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**DIGITAL MEDIA AND UNIONIZATION IN THE “GUILDED” AGE:  
HOW LABOR ORGANIZATIONS IN THE ENTERTAINMENT INDUSTRY ARE SWIMMING  
AGAINST THE CURRENT OF STREAMING NEW MEDIA AND TECHNOLOGY**

by

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## INTRODUCTION

A lot can happen in ten years, and nowhere is this truer than in the ways we consume content, particularly entertainment. Over the past decade, music lovers have bid farewell to compact discs,<sup>1</sup> the iPod has come and gone,<sup>2</sup> YouTube dominated digital media,<sup>3</sup> Netflix quashed the relevance of Blockbuster,<sup>4</sup> and—as a heavyweight contender in the modern-day “Streaming Wars,” it has become just one of several services that has hammered the nail in the coffin of cable television as we’ve known it for more than half a century.<sup>5</sup> Though the Digital Age has made this media landscape our new normal, consumers might forget to consider the effect it has had behind the scenes. Traditional media content created by Hollywood has long been the result of collaborations between several unions whose members dominate “nearly every aspect of production.”<sup>6</sup> The vast majority of jobs in the entertainment industry is unionized, steeped in a long history of creatives who have fought for studios and producers to recognize their rights as workers and artists. Membership in a union within the industry “is a mark of professional achievement and is highly prized,” making them “unusually strong labor organizations.”<sup>7</sup> The unions’ powerful legacy has been preserved both above- and below-the-

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<sup>1</sup> Zoë Bernard, *The Death of the CD Industry Is Leaving Millions of Audiophile Holdouts in the Lurch*, BUS. INSIDER (Feb. 16, 2018, 4:23 PM), <http://www.businessinsider.com/the-compact-disc-industry-is-officially-dead-charts-2018-2>.

<sup>2</sup> Chris Welch, *Apple Confirms iPod Nano and iPod Shuffle Have Been Discontinued*, VERGE (July 27, 2017, 12:18 PM), <https://www.theverge.com/circuitbreaker/2017/7/27/16050420/apple-ipod-nano-shuffle-discontinued>.

<sup>3</sup> Tim Peterson, *With an Eye on TV Ad Budgets, YouTube Debuts Search-Based Video Ad Targeting*, DIGIDAY (Mar. 13, 2018), <https://digiday.com/media/youtube-adds-search-based-targeting-tv-style-google-preferred-ad-program/>.

<sup>4</sup> *A Brief History of Netflix*, CNN (July 21, 2014, 6:06 PM), <https://www.cnn.com/2014/07/21/showbiz/gallery/netflix-history/index.html>.

<sup>5</sup> Ryan Knutson & Liliana Llamas, *A Brief History of Cable TV: Creating and Cutting the Cord*, WALL STREET J. (Dec. 19, 2017, 10:02 AM), <https://www.wsj.com/articles/a-brief-history-of-cable-tv-creating-and-cutting-the-cord-1513695725>.

<sup>6</sup> David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017, 3:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html>.

<sup>7</sup> Gail Frommer, *Hooray for . . . Toronto? Hollywood, Collective Bargaining, and Extraterritorial Union Rules in an Era of Globalization*, 6 U. PA. J. LAB. & EMP. L. 55, 75–76 (2003).

line today, representing not only elite A-listers but also numerous freelancers among the cast and crew of each set who depend on the job security, benefits, and credit ensured by the unions that represent them. “Above-the-line” refers to those who are involved in the creative process;<sup>8</sup> such above-the-line unions include the Directors Guild of America (DGA), the Writers Guild of America (WGA), and media professionals (the recently merged Screen Actors Guild–American Federation of Television and Radio Artists, or SAG-AFTRA).<sup>9</sup> In contrast, “below-the-line” encapsulate the rest of the crewmembers, who often have low or no billing, and many of these workers are represented by the International Alliance of Theatrical Stage Employees (IATSE, the oldest Hollywood union whose members include stagehands, carpenters, makeup artists, grips, cinematographers, editors, and animators).<sup>10</sup> More “traditional” unions, such as the Teamsters for transportation<sup>11</sup> and the International Brotherhood of Electrical Workers (IBEW) for television broadcasting technicians,<sup>12</sup> are not entertainment-centric labor organizations per se but are often hired by creatives. It should also be noted that the entertainment industry has established organizations that appear similar to guilds and unions, such as the Producers Guild of

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<sup>8</sup> John P. Hess, *A Guide to Hollywood Unions*, FILMMAKER IQ: FILMMAKING 360 (Sept. 3, 2012), <https://filmmakeriq.com/2012/09/a-guide-to-hollywood-unions/>.

<sup>9</sup> See W. Harry Fortuna, *The Gig Economy Is a Disaster for Workers. Hollywood's Unions Can Help Them Learn to Fight Back*, QUARTZ (Sept. 1, 2017), <https://qz.com/1052310/hollywood-unions-offer-the-perfect-model-for-the-beaten-down-workers-of-todays-gig-economy/>; see also Nikki Finke, *SAG-AFTRA MERGER APPROVED! 81.9% of SAG Ballots Returned Voted Yes; 86.1% of AFTRA; Single Union Effective Immediately*, DEADLINE (Mar. 30, 2012, 1:13 PM), <http://deadline.com/2012/03/sag-aftra-merger-approved-screen-actors-guild-american-federation-television-radio-arts-251114/>. It should be noted that the WGA is technically two separate guilds that collectively bargain together: the Writers Guild of America, East (WGAE) and the Writers Guild of America, West (WGAW); the distinction between the two, at least for the purposes of the scope of this paper, is purely based on each members' geographic location. Thus, I will use “WGA” to mean these guilds collectively and severally, unless otherwise noted.

<sup>10</sup> Hess, *supra* note 8; *Useful Notes / Unions in Hollywood*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/UnionsInHollywood> (last visited May 3, 2018); *IATSE Departments*, IATSE, <http://www.iatse.net/about-iatse/iatse-departments> (last visited May 3, 2018); see Susan Adams, *Why Should Stage Hands at Carnegie Hall Make \$400,000*, FORBES (Oct. 4, 2013, 7:43 PM), <https://www.forbes.com/sites/susanadams/2013/10/04/why-should-stage-hands-at-carnegie-hall-make-400000/#3615a5b96807>.

<sup>11</sup> See Fortuna, *supra* note 9.

<sup>12</sup> *IBEW Media Center: Broadcasting*, IBEW, <http://www.ibew.org/media-center/Articles/Broadcasting> (last visited May 3, 2018).

America (PGA) and the American Society of Cinematographers (ASC), but neither of these groups collectively bargain, or do so minimally, and instead are exclusive, invitation-only trade societies.<sup>13</sup> In fact, the PGA consists of many individuals who negotiate on the management-side against the guilds, albeit not under the PGA banner.<sup>14</sup>

Instead of negotiating with the PGA, above-the-line unions are party to collective bargaining agreements with the Alliance of Motion Picture and Television Producers (AMPTP). Like the PGA, the AMPTP is not a formal union but instead a management-side association that collectively bargains with all the labor organizations on behalf of the industry's studios, networks, and production companies.<sup>15</sup> Much of its membership is engaged in traditional media (for example, CBS Studios or Warner Bros. Pictures); however, it reportedly includes among its membership new players in the digital space such as Amazon, but not Netflix, though neither are signatories (that is, parties) to the collective bargaining agreements in place as the larger, older management entities are said to intentionally “keep[] Netflix and Amazon out of [negotiations].”<sup>16</sup> Nonetheless, these unions' collective bargaining agreements with the AMPTP are so fundamental to productions regardless of scale and medium, and serve as the foundation

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<sup>13</sup> *About*, AMER. SOC. OF CINEMATOGRAPHERS, <https://theasc.com/asc/about> (last visited May 3, 2018) (“Neither a labor union nor a guild, the ASC is an education[al], cultural, and professional organization.”); *Membership FAQ*, PRODUCERS GUILD OF AM., [https://www.producersguild.org/?page=membership\\_faq](https://www.producersguild.org/?page=membership_faq) (last visited May 3, 2018) (“[T]he Producers Guild of America is a trade organization and not a labor union . . . .”)

<sup>14</sup> See Laura Boersma, *Thinking of Joining the Producers Guild? Here's Why I Joined, and How to Get In*, MOVIEMAKER (June 22, 2017), <https://www.moviemaker.com/archives/moviemaking/producing/why-i-joined-the-producers-guild/> (“[The producer is] the only production job without a formal union because it's seen as a management position.”).

<sup>15</sup> *About Us*, ALLIANCE OF MOTION PICTURE & TELEVISION PRODUCERS, <http://amptp.org/aboutus.html> (last visited May 3, 2018).

<sup>16</sup> Dominic Patten, *Chill on Rumors of Netflix Side Deal as WGA Strike Authorization Looms*, DEADLINE (Apr. 24, 2017, 1:14 PM), <http://deadline.com/2017/04/writers-guild-netflix-side-deal-not-happening-wga-strike-1202076414/> (“A question was asked [during the WGA negotiations in 2017] if YouTube and the others, which everyone knew to mean Netflix and Amazon, could make their own deals . . . . It got shot down . . . . The Big 6 [of the major Hollywood studios] see them as competitors . . . .”; see Cynthia Littleton, *WGA Negotiations Set Stage for Streaming Giants to Have Bigger Role*, VARIETY (May 9, 2017, 7:00 AM), <http://variety.com/2017/digital/news/wga-negotiations-netflix-amazon-hulu-1202419150/> (“Amazon is a member of the AMPTP; Netflix is not.”).

for the type of benefits union members receive; as a result, even streaming companies respect and adhere to the very agreements they are not party to, presumably to entice union talent with the prospect of similar pay and treatment as on a traditional set.<sup>17</sup> Both above- and below-the-line unions can enter into collective bargaining agreements and side deals with individual studios and networks in addition to the AMPTP, but these separate contracts tend to be comparable particularly between studios of similar size.<sup>18</sup>

The plethora of labor organizations in the entertainment industry has largely seen a steady increase in membership, especially for the WGA, SAG-AFTRA, and IATSE.<sup>19</sup> In contrast, unions across all industries have been decreasing in membership, with many observers pondering whether unions are viable in the near future.<sup>20</sup> Interestingly, a distrust of technology seems to lie at the underbelly of most labor organizations' loss of control. Some scholars have theorized that although technology was what brought skilled workers to unionize in the first half

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<sup>17</sup> Littleton, *supra* note 16.

<sup>18</sup> See, e.g., *Contracts & Wages*, ANIMATION GUILD: IATSE LOCAL 839, <https://animationguild.org/contracts-wages/> (last visited May 3, 2018).

<sup>19</sup> See *Screen Actors: Membership*, UNIONFACTS.COM (Nov. 15, 2016), [https://www.unionfacts.com/union/Screen\\_Actors#membership-tab](https://www.unionfacts.com/union/Screen_Actors#membership-tab); *Stage & Picture Operators: Membership*, UNIONFACTS.COM (Nov. 15, 2016), [https://www.unionfacts.com/union/Stage\\_%26\\_Picture\\_Operators#membership-tab](https://www.unionfacts.com/union/Stage_%26_Picture_Operators#membership-tab); *Writers Guild West: Membership*, UNIONFACTS.COM (Nov. 15, 2016), [https://www.unionfacts.com/union/Writers\\_Guild\\_West#membership-tab](https://www.unionfacts.com/union/Writers_Guild_West#membership-tab). The WGAE has had some increase in membership in recent years, albeit less evenly compared to its West Coast counterpart, SAG, and IATSE. *Writers Guild East: Membership*, UNIONFACTS.COM (Nov. 15, 2016), [https://www.unionfacts.com/union/Writers\\_Guild\\_East#membership-tab](https://www.unionfacts.com/union/Writers_Guild_East#membership-tab). The DGA was not included as its statistics do not appear to be publicly available. Of the Hollywood unions previously mentioned, the only one with a decline was the Teamsters, which of all these labor organizations, is not a purely entertainment union. *Teamsters: Membership*, UNIONFACTS.COM (Nov. 15, 2016), <https://www.unionfacts.com/union/Teamsters#membership-tab>.

<sup>20</sup> See Raymond Hogler, *Why America's Labor Unions Are About to Die*, CONVERSATION (Nov. 29, 2016, 10:03 PM), <http://theconversation.com/why-americas-labor-unions-are-about-to-die-69575>. But see Chris Shelton, *Point: Organized Labor Is Not Going Away*, INSIDE SOURCES (Sept. 1, 2017), <http://www.insidesources.com/point-organized-labor-not-going-away/> (arguing, from the author's experience as President of the Communication Workers of America (CWA), that unions are increasingly relevant and are required to keep corporations in check as the latter strength increases).

of the twentieth century, that same rapid shift is driving labor organizations apart.<sup>21</sup> On the other hand, over the past decade, digital media and entertainment unions in particular have become uneasy bedfellows by making the most of the opportunities technology offers its members. From a superficial perspective, the talent guilds serve a different purpose altogether from traditional industrial unions. Yet their history and collective bargaining strategies should be viewed as increasingly important, not only to the entertainment industry as new media and digital content continues to grow, but also as an example to other industries in the guilds' ability to maintain their relevance. Technology should not be seen as a threat to labor of any kind, artistic or industrial, despite many orthodox unions' tendencies towards Ludditism.<sup>22</sup> Unions outside of Hollywood need to embrace and take advantage of these changes, especially in the collective bargaining process, and they can look to entertainment labor organizations as success stories that often refused to fear the onslaught of technology and foresaw its usefulness to expand their trade and their rights.

In this paper, I argue that unions and guilds have found—and should continue to assert—their place in the shifting digital tide in the collective bargaining process by claiming their members' rights in credit, residuals, and intellectual property, thereby leveraging their relevance in the modern age. Though not perfectly analogous to industries outside the entertainment industry, this approach to the use of guilds is arguably helpful to non-entertainment labor unions as well, particularly since many workplaces are shifting towards hiring more freelancers just as production sets have always done. Although other sectors of entertainment and media such as

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<sup>21</sup> Derek Thompson, *Who Killed American Unions?*, ATLANTIC (June 7, 2012), <https://www.theatlantic.com/business/archive/2012/06/who-killed-american-unions/258239/>.

<sup>22</sup> See, e.g., Kavi Gupta, *Will Labor Unions Survive in the Era of Automation?*, FORBES (Oct. 12, 2016, 6:00 AM), <https://www.forbes.com/sites/kavigupta/2016/10/12/will-labor-unions-survive-in-the-era-of-automation/#3b3822803b22>.



music and live theatre have arguably been undergoing a similar shift from a union perspective because of digital media, this analysis will focus only on film, television, and the digital realm in which such audiovisual content now resides. In Part I, I will provide an overview of some key turns in the entertainment industry's labor policy, including the beginnings of SAG, the Animators Strike at the Walt Disney Company, and the WGA Strike of 2007–08, as well as the near repeat of the strike in 2017. Part II will examine the strides that the talent guilds have made with respect to new media, especially with respect to their collective bargaining agreements with management studios and producers, as well as litigation they have taken part in relating to technology in entertainment. This section will also forecast how Disney's proposed acquisition of 21st Century Fox might affect union control should the deal be approved. Finally, Part III will examine the ways the entertainment industry has grown to embrace technology in Hollywood, including an overview of the recent Internet Creators Guild, a newly established union created to represent an emerging type of talent, vloggers and digital video creators. This final section will also suggest ways that entertainment guilds can provide a framework for unions in other industries through the "Hollywood model" of contingent hiring.

#### I. THE TRIALS AND TRIBULATIONS OF TINSELTOWN: THE HISTORY OF THE ENTERTAINMENT INDUSTRY'S RELATIONSHIP WITH LABOR ORGANIZATIONS

The old adage about the entertainment industry is that "Hollywood is a union town," steeped in almost a century run by interwoven artistic labor from unions and guilds that have gained power, recognition, and respect.<sup>23</sup> In order to understand how these labor organizations have stood the test of time, it is worth first providing an overview and context that has afforded Hollywood unions their iconic strength.

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<sup>23</sup> Travis Anderson, *The Writers Guild of America and an Unusual Approach to Dispute Resolution*, 3 RESOLVED: J. ALTERNATIVE DISP. RESOL. 63, 63 (2013).

### A. *The Golden Age of Hollywood, 1920s–1960s*

The financial viability of film picked up steam in the 1920s and 30s as the nation teetered and ultimately delved into the Great Depression, offering reprieve to many Americans who “went assiduously, devotedly, almost compulsively, to the movies.”<sup>24</sup> As a result, studios profited despite the economic crisis, becoming solvent enough to form a powerful corporate system of five studios<sup>25</sup>. Despite the fact that union membership dropped off heavily outside of Hollywood, employees in the entertainment industry took it upon themselves to unionize in the face of wealthy—and increasingly strict and unfair—studios.<sup>26</sup> Right on the tails of the New Deal and the passing of the Norris-LaGuardia Act, several entertainment guilds and unions cropped up in quick succession. Among the labor organizations still in existence today that were officially formed during this period include the WGA (then known as the Screen Writers Guild, or SWG)<sup>27</sup> and SAG in 1933;<sup>28</sup> the DGA (then called the Screen Directors Guild, or SDG) in 1936;<sup>29</sup> the proto-AFTRA union (then AFRA, before the advent of television) in 1937; and the

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<sup>24</sup> *Historical Context: Movies in the Great Depression*, HOME OF SCREWBALL (2001), <http://xroads.virginia.edu/~ug03/comedy/historicalcontext.html> (quoting Carlos Stevens on the impact the Great Depression had on the film industry).

<sup>25</sup> Tim Dirks, *The History of Film, The 1930s: The Talkies, the Growth of the Studios, and ‘The Golden Age of Hollywood’ Part 2*, AMC FILMSITE, <http://www.filmsite.org/30sintro2.html> (last visited May 3, 2018). Today, it is known as the “Big Six” (Disney, Warner Bros., Universal, 21st Century Fox, Paramount, and Sony), but will resort back to a five-studio system should the Fox-Disney merger go through, which will be discussed in greater detail in Part II.B. See Georg Szalai, *Studio-by-Studio Profitability Ranking: Disney Surges, Sony Sputters*, HOLLYWOOD REP. (Feb. 20, 2017, 6:30 AM), <https://www.hollywoodreporter.com/lists/studio-by-studio-profitability-ranking-disney-surges-sony-sputters-977497/item/walt-disney-studio-profitability-977490>.

<sup>26</sup> *Great Depression and World War II, 1920–1945: Labor Unions During the Great Depression and New Deal*, LIBR. OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/depwwii/unions/> (last visited May 3, 2018).

<sup>27</sup> *A Brief History*, WRITERS GUILD OF AM. EAST (2014), <https://www.wgaeast.org/2007/01/a-brief-history/>.

<sup>28</sup> Ken Orsatti, *How SAG Was Founded*, SAG-AFTRA (1995), <https://www.sagaftra.org/history/how-sag-was-founded/how-sag-was-founded>; see also *Timeline*, IATSE, <http://www.iatse.net/about-iatse>.

<sup>29</sup> *About the DGA*, DIRECTORS GUILD OF AM., <https://www.dga.org/The-Guild/History.aspx> (last visited May 3, 2018); see Monica Sandler, *PR and Politics at Hollywood’s Biggest Night: The Academy Awards and Unionization (1929–1939)*, 2 MEDIA INDUS. (2015), <https://quod.lib.umich.edu/m/mij/15031809.0002.201?view=text;rgn=main> (describing the earliest efforts of the DGA’s predecessor, the SDG, to collectively bargain using the 8<sup>th</sup> Academy Awards as leverage).

Screen Cartoonists Guild (today the Animators Guild, or IATSE Local 839) in 1938.<sup>30</sup> With this dearth of labor organizations in Hollywood came a number of growing pains which continue to influence unions today.

One of the first attempts by the talent guilds at taking a crack at the autocratic studio system was further bolstered by the passage of the National Labor Relations Act. This early power play involved a concerted effort by the SDG, SWG, and SAG to boycott the 1936 Academy Awards in order to push producers to participate in new negotiations after two years of failed discussions between the producers, guilds, and the labor division of the Academy of Motion Pictures Arts and Sciences (AMPAS, the organization behind the award show).<sup>31</sup> Using this form of publicity helped lead to a determination by the National Labor Relations Board (NLRB) that the guilds represented talent even though they were not “common laborers,” and ultimately led to a standard contract for each talent guild whose members “have [since] held the right to participate in collective bargaining organizations that support their interests as employees of motion picture financiers.”<sup>32</sup> Given that the ability to use new technology in an art form had begun to blossom only three decades before the growth of the labor movement in the entertainment industry, it is noteworthy that creatives from all walks of life and a variety of skills took up the cause of unionization to vouch for their rights within a new world of artistic innovation.<sup>33</sup>

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<sup>30</sup> Tom Sito, *The Screen Cartoonists Guild & Looney Tune Lockout*, ANIMATION GUILD: IATSE LOCAL 839, <https://animationguild.org/about-the-guild/scg/> (last visited May 3, 2018).

<sup>31</sup> See Sandler, *supra* note 29.

<sup>32</sup> *Id.*

<sup>33</sup> David A. Cook & Robert Sklar, *History of the Motion Picture*, ENCYCLOPÆDIA BRITANNICA (Mar. 22, 2018), <https://www.britannica.com/art/history-of-the-motion-picture>.

1. “*There Are No Strings on Me*”: *The Disney Animators Strike of 1941*

*We'll be ready to fight us a war  
This time we're in it to stay  
Talk about seizing the day  
Write it in ink or in blood it's the same either way  
They're gonna damn well pay!*

“Once and For All,” *Newsies*<sup>34</sup>

Outside of the three major talent guilds, among the most restless union members in Hollywood were animators, whose own sector of the entertainment industry was undergoing a massive shift during the 1930s with the rise of new technology and techniques that required greater time, effort, and skill.<sup>35</sup> The Conference of Studio Unions (CSU) tapped into this dissatisfaction by encouraging animators to form their own guild, leading to the formation of the Screen Cartoonists Guild (SCG).<sup>36</sup> In the midst of this pioneering unionization, Walt Disney’s company was primed for the first major strike in Hollywood fresh off the success of 1937’s *Snow White and the Seven Dwarfs*. The Disney Strike of 1941 established the type of demands that union members in the entertainment industry would come to demand from studio management: Unlike their industrial counterparts, unionized creatives instead sought ownership over intellectual property, recognition through credit, workplace atmosphere, and a fair cut of the amount made from the films that the animators brought to life.<sup>37</sup> This battle in particular focused on Disney’s anti-union policies, as the man behind the Mouse was deeply suspicious of union

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<sup>34</sup> ALAN MENKEN & JACK FELDMAN, *Once and For All, on NEWSIES* (1992) (portraying the strife of the child laborers in the Newsboys Strike of 1899 in a film and Broadway musical recently produced—ironically, as we will see here—by Disney).

<sup>35</sup> Bill Knight, *Opinion: ‘Uncle Walt’ Disney Provoked 1941 Strike*, CANTON DAILY LEDGER (Dec. 28, 2017, 11:52 AM), <http://www.cantondailyledger.com/news/20171228/opinion-uncle-walt-disney-provoked-1941-strike>; Lisa Johnson, *The Disney Strike of 1941: From the Animators’ Perspective* 5–6 (2008) (unpublished B.A. thesis, Rhode Island College), [http://digitalcommons.ric.edu/honors\\_projects](http://digitalcommons.ric.edu/honors_projects).

<sup>36</sup> TOM SITO, *DRAWING THE LINE: THE UNTOLD STORY OF THE ANIMATION UNIONS FROM BOSKO TO BART SIMPSON* 67, 116, 155 (2006); Tom Sito, *supra* note 30.

<sup>37</sup> Johnson, *supra* note 35, at 6.

activities, would not recognize the new union, and even terminated several unionized animators including Art Babbitt, Disney's leading cartoonist and creator of the studio's iconic character Goofy.<sup>38</sup> As a result, the SCG filed a complaint with the NLRB for Disney's refusal to bargain with the guild in good faith.<sup>39</sup>

Hundreds of animators walked out on the studio, adding further tension to an already fraught situation.<sup>40</sup> The SCG found support among other unions, including the Screen Editors Guild, SAG, AFL, and the Teamsters.<sup>41</sup> After weeks of picketing and failed attempts at negotiation, the studio was ultimately forced to recognize the union after the Department of Labor sent Judge James Casey, who ruled that the guild's jurisdiction should be acknowledged, standardized wages and hours, doubled pay rates, and required that complete screen credits be listed on films.<sup>42</sup> The NLRB also recognized the union, found that Babbitt's termination constituted an unfair labor practice, and suggested that the animator be remedied by being reinstated at Disney.<sup>43</sup>

The strike had a lasting, albeit relatively unrecognized, place in the entertainment industry's history. Many union animators left Disney and embarked on their own successful careers in entertainment, ultimately leading to the creation of popular hits such as the Charlie Brown television specials, *Dennis the Menace*, *Mr. Magoo*, and *How to Succeed in Business Without Really Trying*.<sup>44</sup> Animators who loyally stayed with Disney also had their say in the dispute immortalized in *Dumbo*, which was created during the strike and includes a biting parody

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<sup>38</sup> SITO, *supra* note 36, at 119–20

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 123–29.

<sup>41</sup> *Id.* at 130–33.

<sup>42</sup> *Id.* at 141–42.

<sup>43</sup> Walt Disney Prods., 48 NLRB 102 (1943); SITO, *supra* note 36, at 142.

<sup>44</sup> SITO, *supra* note 36, at 144–45.

of the labor dispute in the form of boorish clowns drunkenly singing, “Oh, we’re gonna hit the big boss for a raise!”<sup>45</sup> As for the CSU, which had backed the strike from its inception, it also played an influential role in labor law only four years later during a labor dispute which escalated into what is now known as Hollywood Black Friday or the Battle of Burbank. Warring with IATSE over the jurisdiction of set decorators, the CSU brought 300 strikers with weapons to the Warner Bros. studio lot in Burbank; as a result, eighty people were hospitalized, several union representatives were jailed, and the CSU fell into disrepute, viewed as a communist regime.<sup>46</sup> The violent conflict prompted the passage of the Taft-Hartley Act two years later.<sup>47</sup> Today, the Animators Guild—as mentioned previously—is now an IATSE local, and the CSU is no more.

## 2. *All the World’s a Stage, and All the Men and Women Union Members: The Rise of SAG*

While crew behind the scenes had begun to assert their needs through unionization and the Oscars boycott paved the way for talent guilds’ bargaining power, the talent in front of the camera did not immediately benefit from unionizing under SAG. Despite being a part of one of the earliest entertainment guilds, actors often struggled to take advantage of their union status under the strict studio system. The studios essentially “owned” their actors, though the guild gradually worked for better working conditions including restricted hours and required meal breaks.<sup>48</sup> The first major breakthrough in actors’ rights aided by SAG came only after Olivia De Havilland succeeded in a hard-fought battle where her contemporary Bette Davis did not. Both

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<sup>45</sup> *Id.* at 129.

<sup>46</sup> *Id.* at 160–66; *The War for Warner Brothers*, IATSE LOCAL 728, <https://www.iatse728.org/about-us/history/the-war-for-warner-brothers> (last visited May 3, 2018); Duncan Campbell, *How the Mob Broke Movie Pickets*, *GUARDIAN* (Apr. 28, 2001, 9:31 PM), <https://www.theguardian.com/world/2001/apr/29/filmnews.film>; see also GERALD HORNE, *CLASS STRUGGLE IN HOLLYWOOD, 1930–1950: MOGULS, MOBSTERS, STARS, REDS, AND TRADE UNIONISTS* 180–92 (2001) (describing the lead-up and aftermath of the Battle of Burbank).

<sup>47</sup> *The War for Warner Brothers*, *supra* note 46.

<sup>48</sup> Orsatti, *supra* note 28.

actresses felt constrained by the type of roles that studios boxed them in through their contracts. However, studios could abuse the supposedly “seven-year” term of these contracts and dictate actors’ careers in perpetuity by stretching the term every time the talent turned down a role, which would result in suspension without pay.<sup>49</sup> Davis’ unsuccessful 1936 litigation with Warner Bros. resulted in a decision that “[prevented] her from working for another producer while under contract with the Warners,” whose management Davis famously called a part of “the contract slave system.”<sup>50</sup> Almost a decade later, with the support of a more experienced guild, De Havilland was released from the seven-year term when she took Warner Bros. to court and successfully broke her and her fellow actors’ contracts.<sup>51</sup> As a result, California Labor Code Section 2855 reinforced the concept that contracts with such a fluid term are not tenable and actors can opt out after a set time.<sup>52</sup> Today sometimes termed “the De Havilland law,” it continues to be invoked by talent today.<sup>53</sup>

Despite its support for a statute and litigation that helped dismantle the despotic studio system, SAG’s most pronounced impact on labor law in the entertainment industry arguably

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<sup>49</sup> Steve Greenfield & Guy Osborn, *Sympathy for the Devil? Contractual Constraint and Artistic Autonomy in the Entertainment Industry*, 15 TOLLEY’S J. MEDIA L. & PRAC. 117, 118 (1994); Thomas J. Stipanowich, *Olivia de Havilland: The Actress Who Took on the Studio System and Won*, L.A. TIMES (July 1, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-stipanowich-de-havilland--20160701-snap-story.html>.

<sup>50</sup> *Nelson v. Warner Bros.* [1937] 1 K.B. 209; Albin Krebs, *Bette Davis, a Queen of Hollywood, Dies at 81*, N.Y. TIMES (Oct. 8, 1989), <https://www.nytimes.com/1989/10/08/obituaries/bette-davis-a-queen-of-hollywood-dies-at-81.html?pagewanted=all>.

<sup>51</sup> *De Haviland [sic] v. Warner Bros. Pictures*, 67 Cal. App. 2d 225 (Cal. Ct. App. 1944); Orsatti, *supra* note 28; Stipanowich, *supra* note 49.

<sup>52</sup> CAL. LAB. CODE § 2855 (West 2007); Matthew Belloni, *De Havilland Lawsuit Resonates Through Hollywood*, REUTERS (Aug. 23, 2007, 11:13 PM), <https://www.reuters.com/article/industry-lawsuit-dc/de-havilland-lawsuit-resonates-through-hollywood-idUSN2329585820070824>.

<sup>53</sup> *See, e.g.*, Simon Thompson, *Karl Urban Talks ‘Star Trek Beyond,’ the Future of ‘Dredd’ and Getting Behind the Camera*, FORBES (July 18, 2016, 7:36 PM), <https://www.forbes.com/sites/simonthompson/2016/07/18/karl-urban-talks-star-trek-beyond-the-future-of-dredd-and-getting-behind-the-camera/#32fff147423f> (describing how actor Karl Urban “was under no obligation to do [the] third [*Star Trek*] film” under the De Havilland law and considered invoking it when he believed the role fundamentally changed). Johnny Carson also used the law in 1979 during a contract dispute with NBC, though he ultimately did not break from *The Tonight Show*. *See* Jonathan Blaufarb, *The Seven-Year Itch: California Labor Code Section 2855*, 6 HASTINGS COMM./ENT. L.J. 653, 685 n.169 (1984) (citing *Family Feud: Carson and NBC Go to Court*, TIME, Sept. 24, 1979, at 86).

came much later in the 1950s and 60s, when all guild members—not just A-listers like Davis and De Havilland—benefited from union membership. This key change was ushered forth by one of the most surprisingly influential figures in the guild’s history, Ronald Reagan. Long before his days as the champion of the Republican Party and as U.S President, Reagan led an altogether different group, SAG. Holding the post of guild president for seven terms, Reagan saw SAG through its first three strikes (1952–53, 1955, and 1960), the last of which primarily demanded residual payments.<sup>54</sup>

In the advent of television, actors featured on the big and small screen became concerned about not being paid for repeated showings of their performances—televised re-runs. Seeing this as an untapped source of income, given that the majority of Americans preferred to stay home with their television sets instead of go to the movie theater, actors tried to negotiate for residual payments for telecasts.<sup>55</sup> Producers also recognized—and feared—the lucrative potential in residuals, but since directors and writers had no such deals in their guild contracts and would likely make the same demands if SAG were successful, any talk of residual payments “was simply a nonstarter.”<sup>56</sup> Quipping that he was “trying to negotiate for the right to negotiate,” Reagan received authorization from SAG members to strike. Much to the studios’ surprise, actors walked off set and did not return for over a month, causing production across Hollywood to skid to a stop.<sup>57</sup> As a result, union members were paid residuals for all studio films from 1960 and onward, and instead of retroactive residuals (i.e., payment for televised films before the

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<sup>54</sup> Orsatti, *supra* note 28; *Ronald Reagan, SAG-AFTRA*, <https://www.sagaftra.org/ronald-reagan> (last visited May 3, 2018).

<sup>55</sup> Wayne Federman, *What Reagan Did for Hollywood*, ATLANTIC (Nov. 14, 2011), <https://www.theatlantic.com/entertainment/archive/2011/11/what-reagan-did-for-hollywood/248391/> (discussing Reagan’s surprising impact on SAG from the perspective of a middle-class actor who continues to benefit from residuals today).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



strike), the producers gave a one-time payout amounting to \$2.25 million which jumpstarted SAG's new union health insurance and pension plans.<sup>58</sup> Now a commonplace concept that continues to pay dividends for working union actors (as well as DGA and WGA members), residual payments were a revolutionary and pivotal response to new technology that initially was seen as a threat to their artistic livelihoods. Though Reagan later has been viewed as a union-buster during his presidency over the U.S., it was his contributions to SAG that recently earned him a place in the Department of Labor's Hall of Honor this year.<sup>59</sup>

### *B. The Writers Guild Strike, 2007–08*

While SAG has made some key strides in entertainment labor law and the DGA more or less has a reputation for being its quieter kin (the directors have struck only once in its guild history, which lasted less than a day)<sup>60</sup>, their most outspoken counterpart is assuredly the WGA. The WGA has had eight major (and often lengthy) strikes in its 85-year history, many of which—like SAG's 1960 strike—involved the issue of income earned from home entertainment.<sup>61</sup> For example, the WGA struck in 1960 over revenue from televised movies, in 1981 for cable television and home video revenue, in 1985 over videocassette royalties, in 1988 over residuals, and finally in 2007–08 over new media revenues.<sup>62</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> Joe Davidson, *Induction of Union-Busting Reagan into Labor' Hall of Honor Shocks Union*, WASH. POST: POWERPOST (Sept. 19, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/09/19/induction-of-union-busting-reagan-into-labors-hall-of-honor-shocks-union/?noredirect=on&utm\\_term=.04553db951f9](https://www.washingtonpost.com/news/powerpost/wp/2017/09/19/induction-of-union-busting-reagan-into-labors-hall-of-honor-shocks-union/?noredirect=on&utm_term=.04553db951f9); *Hall of Honor Inductees*, U.S. DEPT. OF LABOR, <https://www.dol.gov/general/aboutdol/hallofhonor/inductees-alpha>.

<sup>60</sup> 1987, DIRECTORS GUILD OF AM., <https://www.dga.org/The-Guild/History.aspx?value=1987&Decade=1980s&Year=1987> (last visited May 3, 2018) (“The Guild’s first industry-wide strike last[ed] three hours, five minutes in the East and five minutes in the West . . . .”); Victor Valle, *DGA Strike—Short but Sweet*, L.A. TIMES (July 15, 1987), [http://articles.latimes.com/1987-07-15/entertainment/ca-2347\\_1\\_dga-strike](http://articles.latimes.com/1987-07-15/entertainment/ca-2347_1_dga-strike).

<sup>61</sup> See Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 180 (2017).

<sup>62</sup> *Writers Guild of America Fast Facts*, CNN (Feb. 11, 2018, 8:51 PM), <https://www.cnn.com/2013/08/26/us/writers-guild-of-america-fast-facts/index.html>.

The latter, of course, is particularly relevant in light of changes in the ways we now consume entertainment. The strike was essentially an updated rehash of the penultimate of the 1988 strike, the latter of which was a 22-week battle over residuals from domestic syndicated reruns and creative control over scripts.<sup>63</sup> Similarly, the 100-day 2007–08 strike involved writers wary of whether they would be able to take advantage of jobs in the new media space and whether they could retain their digital rights.<sup>64</sup> The writers won fair compensation for internet content, reuse on new media platforms of older works, and licensing on ancillary (including digital) platforms, essentially giving the WGA jurisdiction in new media, a move which then-WGAW president Patric Verrone called “a new beginning for writers in the digital age.”<sup>65</sup> Some shortsighted commentators were more doubtful that it was worthwhile in the long-run, as one skeptic noted in 2008, “It’s hard to picture a situation where little programs for tiny screens will kick up the kind of network salaries and residuals that have been the mother’s milk of writers for decades.”<sup>66</sup> In hindsight a decade after the strike, it may seem obvious to us that writers should be given their due in new media as well as traditional media, yet pioneering writers of the guild with much better foresight had to step up to claim these rights for their union. Michael Schur, best known for writing for *The Office* and co-creating *Parks and Recreation*, recalled how “media companies . . . claim[ed] there was no money in streaming and online content, so [writers] should work for free (basically) until they could get a handle on what it was worth”;

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<sup>63</sup> Sam Schechner, *The Writers’ Strike Feels Like a Rerun from 1988; New Technology Is Still Big Issue, and Viewers Could Be Lost Forever*, WALL ST. J., Nov. 12, 2007, at B.1.

<sup>64</sup> *2008: Writers’ Strike Ends After 100 Days*, HISTORY: THIS DAY IN HIST., <https://www.history.com/this-day-in-history/writers-strike-ends-after-100-days> (last visited May 3, 2018).

<sup>65</sup> Carl DiOrio, *Script Goes as Planned: WGA Signs off on New Deal, a ‘New Beginning’ in Digital Age*, HOLLYWOOD REP. (Feb. 27, 2008, 4:00 AM), <https://www.hollywoodreporter.com/news/script-goes-as-planned-wga-105696>.

<sup>66</sup> David Carr, *Who Won the Writers Strike?*, N.Y. TIMES (Feb. 12, 2008), <https://www.nytimes.com/2008/02/12/arts/television/12strike.html>.

however, because of the strike, “everyone who now writes for Netflix and Hulu and Amazon gets guild coverage.”<sup>67</sup>

The result of the strike has not been wholly satisfactory, however. The strike led to not only a series of quality-stricken summer blockbusters in 2009,<sup>68</sup> but also the long-term rise of non-scripted reality programming which—aside from the more subjective issue of artistic merit—usurped some writing jobs for the long run and, as a result, any potential residuals.<sup>69</sup> 2007 also marked the peak of writers’ fortunes and union members “haven’t come close to matching that in any year since,” although the WGA has denied that the strike was a cause and instead “blames . . . the decline in DVD revenues, the rise of tentpole and franchise films and the studios releasing fewer films.”<sup>70</sup> And, although the WGA did recognize the potential future of writing in digital media, the guild could not have foreseen the swift and dramatic shift created by streaming in the television world—an issue that gave Hollywood a feeling of déjà vu this past year.

### *C. A Collective Sigh of Relief: A Near Redux of the Writers Guild Strike*

The rapid growth of new media has shaken up the traditional model of American television in more ways than one, particularly by introducing a glut of content and shortening the number of episodes per season from 20 to 22 down to eight or ten.<sup>71</sup> Though the new format has been most appealing to their counterparts, including actors and directors, who traditionally

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<sup>67</sup> Jeffrey Fleischman, ‘A Firm Stance Is Required,’ Says ‘The Office’ TV Writer Mike Schur, L.A. TIMES (Apr. 28, 2017, 7:00 AM), <http://www.latimes.com/business/la-fi-ct-writers-guild-strike-updates-1493335449-htmlstory.html>.

<sup>68</sup> See *An Aggregated Oral History of 2009 Films Ruined by the Last WGA Strike*, FILM SCH. REJECTS (Apr. 18, 2017), <https://filmschoolrejects.com/wga-strike-2009-movies-affected-b630825b03eb/>.

<sup>69</sup> Carr, *supra* note 66.

<sup>70</sup> David Robb, *WGA: Don’t Blame the Last Strike for Screenwriters’ Declining Fortunes*, DEADLINE (Apr. 4, 2017, 11:03 AM), <http://deadline.com/2017/04/wga-screenwriters-declining-earnings-strike-1202061059/>.

<sup>71</sup> Alissa Wilkinson, *Why Hollywood’s Writers Are on the Verge of a Strike—and What It Could Mean for the Industry*, VOX (Apr. 27, 2017, 5:10 PM), <https://www.vox.com/culture/2017/4/19/15265700/wga-strike-writers-guild-hollywood>.

worked in film and have moved towards television, TV writers are paid by the episode according to the Minimum Basic Agreement and thus have had their pay cut in half.<sup>72</sup>

The AMPTP was reluctant to give in to the WGA's demands, leading to a near-rehash of the 2007–08 strike when the guild had an almost unanimous strike authorization from its membership during the negotiations. In the wake of the last WGA strike, much of the industry has worried about such another major stall on production, though the WGA has continued to be the most fearless advocate for strikes, which it believes is effective in making new strides for its members.<sup>73</sup> The prospect of another strike clearly caused the AMPTP to rethink the WGA's demands and, at the eleventh hour, made a deal with the WGA which included, among other gives, increased compensation for writing series with shorter seasons and “increased residuals for made-for-pay-TV programs [e.g., HBO and Showtime] and programs made for high-budget SVOD [streaming video on demand—e.g., Netflix and Amazon].”<sup>74</sup> Because of the WGA's ability to prove its mettle over the past decade, particularly over the issue of new media, its members have made significant gains in their rights and wages in the digital frontier. Additionally, with its past history of effective but grueling strikes, the guild has made itself an example of how a union can establish itself in its industry as a force to be reckoned with even without an actual strike.

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<sup>72</sup> WRITERS GUILD OF AM., 2014 THEATRICAL AND TELEVISION BASIC AGREEMENT 91 (2014), <http://www.wga.org/uploadedfiles/contracts/MBA14.pdf> (last visited May 3, 2018); Wilkinson, *supra* note 71.

<sup>73</sup> See David Ng, *Hollywood Guilds Flex Their Muscle as Union Influence Declines Nationwide*, L.A. TIMES (May 9, 2017, 3:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-hollywood-unions-20170509-story.html> (“SAG-AFTRA understands the devastating effect that strikes had had on the industry. . . . Union leaders [like the WGA, on the other hand,] often argue that strikes—or threatened strikes—deliver new gains for members.”)

<sup>74</sup> Jonathan Handel, *WGA Ratifies New Studio Contract Almost Unanimously*, HOLLYWOOD REP. (May 24, 2017, 2:24 PM), <https://www.hollywoodreporter.com/news/wga-ratifies-new-studio-contract-almost-unanimously-1007453>; see also Jonathan Handel, *Studios, Writers Guild Avert Strike with Last Minute Deal*, HOLLYWOOD REP. (May 2, 2017, 1:01 AM), <https://www.hollywoodreporter.com/news/studios-writers-guild-avert-strike-last-minute-deal-999492>; Jonathan Handel, *WGA Deal Decoded: Big TV Gains but Movie Writers Have Less to Celebrate*, HOLLYWOOD REP. (May 2, 2017, 7:39 PM), <https://www.hollywoodreporter.com/news/wga-deal-addresses-problems-could-raise-cost-sag-aftra-deal-999819>.

## II. HOLLYWOOD VS. SILICON VALLEY OR: HOW GUILDS LEARNED TO STOP WORRYING AND LOVE TECHNOLOGY

Despite the strides that unions have made since their inception in the Great Depression, particularly in the realm of new media, it is also true that the entertainment industry as a whole is slowly inching towards a predominantly digitized medium that may require less labor than is used now. A recent *Vanity Fair* article which pessimistically proclaimed that “Hollywood, as we once knew it, is over,” painted a quasi-dystopic future that the entertainment industry is already teetering on the edge of, replete with a CGI Carrie Fisher, “A.I. Aaron Sorkin,” and as-of-yet-realized algorithm-based editing.<sup>75</sup> Supposedly in this world, “unions . . . are actually unlikely to pose a significant, or lasting, protection” even though “TV workers feel as if they are in safe harbor, given that the production side of a project is protection by the unions.”<sup>76</sup> If the Faustian Hollywood has essentially sold its soul of guild-affiliated creatives to the Mephistophelian Silicon Valley for the sake of tapping into audience data, then all of the strikes and the hefty negotiations that have gone on for over eight decades will soon be rendered moot.

It’s certainly true that unions and their members are anxious of being upended by technology: The *Vanity Fair* article exemplifies this in a true account of a costumer scolding a screenwriter on set for wiping rain off an actor’s shoulder, which the wardrobe employee asserted was effectively her jurisdiction “protected by a union.”<sup>77</sup> Yet it is difficult to imagine a world with entertainment crafted entirely by robots—if anything, the past half century has proven that unions not only work to preserve their members’ rights when faced with the possibility of pay cuts and job losses to technology, but also serve to negotiate for creatives’

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<sup>75</sup> Nick Bilton, *Why Hollywood as We Know It Is Already Over*, VANITY FAIR: HIVE (Jan. 2017), <https://www.vanityfair.com/news/2017/01/why-hollywood-as-we-know-it-is-already-over>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

ability to take advantage of new media and reshape entertainment in innovative ways. This can be seen in the most recent collective bargaining agreements made between the guilds and the AMPTP, as well as in a more litigious setting, where the unions have lobbied and reasserted ownership against potentially infringing technologies.

*A. Promises, Promises: Collective Bargaining Agreements' Terms with Respect to New Media*

In an age where cord-cutting is the norm and streaming services are becoming akin to utilities,<sup>78</sup> the plethora of new media has obviously touched every aspect of production in the entertainment industry and has become an important and often contentious part of the collective bargaining process for the guilds when negotiating against the AMPTP. The WGA's definition of "Digital/New Media," which is similar to SAG-AFTRA's and the DGA's, is "all . . . audio-visual production intended for the Internet, mobile devices, evolving technological devices such as the iPad, or any other platform thought of as 'new media' by the industry as of the start of the 2008 [Minimum Basic Agreement]."<sup>79</sup> Though new media is an umbrella term that can encompass a short video taken on a phone and posted to a show's official social media channel, to a series-length program on Netflix, the latter is of course an important piece of the digital puzzle—so much so that it is usually marked off in separate provisions termed SVOD (subscription video on demand, or for particularly massive and expensive shows on Hulu Plus,

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<sup>78</sup> See Mike Snider, *A 'Netflix Tax'? Yes, and It's Already a Thing in Some States*, USA TODAY (Aug. 17, 2017, 8:30 AM), <https://www.usatoday.com/story/tech/news/2017/08/17/netflix-tax-yes-and-its-already-thing-some-states/500416001/> (describing how some states have considered taxing digital entertainment by "using laws intended for utilities like water and electricity"); Todd Spangler, *Cord-Cutting Explodes: 22 Million U.S. Adults Will Have Canceled Cable, Satellite TV by End of 2017*, VARIETY (Sept. 13, 2017, 3:00 AM), <http://variety.com/2017/biz/news/cord-cutting-2017-estimates-cancel-cable-satellite-tv-1202556594/> (finding that the number of cord-cutters has rapidly increased, as has the number of "cord-nevers," which are "consumers who have never subscribed to pay TV").

<sup>79</sup> *Digital/New Media*, WRITERS GUILD OF AM. WEST, <http://www.wga.org/the-guild/going-guild/get-involved/digital-new-media> (last visited May 3, 2018); see also 2014 THEATRICAL/TELEVISION MOA 174, SAG-AFTRA (2014), [https://www.sagaftra.org/files/2014\\_sag-aftra\\_cba.pdf](https://www.sagaftra.org/files/2014_sag-aftra_cba.pdf) (last visited May 3, 2018); 2014 BASIC AGREEMENT 12, DIRECTORS GUILD OF AM. (2014), <https://www.dga.org/-/media/E98E71412E1F4BB5B94AE0843C5CD8DE.pdf> (last visited May 3, 2018).

Amazon Prime, or Netflix, “High Budget SVOD”).<sup>80</sup> Streaming subscription services are now such a common part of consumers’ lifestyles, lending to the previously mentioned glut of content which in turn have led to the shortened number of episodes per season. As previously mentioned, these programs—especially series-length shows on streaming platforms—have led the WGA to bargain for increased wages per episode.

In addition, residuals have become more important than ever in collective bargaining agreements’ High Budget SVOD provisions. With re-watches of film and television programs common and even encouraged by streaming services,<sup>81</sup> residuals are again another major bone of contention between the guilds and the AMPTP. This past year, like its writing counterpart, SAG-AFTRA almost repeated history by threatening to strike over residuals stemming from new technology.<sup>82</sup> Fortunately, the guild was appeased by new, highly lucrative provisions that “compensated [members] for global use of their work on streaming new media platforms—such as Netflix and Amazon—in addition to seeing significant gains in streaming media residuals.”<sup>83</sup> The DGA has likewise made significant gains in its High Budget SVOD provisions, “yielding triple the rate in the top subscriber tier for the first two years of streaming” and “[obtaining] union-specific gains in . . . made-for-SVOD movies.”<sup>84</sup> Although in its most recent negotiations,

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<sup>80</sup> See *Residuals for High-Budget Subscription Video on Demand (HBSVOD) Programs*, WRITERS GUILD OF AM. WEST, <http://www.wga.org/members/finances/residuals/hbsvod-programs> (last visited May 3, 2018).

<sup>81</sup> See, e.g., Erin Dwyer, *Netflix Finds Fans of Orange Is the New Black Are Repeat Offenders*, NETFLIX: MEDIA CTR. (June 16, 2016), <https://media.netflix.com/en/press-releases/netflix-finds-fans-of-orange-is-the-new-black-are-repeat-offenders> (reporting that more than half of the viewership of *Orange Is the New Black* have re-watched at least one full season of the show on Netflix).

<sup>82</sup> David Robb & Erik Pedersen, *DEAL! SAG-AFTRA & Producers Reach Tentative Agreement on New Film & TV Contract; Read the Terms*, DEADLINE (July 4, 2017, 9:04 AM), <http://deadline.com/2017/07/screen-actors-guild-strike-averted-tentative-deal-film-tv-contract-sag-amptp-1202123068/>.

<sup>83</sup> *Members Approve 2017 TV/Theatrical Contracts*, SAG-AFTRA (2017), <https://www.sagaftra.org/2017tvtheatrical> (calculating the value of its collective bargaining agreement to be \$256 million); Jonathan Handel, *Hollywood Unions Forge New Contracts, but Who’s Getting the Best Deal?*, HOLLYWOOD REP. (July 13, 2017, 6:30 AM), <https://www.hollywoodreporter.com/news/hollywood-unions-forge-new-contracts-but-whos-getting-best-deal-1020097>.

<sup>84</sup> Handel, *supra* note 83; see also Conrad B. Wilton, *Blockbuster DGA-AMPTP Deal Dramatical Increases Residuals for Streaming Entertainment and Signals Eclipse of Traditional Television Consumption*, FOX

the WGA tried to demand script parity—in other words, “the same wage floors [for all platforms, including new media] regardless of the show’s production budget” so that scripts for SVOD and cable would be paid on the same scale as work for broadcast networks and pay TV—but failed to bring the producers into the fold,<sup>85</sup> such an ask might not be so outrageous in the near future since shows continuously prove to be profitable whether broadcast on a network or streamed online.

The transition from creating shows for traditional media to new media has not been altogether smooth outside of the negotiating table. Critics have questioned whether the streaming services themselves, with their roots in anti-union Silicon Valley, would continue to be receptive to Hollywood’s staple of labor organizations. Netflix, for example, has been caught in the crossfire of at least two separate labor and employment controversies in the past few years. The streaming service faced a protest in 2015 from activists enraged by the company lavishing benefits on highly-paid white-collar workers with specialized skills but skimping on benefits for its part-time and temporary employees in their customer service and DVD divisions.<sup>86</sup> More recently, SAG-AFTRA demanded arbitration against Sony for the Netflix program, *The Get Down*, when it was discovered that the producers held the actors under option contracts beyond the periods contracted with the guild.<sup>87</sup> Although it was not Netflix as a producer that was

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ROTHSCHILD: PAY OR PLAY (Jan. 11, 2017),

<https://payorplay.foxrothschild.com/2017/01/articles/artists/blockbuster-dga-amptp-deal-dramatically-increases-residuals-for-streaming-entertainment-and-signals-eclipse-of-traditional-television-consumption/> (reporting that the importance of the new three-year collective bargaining agreement is rooted in the increasing prevalence of streaming media)..

<sup>85</sup> Handel, *supra* note 74; Cynthia Littleton, *WGA Details How Writers Are Earning Less in Peak TV Era*, VARIETY (Apr. 2, 2017, 3:41 PM), <http://variety.com/2017/tv/news/wag-contract-talks-peak-tv-income-1202021105/>.

<sup>86</sup> Marissa Lang, *Why Some Activists Want Netflix Held to a Higher Labor Standard*, S.F. CHRON. (Sept. 4, 2015, 4:10 PM), <https://www.sfchronicle.com/business/article/Why-some-activists-want-Netflix-held-to-a-higher-6485770.php>.

<sup>87</sup> Jonathan Handel, *Netflix’s ‘The Get Down’ Hit with Union Claim for Holding Actors Too Long (Exclusive)*, HOLLYWOOD REP. (Mar. 1, 2017, 12:19 PM), <https://www.hollywoodreporter.com/news/netflixs-get-down-hit-union-claim-holding-actors-long-981990>.



directly in violation of the SAG contracts, this—combined with its roots in Silicon Valley and previous controversy over its treatment of blue-collar employees—might be a harbinger of the streaming service’s clashes with Hollywood talent guilds who are more accustomed to bargaining on almost equal terms with their producer counterparts. Its competitor, Amazon, has been raising similar red flags in its more obvious anti-union stance: Since acquiring *The Washington Post* and thereby its workers who are members of the Washington-Baltimore News Guild, CEO Jeff Bezos has sought to end many of its long-held practices benefits and raises, including cutting retirement benefits.<sup>88</sup> The News Guild also filed an unfair labor practice charge with the NLRB against *The Post* over a formal warning to a union member for writing a critical op-ed.<sup>89</sup> It is left to be seen how much the company’s mentality against labor organizations will affect its Amazon Studios operations.

For now, Hollywood guilds may hold onto hope that, as independent contractors to Amazon management rather than full-time employees like the News Guild members, they will be relatively independent from the anti-union mindset. However, talent guilds should tread carefully as their members continue to seek and create jobs within the High Budget SVOD space, and they may even need to collectively bargain with the streaming service companies directly as digital media continues to usurp traditional forms of entertainment. Though the Silicon Valley mindset towards unionization cannot be so easily gotten rid of among the likes of Netflix and Amazon, the union-doomsday mentality of the aforementioned *Vanity Fair* article may be prevented if the guilds can continue to prove their relevance. Over the eighty-plus years of collective bargaining with producers and studios, the unions have truly shown their worth in

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<sup>88</sup> Paul Blumenthal, *Jeff Bezos Screws over Workers at Amazon. Now He Wants to Do the Same at the Washington Post*, HUFFINGTON POST: POL. (Oct. 13, 2017, 1:21 PM), [https://www.huffingtonpost.com/entry/washington-post-jeff-bezos\\_us\\_59df9245e4b00abf3646fff9](https://www.huffingtonpost.com/entry/washington-post-jeff-bezos_us_59df9245e4b00abf3646fff9).

<sup>89</sup> *Id.*

negotiating for their members' minimum basic terms, credits, and residuals.<sup>90</sup> These concepts are unique to the guilds and have demonstrated their necessity in the entertainment industry. The minimum basic terms, for one, serve a symbiotic purpose: Union members cannot be paid any lower than the negotiated rate and have no set maximum compensation that allows them to “negotiate for the best possible compensation their individual bargaining leverage can achieve”; on the other hand, management, by working amongst themselves as producers, can “impose [standard terms and condition] across the industry without antitrust issues.”<sup>91</sup>

Furthermore, guilds are in a peculiarly powerful position to bargain for “quasi-intellectual property rights” in the form of credits, which earn their members recognition for their creations that help them develop their careers, and residuals, which serves as “a compensation scheme that allows the buyer or employer to pay the writer-creator over time.”<sup>92</sup> These latter two major asks from unions also benefit management: Credits are soft currency that cost very little actual cash from the producers, and residuals incentivize union members to continue working rather than deprive management from the talent’s “considerable industry-specific human capital.”<sup>93</sup> Additionally, it is easy to foresee that in today’s highly digitized world saturated with social media, credit is even more valuable to unionized artists today as their work is posted online with

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<sup>90</sup> Fisk, *supra* note 61, at 181–82 (“[W]hen the opportunity to negotiate collectively for more control, advance notice of layoffs, a minimum wage, and control over screen credit arose with the enactment of the National Labor Relations Act of 1935, Hollywood writers saw that embracing the legal label “employee” was the key to collective action.”)

<sup>91</sup> Duncan Crabtree-Ireland, *Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS LAW 4, 6 (2015).

<sup>92</sup> Catherine L. Fisk, *The Writer’s Share*, 50 SUFFOLK U. L. REV. 621, 623, 626 (2017) [hereinafter Fisk, *The Writer’s Share*]; see also Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000*, 32 BERKELEY J. EMP. & LAB. L. 215 (2011) [hereinafter Fisk, *Role*] (arguing that credit was one of the major reasons that the WGA has been able to survive the many changes in Hollywood’s history); Catherine Fisk & Michael Szalay, *Story Work: Non-Proprietary Autonomy and Contemporary Television Writing*, 18 TELEVISION & NEW MEDIA 605 (2011) (demonstrating, through a series of interviews with top WGA television writers and showrunners, that credit and unionization have been a key part of their identity in their careers).

<sup>93</sup> Fisk, *The Writer’s Share*, *supra* note 92, at 626.

an attribution that easily provides a direct link to them,<sup>94</sup> and a history of mandating credit has made this bargaining chip an obvious ask. With almost a century's worth of experience and expectation in receiving credit, residuals, and a minimum compensation, the guilds will be forces to be reckoned with against technology-turned-entertainment companies that try to wrest control over these aspects of their labor. In turn, unions should remind their own members that such important aspects of their careers cannot be obtained without collective bargaining. Streaming services should also recognize the value of hiring union talent; in fact, given their great dependence on quality original content to attract subscribers,<sup>95</sup> streaming services likely require consistent labor even more than traditional studios do.

*B. The Mouse's Might: Implications of the Fox-Disney Deal for the Guilds*

Much of this discussion regarding streaming services has used Netflix and Amazon to the exclusion of Hulu, with good reason. Unlike the former two, Hulu is a joint venture owned by four of the major studios: Disney, 21st Century Fox, and Comcast each own 30 percent, and Time Warner holds the remaining 10 percent stake.<sup>96</sup> This structure, however, may soon change if Disney's planned acquisition of most of Fox's assets is approved. Not only will Disney establish its own streaming service to compete with Netflix and Amazon by 2019, but also the House of Mouse will become a majority shareholder of Hulu and establish it as an "adult-oriented product" in conjunction with its upcoming streaming endeavor.<sup>97</sup>

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<sup>94</sup> Cf. *How to Properly Credit Photos on Instagram and Why You Need to Do It*, HONEYBOOK (Mar. 23, 2018), <https://www.honeybook.com/risingtide/how-to-properly-credit-photos-on-instagram-why-you-need-to-do-it/> (discussing the rising importance of crediting artists online, albeit for photographers).

<sup>95</sup> Christine Wang, *More Than Half of US Homes Now Subscribe to a Streaming Service, Spending \$2.1 Billion a Month*, CNBC (Mar. 20, 2018, 8:12 AM), <https://www.cnbc.com/2018/03/19/streaming-services-americans-spend-2-point-1-billion-a-month-in-55-percent-homes.html> (reporting that "[a]ccess to exclusive and original content is a major factor when consumers are deciding to subscribe" according to a Deloitte survey)

<sup>96</sup> Todd Spangler, *Hulu's Future: What Disney-Fox Deal Means for TV-Streaming Venture*, VARIETY (Dec. 14, 2017, 5:46 AM), <http://variety.com/2017/digital/news/hulu-disney-fox-deal-future-tv-streaming-1202640711/>.

<sup>97</sup> Wang, *supra* note 95; see also Edmund Lee, *Disney's Fox Acquisition Means the End of Hulu as We Know It*, RECODE (Dec. 14, 2017, 6:00 AM), <https://www.recode.net/2017/12/14/16771712/hulu-disney-acquisition-fox->

The prospect of a new Disney streaming service, however, is not necessarily what is already of concern to the WGAW. After the \$52.4 billion deal was announced, the ever-outspoken WGAW released a statement disapproving the acquisition, noting that the “antitrust concerns raised by this deal are obvious and significant” and promising that the union “will work to ensure our nation’s antitrust laws are enforced.”<sup>98</sup> Although SAG-AFTRA, the DGA, and IATSE have not commented about the deal,<sup>99</sup> it is clear that the WGAW at least recognizes that the unions’ bargaining power may be endangered in a new studio system dominated by fewer but stronger players. Given that Disney and Fox, as two of the most profitable studios in Hollywood, are already estimated to have held a combined 40% market share in the domestic box office this past year,<sup>100</sup> it can be inferred that the AMPTP would also be strongly under the influence of these merged forces should the deal go through. The unions also have good cause for concern, as the merger is expected to cause the loss of thousands of jobs.<sup>101</sup> It is unclear how many, if any, of those jobs would be union, but the consolidation of two major producers certainly offers the possibility of a loss of creative union jobs as well, particularly if a single studio funds fewer productions than two separate ones had. Though the entire deal is touch and

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means-dis-foxa-21cf (“[W]henver one media player owns/starts/controls its own streaming service, it turns into a walled garden.”); Cynthia Littleton & Brian Steinberg, *Disney to Buy 21<sup>st</sup> Century Fox Assets for \$52.4 Billion in Historic Hollywood Merger*, VARIETY (Dec. 14, 2017, 4:04 AM), <http://variety.com/2017/biz/news/disney-fox-merger-deal-52-4-billion-merger-1202631242/>.

<sup>98</sup> Erik Hayden, *Writers Guild West Rips Disney’s \$52.4B Fox Deal, Citing Antitrust Concerns*, HOLLYWOOD REP. (Dec. 14, 2017, 10:13 AM), <https://www.hollywoodreporter.com/news/writers-guild-west-opposes-disneys-524b-fox-deal-citing-antitrust-concerns-1067702>.

<sup>99</sup> *Id.*

<sup>100</sup> Anthony D’Alessandro, *How the Overwhelming Disney-Fox Movie Lineup Will Impact Rivals and Exhibitors*, DEADLINE (Dec. 14, 2017, 7:42 AM), <http://deadline.com/2017/12/disney-fox-merger-exhibitors-movie-theaters-combined-release-schedule-marvel-star-wars-pixar-1202221594/>.

<sup>101</sup> Dade Hayes, *Disney-Fox Deal: 5,000 to 10,000 Jobs Will Likely Be Shed: Analyst*, DEADLINE (Dec. 15, 2017, 10:05 AM), <http://deadline.com/2017/12/analyst-says-disney-fox-deal-at-least-5000-jobs-will-be-cut-1202227891/>. *But see* Jade Scipioni, *Fox-Disney Deal ‘Great for Jobs’: Trump*, FOX BUS. (Dec. 14, 2017), <https://www.foxbusiness.com/features/fox-disney-deal-great-for-jobs-trump> (reporting — from an undoubtedly biased standpoint — that President Trump and Rupert Murdoch believe the deal will be profitable and not cause a loss in jobs).

go for all concerned in the industry, it is difficult to predict how the guilds can react. However, it is worth noting that Hollywood is already accustomed to mergers which help the bargaining power of management and labor: 2012, for example, saw the merger of SAG and AFTRA into one union, a move which the DGA and WGA celebrated and union members saw as a way to “increase our bargaining leverage,” and which the AMPTP even welcomed with open arms.<sup>102</sup> The guilds already team up and support each other for the sake of increased negotiating power. Thus, a similar move from management is unlikely to completely upend the union town that Hollywood has been so long, since even the entrance of new media has proven to be only another way for labor organizations to find more methods of innovation.

*C. Lights, Camera, (Legal) Action: A Note on the Guilds and Litigation*

The guilds have also sought to establish their members’ rights beyond the negotiating table and into the courts. Unlike traditional labor unions, the guilds have used litigation and lobbying, not to contest NLRB holdings, but instead to wield their influence over cases that these organizations believe are of particular interest to their membership. Though most of these lawsuits have been spearheaded by studios or individual guild-affiliated creators, the unions have often lent to the conversation either by filing amicus briefs (sometimes jointly with other guilds) in support of whichever party was protecting their members’ intellectual property or other rights, or by becoming party to certain suits.

Interestingly, the DGA, SAG-AFTRA, and the WGA have written several amicus briefs together in support of their management in various cases involving potentially infringing technologies that might undermine their members’ ownership of their creative works. For example, the three major talent guilds supported their members’ employers in *American*

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<sup>102</sup> Finke, *supra* note 9.

*Broadcasting Companies, Inc. v. Aereo Inc.*, a copyright case involving a monthly subscription service that broadcast television programming via the internet simultaneously with the original broadcast.<sup>103</sup> Here, the guilds argued that “[a]n unlicensed service such as Aereo has the potential to reduce the value of creative works by circumventing authorized distribution channels for media and entertainment content.”<sup>104</sup> The Supreme Court sided with the studios, networks, and unions, holding that the technology was infringing on the copyright owners’ right to publicly perform.<sup>105</sup> Although the guilds have been quite receptive to new technologies, they take less kindly to those which verge on pirating their members’ works and can successfully throw their weight behind a position persuasive to the courts.

The DGA, despite being a relatively quiet and undemanding union compared to its guild counterparts, has also taken part on its own in lawsuits involving potential infringements of their auteur members’ works. The guild has particularly been involved in cases related to “filtering” technologies and businesses—in other words, endeavors that rent out censored versions of its members’ films, which the DGA views as devaluing its directors’ works. The first such case involved CleanFlicks, a company that edited then sold movies on VHS and DVD to make the films family-friendly.<sup>106</sup> Spearheaded by frequent DGA representative Steven Soderbergh and supported by the guild as a defendant-in-intervention and counterclaimant-in-intervention, the case found that such editing and selling was not fair use and enjoined CleanFlicks from carrying out its business.<sup>107</sup> Though the DGA was successful in supporting the finding of CleanFlicks as

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<sup>103</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

<sup>104</sup> Brief of Screen Actors Guild-American Federation of Television and Radio Artists, Directors Guild of America, Inc., Writers Guild of America, West, Inc. as Amici Curiae in Support of Petitioners at 2–3, *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 880972.

<sup>105</sup> *Am. Broad. Cos., Inc.*, 134 S. Ct. at 2503.

<sup>106</sup> *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006).

<sup>107</sup> *Id.* at 1242–43; see also David Post, *Steven Soderbergh, Copyright Infringer?*, WASH. POST (Jan. 16, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/16/stephen-soderbergh-copyright->

an infringing service, yet another filtering service has cropped up in a similar lawsuit. This case, which involves multiple studios suing VidAngel, a streaming service that offers digital filters, concerns the DGA's collective bargaining agreement, which forbids anyone other than the studios and the union directors from editing their films and renting it out because both parties have already agreed to censoring for films edited for television broadcast and airline viewings.<sup>108</sup> Though VidAngel lost this suit, as the Ninth Circuit also believes filtration is not fair use and constitutes copyright infringement,<sup>109</sup> VidAngel and its supporters continue to accuse the DGA for banning filtering. They claim that the DGA had an unwritten contract outside of the collective bargaining agreement with the studios to prevent filtering, and further believe that the DGA's powerful influence and strong objection is the only reason the studios won't permit the technology.<sup>110</sup> Regardless whether the opposition to filtering is truly one-sided or not, it is clear that the union has the ability to influence in litigation which technological methods are considered copyright infringement according to the needs of their members' works.

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infringer/?utm\_term=.53e6f0bd6654 (describing Soderbergh's representation of the DGA in Congress advocating for "a harsh 'three strikes and you're out' policy for online copyright infringers").

<sup>108</sup> Disney Enters., Inc. v. VidAngel, Inc. 869 F.3d 848 (9th Cir. 2017); 2014 BASIC AGREEMENT, *supra* note 79, at 80–84; Chris Lee, *Nothing Will Stop VidAngel from Exorcising Hollywood's Demons*, VANITY FAIR (June 29, 2017, 1:51 PM), <https://www.vanityfair.com/hollywood/2017/06/vidangel-neal-harmon-cleans-up-hollywood> ("Taking a director's edit for one platform, and then releasing it on another—without giving the director the opportunity to edit—violates our agreement," the DGA said in a statement."). Additionally, although the issue is not part of a lawsuit, the DGA has similarly objected to Sony's plans to create "clean" versions of twenty-four of its films. See Dave McNary, *Judd Apatow to Sony: 'Shove the Clean Versions of Movies Up Your A-!'*, VARIETY (June 13, 2017, 6:19 PM), <http://variety.com/2017/digital/news/dga-judd-apatow-outcry-sony-clean-version-movies-1202465372/>.

<sup>109</sup> *Disney Enters., Inc.*, 869 F.3d at 860–62.

<sup>110</sup> Tal Dickstein & Joel Ernst, *Disney Enterprises, Inc. v. VidAngel, Inc.*, LOEB & LOEB: PUBLICATIONS & NEWS (Aug. 10, 2017), <https://www.loeb.com/publications-ipentertainmentcaselawupdates-20170810-disneyvvidangel/>; FAQ, PROTECTFAMILYRIGHTS.ORG, <http://protectfamilyrights.org/about/faq/> (last visited May 3, 2018) ("Since signing on directors for big movies is the lifeblood of the studios, being publicly supportive of filtering is a risky position for them [even though studios might not really oppose filtering]."); VidAngel, *Is VidAngel Legal?*, YOUTUBE (Nov. 29, 2016), <https://www.youtube.com/watch?v=9TZRTkRgAFc>.

### III. THE BEGINNING OF A BEAUTIFUL FRIENDSHIP? THE FUTURE OF UNIONS AND TECHNOLOGY BEYOND HOLLYWOOD

Aside from these few instances of distrust in the Digital Age, the unions have, for the most part, been supportive of new media and the growth of technology used in entertainment. This relative tolerance of digital possibilities is wise considering that the guilds will need the support of generations to follow to sustain themselves in the long-term, and the media consumption habits of Millennials and Generation Z have been unlike any other. Research has shown that because these generations have grown up with streaming technology—and some have never known a time without it—many prefer the likes of YouTube for their media and entertainment consumption over traditional media.<sup>111</sup> Furthermore, a lack of unionization in one increasingly crucial part of the industry, visual effects, has demonstrated the importance that labor organizations can have in the face of so-called runaway productions. With this radical shift on the horizon, unions—including those outside of the entertainment industry—should keep this in mind as they try to stay relevant and maintain their membership for years to come by implementing the “Hollywood model.”

#### *A. The Internet Creators Guild: Taking the Creator out of Hollywood, but Not Hollywood out of the Creator*

In an age where many young consumers prefer vloggers over “mainstream” celebrities, digital content creators from all over the globe have to work as their own agent, producer, and marketer to amass a following—yet that fame and fortune still bear the potential for

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<sup>111</sup> See, e.g., Nelson Granados, *Gen Z Media Consumption, It's a Lifestyle, Not Just Entertainment*, FORBES (June 20, 2017, 6:03 AM), <https://www.forbes.com/sites/nelsongranados/2017/06/20/gen-z-media-consumption-its-a-lifestyle-not-just-entertainment/#7c6f271e18c9> (charting the media habits of Gen Z); *Young Adults Use Streaming Services Most to Watch TV*, PEW RES. CTR. (Dec. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/12/28/key-trends-shaping-technology-in-2017/young-adults-use-streaming-services-most-to-watch-tv/>.



exploitation.<sup>112</sup> Though traditional media may soon be out of fashion, the idea of—and the need for—a trade union that can collectively bargain on behalf of its members has not, and nowhere is this more apparent than in the recently created Internet Creators Guild (ICG). Its co-creator, online personality and producer Hank Green, has called it “certainly not a traditional union,” though its features are remarkably similar to that of the age-old Hollywood talent guilds.<sup>113</sup> The ICG will only give membership to those who are involved in online video, including those who “create content for a production studio or company,” but in an effort to truly represent the labor and not the management, it “screen[s] applicants to ensure that they are not primarily working for networks, advertisers, or platforms.”<sup>114</sup> In its less than two-year existence, the ICG has already collectively represented and advocated for its members, from such issues as net neutrality and communicating with YouTube on its decision to de-monetize videos.<sup>115</sup> Although it is still too new that it has yet to offer insurance benefits like its established Hollywood counterparts, the ICG does work to serve as a resource for its members to understand and leverage their contracts. Thus, it seems that entertainment and media trends may come and go, but the need to collectively bargain and serve as a resource to educate a group of skilled workers is never-ending.

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<sup>112</sup> Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017, 3:16 PM), <https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities/#692f64a448c6>; Emma Bazilian, *Infographic: 50% of Gen Z ‘Can’t Live Without YouTube’ and Other Stats That Will Make You Feel Old*, ADWEEK (May 21, 2017), <http://www.adweek.com/digital/infographic-50-of-gen-z-cant-live-without-youtube-and-other-stats-that-will-make-you-feel-old/>; John Lynch, *Meet the YouTube Millionaires These Are the 10 Highest-Paid YouTube Stars of 2017*, BUS. INSIDER (Dec. 8, 2017, 1:13 PM), <http://www.businessinsider.com/highest-paid-youtube-stars-2017-12..>

<sup>113</sup> Chris Stokel-Walker, *Vloggers Unite: YouTubers Get Organized After a Decade of Exploitation*, NEWSWEEK (Oct. 8, 2016, 9:00 AM), <http://www.newsweek.com/vloggers-youtube-organized-decade-exploitation-507592>.

<sup>114</sup> *FAQs*, INTERNET CREATORS GUILD, <https://internetcreatorsguild.com/faq#q7> (last visited May 3, 2018).

<sup>115</sup> *What We Do*, INTERNET CREATORS GUILD, <https://internetcreatorsguild.com/what-we-do> (last visited May 3, 2018).

*B. The Green Screen Is Greener on the Other Side: Unionization Attempts amid Runaway Productions and the Visual Effects Industry*

Online creators are smartly moving forward in their unionization efforts while their corner of the entertainment industry is still in its nascent stages and paving the way for guild control beyond the traditional confines of Hollywood. Though few sectors of entertainment are untouched by labor and trade associations, one key creative job has yet to be fully under the jurisdiction of any union or guild: namely, visual effects artists who implement computer generated imagery (CGI).<sup>116</sup> Note that this is separate from “special effects,” which are typically done during filming in front of a camera such as prosthetics or practical effects that are done by unionized (usually IATSE) carpenters, set designers, or makeup artists; “visual effects,” or “VFX,” in contrast, are done post-production on a computer.<sup>117</sup> Visual effects artists also should not be confused with animators who are unionized, even if much animation is now done digitally rather than with pencil and ink and many live-action films use a great deal of CGI. In large part because of their lack of a union, the visual effects sector has arguably been harmed the most by producers’ and studios’ increasingly common practice of hiring outside of Hollywood.

As a medium, visual effects using CGI is not new in the history of entertainment, as its use in film and television has been popularized since the 1970s, most influentially by *Westworld* (1973) and the debut of *Star Wars* (1977).<sup>118</sup> Despite its prevalence over the past four decades, visual effects has often been treated as the proverbial red-headed stepchild of Hollywood. In its

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<sup>116</sup> Tim Carmody, *Why Are Digital Video Effects Artists So Angry at Hollywood?*, VERGE (Feb. 25, 2013, 4:56 PM), <https://www.theverge.com/2013/2/25/4028014/why-are-digital-video-effects-artists-angry-at-hollywood> (“When you meet other people in the filmmaking industry—editors, actors, etc.—to the person, every single person [is] amazed that VFX doesn’t have a union . . . .” (alteration in original))

<sup>117</sup> *What’s the Difference Between SFX and VFX?*, RAINDANCE, <http://www.raindance.co.uk/site/index.php?id=479,7617,0,0,1,0> (last visited May 3, 2018).

<sup>118</sup> *A Computer-Generated Imagery (CGI) History*, COMPUTER STORIES, <https://computerstories.net/a-computer-generated-imagery-cgi-history-698> (last visited May 3, 2018).

early years, the Academy refused to acknowledge that the visual effects in *Tron* (1982) were worthy of an Oscar because using a computer was viewed as equivalent to cheating.<sup>119</sup> This prejudice against visual effects in the industry has persisted in some form into the twenty-first century. In 2013, arguably a pivotal year in CGI's use in film, visual effects artists protested outside the Oscars while one of their own, Bill Westenhofer, was controversially cut off in the middle of his acceptance speech for *Life of Pi*.<sup>120</sup>

At the time, visual effects firms were going out of business (Westenhofer even tried to express in his speech that his own firm was filing for bankruptcy) in large part because of the outsourcing of their work, an increasingly common phenomenon known as “runaway productions.”<sup>121</sup> A runaway production employs, usually for budgetary reasons, unionized American talent (that is, producers, directors, and actors), but will also hire local extras and crew outside of Hollywood.<sup>122</sup> States other than California and New York and other countries have implemented lucrative tax benefits to incentivize film and television production, typically for political gain.<sup>123</sup> The shift has been so dramatic that in recent years Georgia, whose government has been the strongest proponent of tax credits, has turned Atlanta into the “Hollywood of the South,” where many high-budget projects—from the Marvel Cinematic Universe films to

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<sup>119</sup> Matthew Jackson, *Little-Known Sci-Fi Fact: Why Tron's FX Got Snubbed for an Oscar*, SYFY WIRE (Mar. 1, 2013), <http://www.syfy.com/syfywire/little-known-sci-fi-fact-why-trons-fx-got-snubbed-oscar>.

<sup>120</sup> Stephen J. Dubner, *No Hollywood Ending for the Visual-Effects Industry*, FREAKONOMICS: RADIO (Feb. 22, 2017, 11:00 PM), <http://freakonomics.com/podcast/no-hollywood-ending-visual-effects-industry/>.

<sup>121</sup> *Id.*

<sup>122</sup> Christina Klein, *The Hollowing-Out of Hollywood*, YALE GLOBAL ONLINE (Apr. 30, 2004), <https://yaleglobal.yale.edu/content/hollowing-out-hollywood>.

<sup>123</sup> Cf. Adrian McDonald, *Through the Looking Glass: Runaway Productions and “Hollywood Economics,”* 9 U. PA. J. LAB. & EMP. L 879, 929–30 (2007) (noting that some creators make a publicized effort to keep production in Los Angeles but usually not for altruistic reasons, such as when former Governor of California Arnold Schwarzenegger refused to join *Terminator 3* if production was moved to Vancouver instead of California at a time when he was preparing for his gubernatorial run).

*Stranger Things*—are primarily filmed.<sup>124</sup> But it is visual effects artists who have felt the impact of runaway productions the most: Their post-production jobs, which are some of the priciest items of a production’s budget, have been “farmed out all over the world[] [s]ince the work can theoretically be done anywhere.”<sup>125</sup> As a result, the majority of VFX work isn’t done in California but instead in Canada (particularly British Columbia), the United Kingdom, and Australia, all of whose governments offer lucrative tax incentives.<sup>126</sup>

Despite the fact that the main creative process and largest names originate from Tinseltown, the DGA and SAG estimated that “over 125,000 jobs were lost to runaways in the 1990s.”<sup>127</sup> Although unions alone cannot stop the outsourcing of entertainment jobs due to external political and economic pressures,<sup>128</sup> their members have fared better than they would have without the support of the guilds. For example, SAG-AFTRA has made an effort to control its jurisdiction over jobs abroad by enforcing Global Rule One, which decrees that members “must always work under a union contract around the globe.”<sup>129</sup> Visual effects artists, on the other hand, have failed to collectively form or join a union as a reaction to the outsourcing of their work, though this is certainly not without much effort and some interest. Some of the most outspoken activists in the VFX community have vouched for unionization in order that they may

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<sup>124</sup> Rodney Ho, *What Made Georgia Hollywood of the South? The Tax Credits Explained*, AJC (Oct. 5, 2017), <http://radiotvwalk.blog.ajc.com/2017/10/05/what-made-georgia-hollywood-of-the-south-the-tax-credits-explained/>.

<sup>125</sup> Carmody, *supra* note 116; Dubner, *supra* note 120.

<sup>126</sup> Dubner, *supra* note 120 (describing how, during the production of the *Harry Potter* film series, the U.K. established a controversial sale-leaseback system that allowed film investors to avoid tax and producers to claim cash rebates).

<sup>127</sup> *Id.*; see also Charles H. Davis & Janice Kaye, *International Film and Television Production Outsourcing and the Development of Indigenous Capacities: The Case of Canada 2* (2010), <https://www.ryerson.ca/~c5davis/publications/Davis-Kaye%20-%20International%20Film%20and%20TV%20Production%20Outsourcing.pdf>.

<sup>128</sup> Kerry A. Chase, *Services Offshoring and the Political Responses of Labor: The Case of Motion Pictures 26* (2006); Dubner, *supra* note 120.

<sup>129</sup> *Global Rule One*, SAG-AFTRA, <https://www.sagaftra.org/production-center/globalruleone> (last visited May 3, 2018); see also Frommer, *supra* note 7, at 84–120 (critiquing Global Rule One but noting that it will benefit SAG members in addition to SAG itself by instilling loyalty among its membership).

keep their jobs, and both IBEW and IATSE have been interested in unionizing American and Canadian visual effects artists.<sup>130</sup> However, the artists themselves have been reluctant to band together, and “it’s not clear whether a sufficient nucleus of VFX artists support the idea.”<sup>131</sup> And, at least when it comes to runaway productions, some doubt whether a union could help this late in the game, particularly because of their “job mobility . . . since organization has to be done on a company to company basis”<sup>132</sup> and the prospect that unionization will have the adverse effect of “[costing VFX vendors and firms] more money and they may go out of business.”<sup>133</sup> Nonetheless, IATSE has continued to pursue VFX jurisdiction to this day and has even addressed the issue of runaway productions, stating that although unions won’t necessarily prevent visual effects jobs from going overseas, “wherever [VFX] companies go in North America, they can’t hide from their obligations to supply their employees[’] health and pension benefits and follow rules governing working conditions.”<sup>134</sup> It is left to be seen whether this endeavor will be successful, but it is clear that early unionization efforts in the entertainment industry help set members ahead even amid changes in technology.

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<sup>130</sup> Jonathan Handel, *VFX Unionization Effort Struggles to Gain Traction*, HOLLYWOOD REP. (June 26, 2013, 9:56 PM), <https://www.hollywoodreporter.com/behind-screen/vfx-unionization-effort-struggles-gain-575891>; Daniel Lay, *What a Union Does for You*, VFX SOLDIER (Oct. 31, 2010, 10:17 PM), <https://vfxsoldier.wordpress.com/2010/10/31/what-a-union-does-for-you/> (advocating for unionization and outlining the specific benefits VFX artists should bargain for in a piece written by a VFX artist and activist).

<sup>131</sup> Jonathan Handel & Carolyn Giardina, *VFX Town Hall Urges Trade Association and Union*, HOLLYWOOD REP. (Mar. 16, 2013, 7:50 AM), <https://www.hollywoodreporter.com/news/vfx-town-hall-urges-trade-429245>.

<sup>132</sup> *Id.*

<sup>133</sup> Dubner, *supra* note 120.

<sup>134</sup> *Union FAQ*, VFX I.A.T.S.E., <https://vfxunion.org/union-faq/> (last visited May 3, 2018); *see also Union for VFX*, IATSE, <http://www.iatse.net/organize/union-vfx> (last visited May 3, 2018).

*C. How Life Should Imitate Art(ists): Lessons in Labor from the Hollywood Model*

*It's the only way working men can get their rights, by all joining together. More the members, more chance for each one separate man having justice done him. . . . [W]e can make a man's life so heavy to be borne, that he's obliged to come in, and be wise and helpful in spite of himself.*

*North and South*, Elizabeth Gaskell<sup>135</sup>

Outside of Hollywood, beyond the creatives of the entertainment industry, labor organizations in general have been floundering, and many fear rather than embrace technological progress. True, many traditional unions represent workers without skills, or those which are about to become obsolete because of the growth of technology. Nonetheless, as we shift towards a gig economy and freelancers become increasingly prevalent, it becomes all the more apparent how much other labor organizations can learn from their Hollywood counterparts. Given that there is such a broad variety of unions, it is difficult to come up with a solution that benefits and equally ensure their survival. However, one commentator remarked that the answer to unions in a gig economy is simple: “The only way to make freelance and contract work sustainable is for those at the bottom to stand together to prevent exploitation from those at the top.”<sup>136</sup> Another believes (rather optimistically) that new technology will free up unskilled union workers to take on better skills.<sup>137</sup>

Yet if we've learned anything from the guilds of Tinseltown, freelancers should recognize that unionization can be an important part of their careers in the Digital Age. Because

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<sup>135</sup> ELIZABETH GASKELL, *NORTH & SOUTH* 286 (Patricia Ingham ed., Penguin Books 1995) (1855) (describing the power of unionization in the face of emerging technology from the point of view of a fictional union representative in Industrial Revolution-era England).

<sup>136</sup> Fortuna, *supra* note 9.

<sup>137</sup> Enrique Dans, *When Will Labor Unions Understand the Potential of Technology to Improve Our Lives?*, *FORBES* (Feb. 2, 2018, 3:35 PM), <https://www.forbes.com/sites/enriquedans/2018/02/02/when-will-labor-unions-understand-the-potential-of-technology-to-improve-our-lives/#1476932029d6>.

the number of “contingent workers”—that is, independent contractors and workers who do not receive benefits through their employer—has risen substantially in recent years, it has become increasingly relevant for today’s workforce to turn to the so-called “Hollywood model.”<sup>138</sup> The Hollywood model is carried out when “[a] project is identified; a team is assembled; it works together for precisely as long as is needed to complete the task; then the team disbands”; through this system, “ad hoc teams carry out projects that are large and complex, requiring many different people with complementary skills.”<sup>139</sup> Adam Davidson, a journalist and economic consultant who noticed the applicability of this business concept to other industries while observing the film set of *The Big Short*, believes “[o]ur economy is in the midst of a grand shift toward the Hollywood model.”<sup>140</sup> In fact, with the rise of technology, he states that the model is highly “adaptable,” hiring “based on the specific needs of that moment and with a limited financial commitment” that is beneficial for both management and workers alike.<sup>141</sup> Davidson also noted that the Hollywood model works well in the entertainment industry because it “is strongly unionized, which keeps wages high.”<sup>142</sup> The Hollywood model of hiring contingent workers thus goes hand in hand with an increased need to unionize the rampant freelance workforce of today, and should rely on similar techniques to boost their bargaining power. For example, widespread publicity of union issues has lent to the power of many entertainment

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<sup>138</sup> Elaine Pofeldt, *Shocker: 40% of Workers Now Have ‘Contingent’ Jobs, Says U.S. Government*, FORBES (May 25, 2015, 11:27 AM), <https://www.forbes.com/sites/elainepofeldt/2015/05/25/shocker-40-of-workers-now-have-contingent-jobs-says-u-s-government/#61a7fd0314be>; see Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 21–22 (2016) (“[Corporations] vastly [increased] their use of “contingent” workers—part-time and temporary workers and independent contractors . . .”).

<sup>139</sup> Adam Davidson, *What Hollywood Can Teach Us About the Future of Work*, N.Y. TIMES MAG. (May 5, 2015), <https://www.nytimes.com/2015/05/10/magazine/what-hollywood-can-teach-us-about-the-future-of-work.html>; Fortuna, *supra* note 9.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Zoë Henry, *3 Reasons You Should Adopt the ‘Hollywood Model’ of Doing Business*, INC. (May 15, 2015), <https://www.inc.com/zoe-henry/3-reasons-you-should-adopt-the-hollywood-model-of-doing-business.html> (describing the exciting possibilities for the Hollywood model in other industries).

<sup>142</sup> Davidson, *supra* note 139.

unions. Their members' visibility is "a major part in negotiations," as Hollywood unions' dissatisfaction often turns into public pressure by the media and average viewers, which "may be purely personal."<sup>143</sup> Similarly, this tactic can be used in most other industries through the kind of "social bargaining" endorsed by scholar Kate Andrias, who noted that this "more public and social approach" in the form of intersectoral worker movements can elevate labor organizations' roles on and beyond the negotiating table.<sup>144</sup> Just as the talent guilds which represent a variety of skills in Hollywood have increased their power and influence by banding together over the years especially in the face of technological innovation, so too can unions collaborate across trades and even industries to establish an equal footing with their management counterparts.

As a result of unionizing under the Hollywood model outside the entertainment industry, contingent workers can expect a number of benefits, such as the ability to collectively bargain for a minimum but negotiable pay.<sup>145</sup> Unions should also embrace their ability to offer resources that will educate members on their rights and their trade, hone their skills for their work, network within their community, and address issues particular to their industry. This unique purpose has given entertainment unions their particular brand of prestige and insider knowledge that is applicable elsewhere. For instance, the talent guilds have been able to support its members in the wake of the #MeToo and Time's Up movements by establishing and enforcing sexual harassment prevention methods and encouraging equality;<sup>146</sup> given that these issues are prevalent in other industries, all unions can likewise play a role in offering such support and advocacy to

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<sup>143</sup> Jan Wilson, *Special Effects of Unions in Hollywood* 12 LOY. L.A. ENT. L.J. 403, 406 (1992).

<sup>144</sup> Andrias, *supra* note 138, at 46–70 (describing, as an example, how the union-led worker movement Fight for \$15 encouraged a discussion about minimum wage policies and did more than "call for union rights").

<sup>145</sup> Fisk, *supra* note 61.

<sup>146</sup> David Robb, *AMPTP & Hollywood's Unions Were "Ahead of the Curve" Before Weinstein Sex Scandal, Producers' Rep Says*, DEADLINE (Dec. 19, 2017, 3:46 PM), <http://deadline.com/2017/12/hollywood-unions-sex-harassment-scandal-contract-provisions-ahead-of-curve-1202230186/>; *see also* Jonathan Handel, *#MeToo: Hollywood Guilds Grapple with How to Represent Accuser and Accused*, HOLLYWOOD REP. (Feb. 15, 2018, 5:39 AM), <https://www.hollywoodreporter.com/news/guilds-grapple-how-represent-accuser-accused-1084439>.



protect their members from discrimination and harassment. Furthermore, the Digital Age has made it crucial for the workforce to engage in lifelong learning to stay ahead of the curve,<sup>147</sup> and there is no place better suited than unions to provide constant and updated information to their members about changes in their trade. Albeit not as easily and equally applicable to all unions as minimum negotiated compensation or trade-related resources, unions can also find new footing in the psychological importance of acknowledging and protecting laborers' ownership over their work. Writers, directors, and actors have all required credit and intellectual property protection of their work, which their guilds recognized, valued, and have fought for at the negotiating table, in the collective bargaining agreements' careful language, at the picketing line, and in the courts. Especially in the Digital Age and with the growth of skilled technical workers whose labors might often go unrecognized, the ability to take advantage of the growth of technology collectively rather than fight against it can help ensure the viability of unions to come.

Scholars have observed that “Hollywood does not operate in a vacuum in labor law,” and although it bears some traits that are distinctly a part of show business, its incredibly strong unionization efforts should serve as a paragon for labor organizations in other industries to sustain their own membership.<sup>148</sup> The guilds might be known for their flashier, famous members, but it is important to note that such renown can be—and have been over the last eighty-plus years—used to bargain collectively for their fellow members with less clout and who would have had none at all without a union.<sup>149</sup> This same philosophy is applicable to non-

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<sup>147</sup> *Equipping People to Stay Ahead of Technological Change*, ECONOMIST (Jan. 14, 2017), <https://www.economist.com/news/leaders/21714341-it-easy-say-people-need-keep-learning-throughout-their-careers-practicalities>.

<sup>148</sup> Wilson, *supra* note 143, at 439.

<sup>149</sup> See, e.g., Federman, *supra* note 55 (noting that many of SAG's members, like the writer of the piece, are middle-class actors who depend on the residuals the union collectively bargains for); Fisk & Szalay, *supra* note 92, at 613 (describing how immediately prior to the WGA 2007–08 strike, showrunners, who may have seemed like management but were WGA members and received WGA benefits, decided to strike on behalf of their junior counterparts); see also Alissa Wilkinson & Todd VanDerWerff, *The Writers Guild of America has Vote to*

entertainment unions, as all industries—inside and outside of Hollywood—struggle to assert their power against the rise of technology, globalization, and contingent work. The power of standing and working together as a collective has the potential to be the one constant that can withstand the inevitable shifts of technology and the unpredictability the future holds.

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*Authorize a Strike, with 96 Percent in Favor*, VOX (Apr. 24, 2017, 8:39 PM), <https://www.vox.com/culture/2017/4/24/15168140/wga-strike-authorization-vote> (noting how middle-class writers are particularly hard hit by industry changes, as their compensation can “go down, in some cases rather sharply”).