8 (2011)).

skeptical of a venture's future worth, the promise of future payments based on success enables that transaction.[54] The entertainment business is founded on a tradition of deficit financing that enabled risk-taking, innovation, and huge profits. Though only two to five percent of network TV shows reached major success, just one "hit" would be lucrative enough to bankroll thirty-five others. As secondary market opportunities shrink and a new model has purchasers covering all costs up-front, it seems independent, risk-taking, or fringe content creators may have a hard time finding financers as purchasers will be more risk averse.

The current shifts seem to incentivize prioritizing quantity over quality in investment, not just for content financers but for the creators as well. As opportunities to capture residual payments decrease and the success metrics become more and more shrouded, the above-the-line talent pool that rarely works year-round could be forced to shift to a more regular employment regime. [55]

The instinct of weathered industry veterans may be to dismiss the streaming hysteria as one of a long list of alarmist indulgence. However, despite the historical validity of this critique, the industry-wide shift to streaming is not like the others as evidenced by shifts in fundamental business model, fractured negotiating bodies, and an inability to coherently apply a residuals framework as with previous mediums. As streaming becomes the dominant distribution mechanism for film, industry negotiations may inaugurate the next, and first, new chapter of the film industry since its inception, when the advent of recorded media necessitated the creation of residuals themselves.

[54] Frisk, 626
[55] Frisk, 626

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