

Impact of the Writers Guild Settlement On Digital Content Distribution

In the coming days, the 10,500 striking members of The Writers Guild of America are expected to ratify a new, three-year agreement, which secures the writers a share of the digital media market by way of compensation for television programming and films delivered via the Internet and new media distribution platforms, including those delivered on an ad-supported basis. The proposed deal recognizes that the Internet is a *primary* means for content creation and delivery and firmly establishes the union's jurisdiction over programming created for and distributed via new media outlets.

The anticipated compensation formula provides for the writers to receive a flat fee for programs streamed for the first two years of the term of the agreement. In the third year, the writers will begin to receive a percentage of the distributors' gross revenue. The proposed agreement also provides for compensation for programming written specifically for new media platforms that are distributed and syndicated later as a television series, special or motion picture. The new rate at which writers will be compensated for electronic distribution of movies and television shows is speculated to be nearly double the rate historically paid by distributors for DVDs.

The arrangement raises complex and daunting questions for content producers, providers, distributors, aggregators and syndicators operating in the new media space. These include:

- How will networks and studios take these additional fees into account in determining the license fee that distributors will pay or share of advertising revenue they will receive?
- Will the writers' success in securing this compensation formula have a precedential effect on upcoming negotiations of the Screen Actors Guild contract?
- How will the well-established economic model for video downloads (*i.e.*, fixed price per download) be impacted if content providers are compelled to evaluate download-to-own and electronic-sell-through pricing based on the popularity of a particular show?
- Will the distribution of promotional content trigger the payment of residuals? What distinguishes "promotional" programming from "commercial" programming for this purpose?
- What is the scope of the revenue model contemplated and how far do the writers' residuals extend? Content providers will need to carefully structure their transactions with distribution partners to exclude consideration received that is not directly attributable to the programming that is ultimately distributed (*e.g.*, ancillary on-air advertising buys, run of site banner advertising inventory appearing on pages where such programming is streamed via an embeddable/viral media player, *etc.*).
- How will residuals based on "gross revenues" be calculated? What exactly does "gross revenues" mean? Both content providers and content aggregators/distributors will need to be extremely vigilant in delineating applicable deductions for any royalty payments or revenue shares due in connection with the distribution of programming.

The reality is that many content distribution and syndication deals are multi-faceted and often involve multiple forms of distribution, equity components and revenue streams. Now, more than

ever, it has become increasingly important for studios, producers, content providers, distributors and aggregators alike to seek competent legal counsel to mitigate the legal, economic and operational risks involved when contemplating the structure of these transactions.

We are here to help. We have extensive experience in assisting our clients with the development of new business models and the negotiation of cutting edge transactions that facilitate the exploitation of their programming, products and services on all new media platforms, and will continue to stay apprised of how the WGA agreement (once ratified), and other related industry developments, challenge and create obstacles for our clients to overcome.

Contact Dan Schnapp at schnapp@hugheshubbard.com or (212) 837-6258 or Hali Resnick at resnickh@hugheshubbard.com or (212) 837-6058 of our New Media, Entertainment and Technology practice group to find out how we can help you.

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