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# Digital Hollywood 2.0: Reimagining Film, Music, Television and Publishing Distribution as a Global Artist Collaborative

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DIGITAL HOLLYWOOD 2.0: REIMAGINING FILM,  
MUSIC, TELEVISION, AND PUBLISHING  
DISTRIBUTION AS A GLOBAL ARTIST  
COLLABORATIVE

*Jon M. Garon\**

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ABSTRACT

*The seven largest U.S. motion picture distributors control as much as ninety percent of the U.S. domestic box office and the majority of the global theatrical box office revenues. This economic dominance in gross revenue, however, undervalues the success of financially and artistically*

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\* Director, NKU Chase Law + Informatics Institute and Professor of Law, Northern Kentucky University Salmon P. Chase College of Law; J.D. Columbia University School of Law 1988. This paper was initially prepared for presentation at the IP for Creative Upstarts Conference, Michigan State University College of Law, Nov. 9-10, 2012.

*successful works budgeted for smaller audiences. Similar economics also drive music and publishing economies.*

*Measured solely from gross revenue, the Hollywood model of distribution dominates most markets around the world. Lower budgeted projects, however, may have much higher returns on capital investment and allow the creative artists to engage more targeted audiences. When more appropriate measures of success are utilized, a different picture emerges. European productions represent a significant amount of content and although Hollywood continues to achieve a disproportionate amount of gross revenue, the European productions continue to achieve profitability and audience acclaim.*

*The same is true elsewhere. India, for example, “has a thriving film industry, both Bollywood films, the Hindi blockbusters coming out of Mumbai film studios, and regional films made in regional languages dominate the Indian box office leaving less room for Hollywood films.”<sup>1</sup> South Korea, Nigeria, Hong Kong and increasingly China all have strong attendance of regionally produced films despite the competition with U.S. products.*

*This article will analyze the legal strategies and business models utilized by the new film distribution companies and will contrast these with the models working for Bollywood, online music distribution at Apple, and e-book strategies at Amazon and Google. These strategies include social networking and community development at the inception, production, and distribution stages of the content. Distribution 2.0 begins with crowd-funding and related strategies to engage the audience before and during production to build interest prior to distribution. The article analyzes current financial structures to assure a healthier economic relationship between participants, producers, and distributors in order to create a sustainable business model. It then looks at the distribution strategies to emphasize the ability to use social networking and communities of interest to build and sustain audiences and rethink pricing strategy.*

*This article will address the financial regulations, intellectual property laws, and contracting strategies that interfere with existing models and articulate the potential best practices for the next generation of narrative and documentary films. The model also creates a platform for shorts, episodic content (e.g., series television), and music.*

It sounds like bragging, but we didn't borrow from the bank. We kept a certain amount of money aside and financed our own pictures. In a way we gambled a little heavier than some people do at Las Vegas, but we always got away with this.

—Harold Lloyd, Filmmaker (1893-1971)<sup>2</sup>

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1. FINOLA KERRIGAN, *FILM MARKETING* 18-19 (2009).

2. GEORGE STEVENS, JR., *CONVERSATIONS WITH THE GREAT MOVIEMAKERS OF HOLLYWOOD'S GOLDEN AGE AT THE AMERICAN FILM INSTITUTE* 3 (2006).

I think the introduction of quick, instant communication is the basis of all our woes. Sometimes it's beneficent, but often it's the other way around.

—Gene Kelley, Filmmaker, Choreographer and Dancer (1912-1996)<sup>3</sup>

## INTRODUCTION

Louis C.K. tried an experiment. A U.S. based comedian and television star, he invested in a premium production of his stage show, which he then sold directly to the public for \$5.00, free of any digital rights management or other restrictions.<sup>4</sup> The experiment was a success. Despite \$170,000 in direct production expenses and significant additional expenses for web design, processing fees and marketing, the project was profitable within two days of launch<sup>5</sup> and has reportedly earned the artist a pre-tax earnings of \$750,000.<sup>6</sup>

The experiment is neither new nor entirely exceptional. DramaFever, Epix, Fandor, Film Fresh, Popcorn Flix, and others provide opportunities for filmmakers to distribute their content. Many of these have modest distribution fees that would have been comparable to the costs Louis C.K. incurred by building his own infrastructure.<sup>7</sup> Other comedians such as Ron White have started the direct-to-public marketing strategy.<sup>8</sup> Nonetheless, the experiment is important because it reflects the next wave of content disintermediation. Premium cable television systems such as HBO and Showtime had held a monopoly on first-run comedy specials, competing only with basic cable channel Comedy Central.<sup>9</sup> The premium cable channels would promote the shows to encourage monthly subscribers.<sup>10</sup> Once the special had completed its run, the cable system would license the special for general broadcast on basic cable systems.<sup>11</sup> Often these specials

3. *Id.* at 529.

4. Louis C.K., *A Statement from Louis C.K.*, LOUISCK.NET (Dec. 13, 2011), <http://buy.louisck.net/news/a-statement-from-louis-c-k>.

5. *Id.*

6. David Carr, *A Comic Distributes Himself*, N.Y. TIMES, Dec. 19, 2011, at B1, available at [http://www.nytimes.com/2011/12/19/business/media/louis-ck-plays-a-serious-joke-on-tv-the-media-equation.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/19/business/media/louis-ck-plays-a-serious-joke-on-tv-the-media-equation.html?pagewanted=all&_r=0).

7. See, e.g., Tim Appelo, *New Film Site Fandor: A Cross Between Sundance and Netflix, Only Smaller*, HOLLYWOOD REP. (Mar. 8, 2011, 10:19 PM), <http://www.hollywoodreporter.com/news/new-film-site-fandor-a-165495>.

8. Chris Marlowe, *Ron White becomes latest to sell direct-to-fan downloads*, DIGITAL MEDIA WIRE (Sept. 14, 2012, 5:04 AM), <http://www.dmwmedia.com/news/2012/09/14/ron-white-becomes-latest-to-sell-direct-to-fan-downloads>.

9. Deborah Vankin & Dawn C. Chmielewski, *The new comedy stages: YouTube, Twitter, online specials*, SAG ACTOR ONLINE (Dec. 30, 2012), <http://www.sagactoronline.com/2012/09/the-new-comedy-stages-youtube-twitter.html>.

10. June Thomas, *How Much Gold Is Game of Thrones Worth?* SLATE MAG. (Mar. 29, 2012, 2:00 PM), [http://www.slate.com/articles/arts/culturebox/2012/03/game\\_of\\_thrones\\_how\\_hbo\\_and\\_showtime\\_make\\_money\\_despite\\_low\\_ratings\\_.html](http://www.slate.com/articles/arts/culturebox/2012/03/game_of_thrones_how_hbo_and_showtime_make_money_despite_low_ratings_.html).

11. *Id.*

would require some editing to meet the slightly more restrictive censorship requirements.

A number of decisions made by Louis C.K. and Ron White are notable. Both are using Internet-based distribution that eschews digital rights management and country-code controls.<sup>12</sup> This allows for the distribution of the content to any Internet enabled computer in the world, unless the computer is located in a region that is subject to governmental filtering. Louis C.K. is making his content available exclusively on his own, personally branded website. White, in contrast, is using both his own website and a more general content distribution platform in which he is a partner.<sup>13</sup> For less established artists, there may be other services available.<sup>14</sup>

The disintermediation of cable parallels the decline in control by record distributors and book publishers. This has been less true of film and television, but just as comedy specials are a form of television, the Louis C.K. experiment may be a harbinger of change in these industries as well.

This article will analyze the legal strategies and business models utilized by the new content distribution companies and contrast these with the models working for Bollywood, online music distribution at Apple, and e-book strategies at Amazon and Google. These strategies include social networking and community development at the inception, production, and distribution stages of the content. Distribution 2.0 begins with crowd-funding and related strategies to engage the audience before and during production to build interest prior to distribution. Distribution 2.0 also analyzes the financial structures to assure a healthier economic relationship between participants, producers, and distributors to create a sustainable business model. Distribution 2.0 then looks at the distribution strategies to emphasize the use social networking and communities of interest to build and sustain audiences and rethink pricing strategy.

The article will address the financial regulations, intellectual property laws, and contracting strategies that interfere with existing models and articulate the potential best practices for the next generation of narrative and documentary films. The model also creates a platform for shorts, episodic content (e.g. series television), and music.

## I. THE NEW INTERMEDIARIES

The media distribution industry can be measured by eras. The “golden age” of Hollywood ran from 1929 to 1948.<sup>15</sup> The end of the golden age

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12. See Louis C.K., *supra* note 4; see also Marlowe, *supra* note 8.

13. See Marlowe, *supra* note 8 (discussing Ron White).

14. See, e.g., DACAST.COM (2013) (offering pay-per-view and subscription services on a web-based platform).

15. Others put the date between 1945 and 1950. Cf. STEVENS, *supra* note 2, at ix (“Beginning in the 1950s people started watching films on small television screens by themselves, or with one or two others, and later video and DVDs increased private viewing.

came about as the U.S. economy responded to the post-World War II era and the adoption of television, which changed the economics of distribution. I prefer 1948, however, as a specific moment because it was the date that *U.S. v. Paramount Pictures*<sup>16</sup> forced the major Hollywood distributors to divest themselves of their theatrical changes and end their anti-competitive practices related to the booking of films. The oligopoly among the major Hollywood studios allowed for control of first-run theatrical film distribution.<sup>17</sup> This dominance has not changed greatly in the ensuing half century.<sup>18</sup>

The golden age was defined by a studio system in which a group of seven companies dominated production, distribution, and first-run

The filmmakers of the Golden Age worked for a large and vibrant communal audience that no longer exists.”), and RICHARD B. JEWELL, *THE GOLDEN AGE OF CINEMA: HOLLYWOOD, 1929-1945 2* (2007) (associating the end of the golden age with the end of World War II and the changes coming to Hollywood).

16. *U.S. v. Paramount Pictures*, 334 U.S. 131, 166 (1948). See also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 257 (1946) (“respondents conspired to maintain the release system as part of a conspiracy to maintain minimum admission prices to be charged by exhibitors generally”).

17. *Paramount Pictures*, 334 U.S. at 166.

The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew’s, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporation and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artists Corporation, which is engaged only in the distribution of motion pictures.

The Walt Disney Company has replaced RKO as a major distributor. Loew’s was the parent company of MGM, which, following the court ordered divestiture, resulted in MGM becoming the production and distribution studio while Loews remained the name of the exhibition company. MGM retained the theatrical exhibition companies outside the U.S. See LEARN ABOUT MOVIE POSTERS, *Metro-Goldwyn-Mayer History*, <http://www.learnaboutmovieposters.com/newsite/index/countries/US/history/studios/MGM/mgm-history.asp> (placing the date of divestiture at 1958) (last visited Jan. 31, 2013); Cf. *United States v. Loew’s, Inc.*, 783 F. Supp. 211 (S.D.N.Y. 1992) (noting that the final divestiture was ordered in 1952 with the end of the *U.S. v. Paramount* proceedings).

18. Robert W. McChesney, *The New Global Media – It’s a Small World of Big Conglomerates*, NATION, Nov. 29, 1999, at 11, available at <http://www.hartford-hwp.com/archives/29/053.html> (“In short order, the global media market has come to be dominated by the same eight transnational corporations, or TNCs, that rule US media: General Electric, AT&T/Liberty Media, Disney, Time Warner, Sony, News Corporation, Viacom and Seagram, plus Bertelsmann, the Germany-based conglomerate.”); News Corp. owns Fox; Sony owns Columbia and U/A; Time Warner owns Warner Bros; Viacom owns Paramount and GE owned Universal. In 2011 GE formed a joint venture with Comcast to create NBC Universal, LLC. See JT. Ramsay, *Comcast and GE Complete Transaction to Form NBC Universal, LLC*, COMCAST VOICES (Jan. 29, 2011), <http://corporate.comcast.com/comcast-voices/comcast-and-ge-complete-transaction-to-form-nbcuniversal-llc-2>.

exhibition of motion pictures in the United States.<sup>19</sup> These companies generally hired talent such as employees, casting actors, shifting writers, and assigning directors as needed. These major studios had a monopoly over talent, production, and distribution.<sup>20</sup>

With the changing post-War economy, the unanticipated adoption of television, and the legal action to break up the oligopolistic control of the industry, Hollywood shifted its control from production to distribution. The model of distribution control has proven very successful. For example, the MPAA reports that “[w]hile the total number of films released reached 610 in 2011...110 films made up 90% of the box office in 2011.”<sup>21</sup> These 110 films are almost exclusively distributed by the same large distributors that controlled Hollywood during its golden age. Of course, not all distributed films are successful. Five hundred other films were released theatrically in the U.S. through large and small independent film companies.

Still, the distributors control the industry. The 610 theatrically released films represent a fraction of the films produced. In 2011, the Sundance Film Festival received 3,812 feature-length films, representing 1,943 U.S. and 1,869 international feature-length films.<sup>22</sup> Sundance, of course, is only one of thousands of film festivals annually.

The global picture is much the same. American films only represent between 39% and 46% of European theatrical film supply, but account for 66-76% of admissions.<sup>23</sup> On the other hand, films produced in the European Union represent between 45%-53% of supply, but only 22-33% of admissions.<sup>24</sup> Films from the rest of Europe still account for less than 2.5% of those produced and a market share of under 0.2%.<sup>25</sup> Between 6-7% of films are made in another part of the world, but their market share fell from

19. See Frederick Dennis Greene, *Cultural Colonization In the Hollywood Film: The Harlem Debates - Part 2*, 5 *ASIAN L.J.* 63, 69 (1998) (“[the studio’s] response to the death of one monopoly was to take control of the motion picture in this country through the creation of a newer form of motion picture combination: a vertically integrated monopoly.”); Warren H. Husband, *Resurrecting Hollywood’s Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers*, 17 *COLUM.-VLA J.L. & ARTS* 327, 328-29 (1992-1993).

20. TINO BALIO, *UNITED ARTISTS: THE COMPANY THAT CHANGED THE FILM INDUSTRY* 11-12 (1987) (“By the thirties, the motion picture industry had become, in economic terminology, a mature oligopoly. . . . To say that creative people were kept in a subservient position in the studio system is an understatement”).

21. MOTION PICTURE ASS’N OF AM., *THEATRICAL MARKET STATISTICS 2011 16* (2012) [hereinafter *THEATRICAL MARKET STATISTICS*], available at <http://www.mpa.org/resources/5bec4ac9-a95e-443b-987b-bff6fb5455a9.pdf>.

22. *2011 Sundance Film Festival Announces Films in Competition*, SUNDANCE FILM FESTIVAL (Dec. 1, 2010, 11:12 AM), <http://www.sundance.org/festival/article/2011-competition-film-announcement/>.

23. *Data Analysis*, LUMIERE, <http://lumiere.obs.coe.int/web/sources/analyse.html> (last visited Jan. 31, 201314).

24. *Id.*

25. *Id.*

2.5% in 1996 to 0.9% in 1999.<sup>26</sup> The oligopoly model of parallel pricing and business structures allows the established companies to limit new competition.<sup>27</sup>

Nor is the film industry alone. In other creative industries, market strategies have been controlled by the companies that controlling distribution.<sup>28</sup> In most countries, television was dominated by state-owned or state-operated broadcasters which slowly opened to competition from commercial broadcasting alternatives.<sup>29</sup> Television itself changed slowly with the advent of cable systems that created competition for the national broadcasters.<sup>30</sup> The systems varied by country, as did the internal rules regulating the power of the national broadcasters to also control television production, but the change was incremental.

The next revolution occurred in 1999 with the launch of Napster, the paradigm-shifting peer-to-peer platform that enabled the public to have access to any content that resided on any other participant's computer system.<sup>31</sup> Napster and its progeny operate outside of territorial boundaries and without the ability to charge for content.<sup>32</sup>

Although Napster itself was successfully sued for its contributory copyright infringement,<sup>33</sup> the legacy of peer-to-peer content distribution made it imperative for content companies to open up their content to Internet distribution.<sup>34</sup> Apple was the first mover to take full advantage of

26. *Id.*

27. George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 445 (1982); *see also* Buchwald v. Paramount, 13 U.S.P.Q.2d 1497 (Cal. Sup. Ct. 1990).

28. *See, e.g.*, Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 587-88 (1999).

29. *See* Simeon Djankov *et. al.*, *Who Owns the Media?* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 8288, 2001), available at <http://www.nber.org/papers/w8288> ("On average, the state controls approximately . . . 60% of television stations").

30. *See* McChesney, *supra* note 18. *See also* MARK COOPER, MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE 95 (2003), available at <http://cyberlaw.stanford.edu/attachments/mediabooke.pdf>.

31. *See* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 658 (2005); *see also* Robert A. Heverly, *The Information Semicommons*, 18 BERKELEY TECH. L.J. 1127, 1136 (2003); *see generally* Grace J. Bergen, *The Napster Case: The Whole World is Listening*, 15 TRANSNAT'L LAW 259, 260-69 (2002).

32. Theodore Hong, *Performance, in PEER-TO-PEER: HARNESSING THE BENEFITS OF A DISRUPTIVE TECHNOLOGY 204* (Andy Oram ed., 2001).

33. A&M Records, Inc., v. Napster, Inc., 284 F.3d 1091, 1098-99 (9th Cir. 2002). *See also* MGM Studios Inc., v. Grokster, Ltd., 545 U.S. 913 (2005) (finding peer-to-peer file sharing service could be liable for inducing copyright infringement even in absence of vicarious or contributory liability).

34. *See* Kimberlianne Podlas, *The Moral of the Story. . . Musical Artists must Protect Their own Rights in Digital Music*, 10 WAKE FOREST INTELL. PROP. L.J. 265, 287-88 (2010); *see also* Seth Robert Belzley, *Grokster and Efficiency in Music*, 10 VA. J.L. & TECH. 1, 7 (2005) ("This process of cutting the entertainment industry out of the transactional loop

this market pressure, launching iTunes to make its elegant music player a better value than products from rival Sony or Microsoft.<sup>35</sup> For example, had Sony been in a position to exploit its large music catalog and content holdings by licensing its own content on its music players, it is reasonable to expect that it would have retained significant market share in this competitive environment.<sup>36</sup>

Book distributors, Amazon and Barnes & Noble, have been equally aggressive in establishing book and e-book distribution platforms that have largely consolidated the retail end of book publishing, shifting power to these distributors.<sup>37</sup> Not to be outdone, Apple has moved aggressively to manage book distribution on its iTunes platform as well.<sup>38</sup>

In film, the industry remains much more fragmented. Control remains dominated by nearly the same group of distributors as existed at the time of the *U.S. v. Paramount* decision. The historical legacy of price fixing by the exhibitors has left global audiences with little expectation that there will be meaningful price competition for a movie ticket. Instead, within each city the prices of movie tickets do not reflect popularity or the number of weeks a motion picture has played. Ticket prices are held rather constant and the exhibitor varies the number of seats available to see a popular movie by increasing the number of screens on which the movie will play.<sup>39</sup>

But just as television moved the audience from the communal theater to the living room, Napster initiated a move to the computer screen which technology has further pushed to mobile devices. These mobile devices – smartphones, tablets, and netbooks – serve as platforms for each of the content industries, so control for the mobile device will define the next generation of viewership.<sup>40</sup> Moreover, since television advertising is a ripe

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threatens the industry's ability to maintain the status quo. And when the status quo changes, there is always a strong chance of creative destruction").

35. See Kristin Thomson & Brian Zisk, *iTunes and Digital Downloads: An Analysis*, FUTURE OF MUSIC COALITION (June 15, 2003), <http://www.futureofmusic.org/article/article/itunes-and-digital-downloads-analysis>.

36. See generally Frank Rose, *The Civil War Inside Sony*, WIRED MAG., Feb. 11, 2003, at 101, available at <http://www.wired.com/wired/archive/11.02/sony.html>; see also Steve Hamm & William C. Symonds, *Mistakes Made on the Road to Innovation*, BUS.WK. (Nov. 26, 2006), <http://www.businessweek.com/stories/2006-11-26/mistakes-made-on-the-road-to-innovation>.

37. See John Biggs, *Nook Media Officially Spins Out Of B&N With Microsoft's Help, Plans To Enter Ten New Markets By Next Year*, TECHCRUNCH (Oct. 4, 2012), <http://techcrunch.com/2012/10/04/nook-media-officially-spins-out-of-bn-with-microsofts-help-plans-to-enter-ten-new-markets-by-next-year/>.

38. See Declan McCullagh, *DOJ announces three e-book settlements, but not with Apple*, CNET (Apr. 11, 2012, 9:27 AM), [http://news.cnet.com/8301-13578\\_3-57412452-38/doj-announces-three-e-book-settlements-but-not-with-apple/](http://news.cnet.com/8301-13578_3-57412452-38/doj-announces-three-e-book-settlements-but-not-with-apple/).

39. See Hay, *supra* note 27, at 447-50.

40. AARON SMITH & JAN LAUREN BOYLES, *THE RISE OF THE "CONNECTED VIEWER,"* PEW INTERNET & AM. LIFE PROJECT 2 (2012), available at <http://pewinternet.org/Reports/2012/Connected-viewers.aspx>.

target for further disintermediation, it is reasonable if not inevitable to expect that the device companies and content providers will seek to reimagine television sets as extensions of the mobile experience.<sup>41</sup>

In the not too distant future, the mobile device will also be the preview screen for the large living-room device. Whether broadcast television or cable/satellite resides on the device will depend on the battle over market and design.

#### A. Production v. Distribution – The Media Economy

Copyright is the primary legal protection afforded to creative arts. This exclusive right is designed to “promote progress” and the “useful arts”<sup>42</sup> or to protect the paternity and integrity of an author’s creative endeavors.<sup>43</sup> It would therefore stand to reason that the economic structure of the industry follows this foundational axiom, assuring maximum economic reward for the creative aspects of the production, with modest transaction costs throughout the remainder of the process. Nonetheless, most of the financing flows through to distribution and exhibition. Investments regarding the cost of production must also be recouped. What is left, if there is a profit, is then returned to the producers.

Each industry is different in its particulars, though it typically follows the same pattern. In film, the producer acquires underlying copyrights and other necessary rights to create the project. The screenwriter, director, cast, and crew work for some combination of paid salary, deferred salary, and profit participation.<sup>44</sup> Only rarely is the profit participation based on gross profit.<sup>45</sup>

41. See Chris Morris, Mobile TV searches for breakthrough, *VARIETY* (Sept. 29, 2012, 4:00 AM), <http://www.variety.com/article/VR1118060011/> (“The history of mobile television has been rocky at best. While the allure of streaming live network programming to viewers over their handheld devices is undeniable, delivering that content in ways that don’t abrogate rights agreements and can somehow be monetized has proven mercurial”).

42. U.S. CONST., art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

43. Berne Convention for the Protection of Literary and Artistic Works, art. 6, adopted Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) [hereinafter *Berne Convention*].

44. See generally JON M. GARON, *THE INDEPENDENT FILMMAKER’S LAW AND BUSINESS GUIDE* 75 (2d ed. 2009).

45. See Ross Bengel & Bruce Ikawa, *Business Readings*, CENGAGE LEARNING (1997), <http://college.cengage.com/accounting/resources/students/readings/12-bengei.html> (“Big name stars, producers, directors, and other participants with greater bargaining power sometimes can negotiate gross participation arrangements.”); see also Malcolm Ritchie, Revenue Flow and Making Money out of Film, *CREATIVE SKILL SET*, [http://www.skillset.org/film/knowledge/article\\_5103\\_1.asp](http://www.skillset.org/film/knowledge/article_5103_1.asp) (last visited Oct. 6, 2012) (“[T]he net deal is the one most commonly used. . . . [I]t is unusual for independent producers to receive any back-end profits from the theatrical release since the other parties further up the chain will still be unrecouped”).

Typically only the most important participants receive any profit participation and it is a modest percentage of net profits. The producer also typically pays itself a fee (to assure the producer is paid even if the project is a financial failure).<sup>46</sup>

The film producer then leverages the bundle of film rights by offering investors the right to all of the production company's proceeds until their investment is recouped.<sup>47</sup> Thereafter any remaining profits are split between the producer and the investors. The profit participants will generally be receiving a percentage of the producer's share (thus fractionalizing it even further).<sup>48</sup>

For example, a film with a \$10 million dollar budget will pay the producer a \$500,000 fee; fees for all the cast, crew, staff, equipment, set construction, costumes, make-up, special effects, and other production costs. The salaries for union employees in the U.S. provide very good payments. The problem for those people, however, is the limited number of weeks for which they can typically find work each year.

The film in this example is then sold to a distributor. That distributor will pay \$5 million for the rights to distribute the film. The payment is actually an advance against future earnings. The distributor will then license the film to theaters across the globe. Although the revenues generally are split between the theaters and the distributors, the actual transactions are much more complicated.<sup>49</sup> Distributors may keep as much as 90% of the first week's box office revenue (though none of the popcorn or other concession profits), but these are on a sliding scale so it will be 80% of the second week; 70% of the third week and so on.<sup>50</sup> As part of this arrangement, however, the distributor will be obligated to spend millions of dollars in television, radio, newspaper, and billboard advertising.<sup>51</sup> A \$10 million film could potentially have a \$30 million to \$50 million advertising budget, if the

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46. See Dov S.S. Simens, Chapter #48 Theatrical Distribution, DOV S-S SIMONS' FILM BLOG (Aug. 27, 2008), <http://webfilmschool.blogspot.com/2008/08/chapter-48-theatrical-distribution.html>; Ritchie, *supra* note 45.

47. The term recoupment is a defined term in most agreements. It may range from 100-125% of the monies invested. In the latter case, the investors each receive 125% on his or her investment before any money is shared with the producers or other third parties.

48. See Simens, *supra* note 46.

49. See Jeff Tyson, How Movie Distribution Works, HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/movie-distribution2.htm> (last visited Feb. 26, 2013).

50. *Id.* The percentage may be offset by a "nut" or base payment to cover some portion of the theater's overhead expenses. *Id.*

51. Larry Gerbrandt, It's not just the story: latest analysis of studio marketing costs suggests that big-time spending on tentpoles mostly does pay off, HOLLYWOOD REP., Jun. 11, 2010, at 28-29 ("for every dollar spent on producing a major film, the studios have been spending 51 cents-58 cents to release and market it in the U.S. and Canada."); see Michael S. Fischer, So You Want To Be In Movies? PRIVATE WEALTH, May 12, 2011, at 61, available at <http://www.fa-mag.com/news/so-you-want-to-be-in-movies-7250.html>; see also DONALD C. FARBER, PAUL A. BAUMGARTEN & MARK FLEISCHER, PRODUCING, FINANCING, AND DISTRIBUTING FILM: A COMPREHENSIVE LEGAL AND BUSINESS GUIDE 72 (2d ed. 2004).

distributor anticipated it could prove to be a smash movie. After six weeks in theaters, the movie earned \$100 million, making it a small summer blockbuster. The theaters collectively earned \$50 million; the distributor recouped its \$50 million in advertising; but there are no additional funds leftover. In fact, the distributor never recouped its \$5 million initial advance. For the filmmakers, the investors lost half of their investment and neither the producer nor anyone else received any deferred compensation.

Assume instead a movie of the same budget with an advertising budget of \$30 million and a gross profit of \$100 million. In that case, the distributor would recoup both its advertising budget and its advance. Of the \$15 million in profit to the distributor, it would typically retain approximately one third or \$5 million. The remaining \$10 million would go the production company and the investors would recoup their initial investment – though without any profit. Again neither the producer nor anyone else among the artists, cast, and crew would receive any deferred compensation.

The film distributor is in the best position among all the parties to manage the risk. It can determine how much initially to advance to acquire the rights to a film and decide on a daily basis how much to invest in advertising for a particular project. So long as the advertising is showing a return on investment, the distributor will keep pumping up the advertising support. If a project is at risk, the distributor can quickly retreat. Theaters can move films from larger to smaller screens and drop films that are under-producing, but they commit on a weekly basis and have much less information available upon which to make such adjustments.

The film company has no flexibility. Once its production budget is set, it cannot adjust the scale of the project. It takes the majority of the risk and has the least ability to manage that risk. This risk explains why investors are given preference over the artists, but does little to rationalize the overall system.

If the film in the example continues to be highly successful, there will be additional revenue from subsequent distribution windows, including DVDs, premium, cable and broadcast television, online distribution and mobile downloads. But each of these distribution windows has its own costs and requires additional marketing to support large audiences. A highly profitable film will become more profitable while a modest project will earn proportionately modest returns.<sup>52</sup>

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52. The correlation, of course, is never exact. Some films find their audiences on DVDs. Clever films without significant action may be better viewed on a home television than a crowded theater; other films are worth a \$3.00 rental but not a \$10.00-\$20.00 movie ticket and evening out. On the price of tickets, see *Average U.S. Price*, NATO, <http://www.natoonline.org/statisticstickets.htm>, (last visited Mar. 14, 2013). The 2011 average ticket price was \$7.93. *Id.* The average U.S. price, however, “represents a national average of theaters in big cities and small towns alike, and includes lower-priced matinees and children’s prices.” *Id.* 3D first run films can cost as much as \$20.00 in some markets. Richard Verrier, *Movie ticket prices reach new milestone*, L.A. TIMES (Jan. 28, 2011, 12:15 PM), <http://latimesblogs.com>.

In the music industry, the economics of record distribution are largely the same. The industry is even more concentrated, with Universal Music Group, Sony Music Entertainment, and Warner Music Group collectively controlling all but 12.1% of the U.S. market.<sup>53</sup> While even more concentrated than film, the music industry also has two notable differences. First, the record labels are typically both the producers and the distributors. Like studio-financed films, these companies combine the high-risk aspects of production with the lower-risk aspects of distribution to build some stability into the production side of the business. Unlike filmmakers, however, record labels typically treat the payments to artists for the production on the album as advances against future royalties rather than salary. By doing this, it puts the artists at even greater risk of default to the record label. By providing artists with advances instead of outright payments, the recording industry pushed the risk of financial failure onto the artists themselves, reflecting the most pernicious business practices in any creative industry.

Although the models are simplified, the lesson is clear: the creative artist cannot truly reap the rewards of financial success because the artist has no ability to adjust costs to manage risk, no ability to control the costs of advertising which largely dictate the total cost of distribution and the size of the audience, and often little upside revenue when the projects are very successful.

A few star performers have overcome the rigged nature of the model. Like Oprah Winfrey,<sup>54</sup> some actors become producers, putting themselves into a control position where they can command control of the distribution network and reap the benefits of the profits. Others, like Arnold Schwarzenegger and Bruce Willis can command both a very high salary and a percentage of the gross income earned on a project.<sup>55</sup> Like United Artist founders Charlie Chaplin, Mary Pickford, Douglas Fairbanks, and D.W. Griffith, the writers, directors, and talent could command participation only when they owned the company.<sup>56</sup>

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latimes.com/entertainmentnewsbuzz/2011/01/movie-ticket-prices-reach-new-milestone.html.

53. See Randy Lewis & Alex Pham, Universal's EMI Acquisition OK'd, STAR TRIB., Sept. 24, 2012, at D4, available at <http://m.startribune.com/business/?id=170790566> (describing the acquisition by Universal of EMI which previously represented 9.6 percent of the market).

54. See Oprah Winfrey biography, BIOGRAPHY.COM, <http://www.biography.com/people/oprah-winfrey-9534419> (last visited Feb. 26, 2013).

55. See Thomas Schatz, The New Hollywood, in *FILM THEORY GOES TO THE MOVIES: CULTURAL ANALYSIS OF CONTEMPORARY FILM* 31 (Jim Collins, Hilary Radner, & Ava Preacher Collins eds., 1993) (discussing explosion of film star percentage deals beginning in the 1980's).

56. The United Artists history, however, may carry its own forewarning. Despite its initial success, the company struggled financially during the last days of the golden age of film, with the company ceasing production in 1951. Thereafter it financed and distributed films only. See Feb 5, 1919: United Artists created, HISTORY.COM, <http://www.history.com/th>

## B. Successful Instead of Profitable

A second economic anomaly also flows from the financial model typical of motion pictures and record albums.<sup>57</sup> Because the producers often leverage the intellectual property assets to develop the projects with little direct financial risk, the producers will maximize their leverage with larger-budget projects. Assume for example, that motion picture's rights to a novel may be acquired for \$50,000. The producer who raises \$100 million to make that novel into a motion picture will likely be able to charge a much larger producer fee and potentially earn a much greater return on investment than the producer who raises \$1 million to make the same novel into a motion picture.

With today's technology, it is reasonable to say that any story may be told with any budget.<sup>58</sup> The budget shapes the choice of cast members, locations and size of special effects. It changes how a story will be told. It does not, however, forestall the telling of the story. Shakespeare's plays have been filmed countless times, but produced on stage thousands more. A single actor, standing alone on a barren stage may still be more affecting than a complex scene shot upon the perfect creation of Denmark's Elsinore Castle, complete with full armies and real cavalry.

For some producers, the telling of the story dictates the budget. For others, the ability to cast notable actors and design sophisticated effects are the most compelling budgetary factors. But there remains something of an inverse correlation between budget and profit.<sup>59</sup>

is-day-in-history/united-artists-created (last visited Sept. 20 2013).

57. See Mark Hayes, Stop Obsessing Over Revenue: 3 Proven Strategies for Increasing Profitability, SHOPIFY (Oct. 04, 2012), <http://www.shopify.com/blog/6657676-stop-obsessing-over-revenue-3-proven-strategies-for-increasing-profitability> (guest post by Andrew Youderian of eCommerceFuel.com, stating

[p]eople LOVE to talk about revenues. The numbers are big, impressive and easy to fixate on. But when was the last time you heard someone bragging about growing their margins or improving business efficiency? These metrics aren't nearly as sexy, but they're immensely important. As the saying goes, 'It doesn't matter how much you make. It matters how much you keep'.

58. See, e.g., Andrew Said Thomas, The Making of a Micro-Budget Film: Pre-Production, MICROFILMMAKER MAGAZINE, <http://www.microfilmmaker.com/tipstrick/Issue9/preprod.html> (last visited Feb. 26, 2013) ("[D]oes this scene benefit the movie or could it be re-written to have the same effect on the movie but be less monetary intensive? So now the budget is effecting [sic] the script").

59. Because of the overhead costs and costs for marketing, this may not be true for the major studios. "SNL Kagan, a research firm, calculates that between 2004 and 2008 films costing more than \$100m to produce consistently returned greater profits to the big studios than cheaper films did." A world of hits: Ever-increasing choice was supposed to mean the end of the blockbuster. It has had the opposite effect, ECONOMIST, Nov. 28, 2009, at 79 [hereinafter *A world of hits*], available at <http://www.economist.com/node/14959982>; see Neil Terry, De'Arno DeArmond, & Miles Zachary, *The determinants of opening weekend box office revenue for movies*, 9 J. ACAD. OF BUS. & ECON. 193, 194-95 (2009) (analysis

If the story can be told in a manner that attracts the same audience for half the budget, then the film will generate twice the profit. Despite this, these savings will not go to the artists and will only go to the producers to the extent they offset the reduced production fee, so there is little incentive to manage low budget productions. Instead, the industry regularly tracks grosses and ticket sales rather than profitability. As a result, production companies are rewarded for making very expensive movies with very high advertising budgets that generate hundreds of millions of dollars in costs and revenues – even if they have only marginal returns on investments. In contrast, a film made for \$100,000 and earning \$250,000 for its producers, investors, and profit participants is a financial smash and will barely be noticed among industry statistics.

This latter point may help explain some of the global tension regarding international film revenues. No country competes with the U.S. for blockbuster financing of films. The Hollywood megahits now cost over \$250 million to produce and few of those have returns on investment that justify the cost and expense. Nonetheless, European films costing €100,000 could return three to four times their investment while being perceived as a marginal competitor to the U.S. blockbuster. This accounting misses the appropriate business sense behind creative arts financing. The slanted financial reporting across for-profit arts sectors adds to the confusion and perception that Hollywood dictates the audiences for content either in America or in the rest of the world.

### C. Retailers as the New Intermediaries

Technologies available in the twenty-first century have dramatically lowered the barriers to entry for authors, musicians, and filmmakers.<sup>60</sup> Not only have the means of production enabled musicians to record commercial quality albums in home studios; filmmakers to shoot on digital and cut their films on laptops; and authors to write beautifully illustrated books on even outdated computers; but modern networks and resources now make self-publishing and distribution available for all media.<sup>61</sup>

At its simplest, creative artists can readily acquire a website and post their material to the Internet for worldwide distribution. Through the use of

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shows the number of screens on which a film opens is a significant predictor in the film's gross income and the budget of the film correlates very closely with the number of screens on which a film opens – making budget a proxy for opening gross income). But like most studies, this focuses on revenue rather than profitability.

60. ELI NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA* 36 (2009).

61. *Id.*

free blogging software or video hosting services,<sup>62</sup> creative artists can post their content for free. Access to the world market has never been easier.

For creative artists seeking compensation for their work, a slightly more sophisticated set of tools will be required, but even here the costs are relatively small and the barriers minimal. Amazon's Createspace provides a suite of tools and services to self-publish books, music, and films.<sup>63</sup> For a fee, authors and artists can subscribe to services that enable them to professionalize many of the distribution services. Amazon supports both digital and physical distribution in the markets it covers, primarily the United States and Europe.

Apple iTunes distributes all of these same types of content.<sup>64</sup> Other than some limited book publishing, Apple does not directly support the creation of content.<sup>65</sup> Instead, Apple works with third party content aggregators, which provide the tools for any creative artist to be distributed on the iTunes platform.<sup>66</sup>

The shift in technology highlights the power of the new intermediaries. Unlike the old Hollywood studios and record labels, the control no longer stems from the creation of content. Instead, the control flows from the marketing and distribution of content.

iTunes is now the leading U.S. source for music, followed by Amazon, Walmart, and Target.<sup>67</sup> But Apple and Amazon are not alone in the online market. Spotify, Buy.com, eBay (including subsidiary Half.com), Google Store, and dozens of others located across Asia, Europe, and North America provide online delivery services for books, movies, television, and music.<sup>68</sup>

Sales on these platforms follow the same pattern the movie industry has used since the golden age of Hollywood. Those projects, which receive the most marketing and promotion, tend to garner the largest audiences so the intermediaries that can put the greatest resources toward promotion of the content can manage the largest audiences.

As a result, the new model of distribution has two convergence points: the distributors that promote content and the retailers that deliver it to the

62. *E.g.*, wordpress.com, blog.com, and blogger.com all provide free internet access and the ability to upload files. YouTube.com can host longer-form music videos and motion pictures.

63. *E.g.*, CREATSPACE, <https://www.createspace.com/> (last visited Feb. 26, 2013).

64. Miranda Brookins, The Approval Process for iTunes Content Providers, DEMAND MEDIA, <http://smallbusiness.chron.com/approval-process-itunes-content-providers-33403.html> (last visited Feb.26, 2013).

65. *Id.*

66. *See, e.g.*, Indie Music Signup FAQs, iTUNES, <http://www.apple.com/itunes/content-providers/music-faq.html> (last visited Feb. 26, 2013).

67. Glenn Peoples, Business Matters: Is Spotify Labels' #2 Source of Revenue? Probably Not, BILLBOARD (June 27, 2012, 5:45 PM), <http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-is-spotify-labels-2-source-1007443752.story#RK754u44yR3yis9J.99>.

68. *Id.*

public. For distributors, the world has yet to change. Advertising and marketing support drives audience interest, promotes sales of content, and encourages the retailers to push the sales of these popular products.

The retailers, such as Amazon, iTunes, Play.com (UK), Joyo.com (China), Kalahari.com (South Africa), and others across the globe have increasingly grown to compete with the theaters, bookstores, music shops, and even broadcasters that had traditionally served as the second convergence point on content distribution. Retailers operate in a fundamentally different manner than exhibitors such as theater chains or broadcasters. In the exhibitor model, the exhibitor must make an editorial decision to select content for exhibition, rejecting most of the available product at any given time. The exhibitor's decision would be motivated by the potential size of the audience, the profitability of the content, the buyer's personal sense of artistic and commercial merit in the content, and the other competition vying for the very scarce exhibition space available at any moment in time.

The online retailer model, in contrast, has only marginal scarcity issues.<sup>69</sup> An online retailer desires to maximize customer traffic to its site, encourage the customers to transact business, and work to make its retail location the preferred shopping experience to increase repeat business.<sup>70</sup> While exhibitors and physical retailers have limits on the number of selections available, online retailers can support vastly more products for sale or license. The options are not, of course, unlimited. But they are potentially so much greater than either exhibitors or physical retailers can provide that the difference can be treated as infinite for purposes of comparison.

The nearly unlimited ability to sell or license the artistic works, in turn, changes the relationship with the distributors.<sup>71</sup> Every distributor can sell to the online retailers. Large distributors and small distributors will be equally successful in making their works available online.

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69. David R. Bell, Jeonghye Choi & Leonard Lodish, What Matters Most in Internet Retailing, MIT SLOAN MGMT. REV., Sept. 18, 2012, at 27, available at <http://sloanreview.mit.edu/the-magazine/2012-fall/54116/what-matters-most-in-internet-retailing/> ("Traditional and Internet retailing differ in two critical ways. First, in theory at least, Internet retailers have 'unlimited' trading areas").

70. See, e.g., Amazon, GROWTH CHAMPIONS, <http://growthchampions.org/growth-champions/amazon/> (last visited Feb. 26, 2013) ("Instead of attempting to replicate traditional sales experiences, Amazon simply created new ways to communicate and in so doing also exposed the weaknesses of traditional retail – for example by championing the concept of outsourcing the reviewing role to customers, Amazon managed to lower staff costs and increase service quality").

71. Compare this with the business practice of "selling" shelf space at grocery and other retailers. See William L. Wilkie et al., Marketing Research and Public Policy: The Case of Slotting Fees, 21 J. OF PUB. POL'Y & MARKETING 275, 279 (2002) (slotting fees may be fueled by many factors - among these are new product proliferation, new product failures, and greater retailer influence); Jared M. Hansen, Sumit Raut & Sanjeev Swami, Retail Shelf Allocation: A Comparative Analysis of Heuristic and Meta-Heuristic Approaches, 86 J. OF RETAILING 94 (2010).

The value that the retailer can sell to the distributor is the priority given to a particular work over the other works in the infinite catalog.<sup>72</sup> At any moment, only a few works can be featured on the landing page of iTunes, Amazon or Joyo. The value of being highlighted makes that featured attention as valuable as the scarce space in the bookstore window or on the marquee.<sup>73</sup> Both the distributor and the retailer recognize the tremendous value in being featured, so the works which have the greatest promotional budgets will rise to the home page of the online retailer, and less well financed works will be found only if the audience member knows the title for which she is searching.<sup>74</sup>

Television has also been incorporated into the retailer mix. When Sony first introduced the Betamax, transforming television from an ephemeral public good into a property that could be consumed and collected, it reinvented the way the public consumes episodic content.<sup>75</sup> Television today has developed a highly lucrative secondary market for consumers who rent or purchase television episodes or series. In some cases, these purchases are to collect shows previously aired; in other cases the television exhibitors are selling advance access to the content that will be delivered without charge. In the transformation from Betamax to iTunes, the audience has grown willing to purchase or license television and increased the role for the retailers in this medium as well.

As noted earlier, however, building a mass audience using expensive marketing and costly advertising does not necessarily mean the work is either the greatest financial triumph or most artistically successful work. The distributor/retailer model has the effect of increasing the importance of creating blockbusters. Only the largest of the promotional efforts can gain space on the home page of the retailers. So these campaigns are typically tied to projects that have the largest budgets. These projects are promoted heavily, often for months in advance, to assure that the project gains the greatest amount of attention possible.

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72. See SUCHARITA MULPURI, TRENDS 2012: US RETAIL EBUSINESS 4 (Forrester Research, Inc. 2012), available at [http://www.baynote.com/wp-content/uploads/2012/05/trends\\_2012\\_us\\_retail\\_ebusiness.pdf](http://www.baynote.com/wp-content/uploads/2012/05/trends_2012_us_retail_ebusiness.pdf) (“Google AdWords . . . are essentially online slotting fees”).

73. *Id.*

74. *Id.* at 4.

75. Edward W. Kallal, *Betamax and Infringement of Television Copyright*, 1977 DUKE L.J. 1181, 1183 (1977) (“Sony would like to exploit the new market, and the home user would like to enjoy the ‘freedom’ of memorializing whatever appears on his television set.”); see generally JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR (1987).

#### D. Where the New Intermediaries Fail

The online retailers are seeking to displace the exhibitor rivals and marginalize the brick-and-mortar competitors. The retail model will not displace the theatrical exhibitors any more than television has displaced movie theaters. The movie theater experience remains a social experience that cannot be replicated in a living room and certainly cannot be replicated when a movie is watched on a phone, tablet or laptop.

Brick-and-mortar retailers have no such experiential luxury. While the bookstore and record store are better for browsing than their online counterparts, the online store can offer excerpts and reviews to make up for the opinions of the sales person. Virgin Records, Blockbuster, Crown Books, and many smaller retailers have failed to compete against the convenience of online shopping and the nearly infinite selection.

Nonetheless, the online retailers also have limitations. They compete with an uncountable number of competitors online.<sup>76</sup> Although some of the advertising and promotion is designed to create a general audience, most of the decisions are more narrowly focused on the subset of consumers most likely to spend money on the content. Demographic studies show that for any given medium only a small fraction of the public makes up a disproportionate share of the consumers.<sup>77</sup> Ten percent of moviegoers purchase 50% of the theatrical tickets.<sup>78</sup> So the projects selected are designed for the paying audience rather than the general public. The other 90% of the public is left out of much of the production and most of the advertising in each medium. Similar trends exist for book sales and music sales.<sup>79</sup>

The potential audience is finding it harder and harder to browse the online store because the same few, highly promoted items are presented in each virtual venue.<sup>80</sup> The very success of iTunes has made it difficult for

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76. Bell, Choi & Lodish, *supra* note 69, at 28 (“[W]hile traditional retailers can identify and target customers with relative ease (most customers either work or live within a few miles of the store), Internet retailers without physical stores find this much more difficult to do. Many Internet retailers have trouble getting noticed and acquiring customers”).

77. THEATRICAL MARKET STATISTICS, *supra* note 21, at 11 (“Frequent moviegoers continue to drive the movie industry. They account for only 10% of the population but they bought half of all the movie tickets sold in 2011, comparable to the 2009 and 2010 results for this group”).

78. *Id.*

79. See, e.g., Geoffrey A. Fowler & Marie C. Baca, *The ABCs of E-Reading*, WALL ST. J., Aug. 25, 2010, at D1, available at <http://online.wsj.com/article/SB10001424052748703846604575448093175758872.html> (“Among early adopters, e-books aren’t replacing their old book habits, but adding to them. Amazon, the biggest seller of e-books, says its customers buy 3.3 times as many books after buying a Kindle, a figure that has accelerated in the past year as prices for the device fell”).

80. See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, at 172, [hereinafter *The Long Tail*, WIRED] available at [http://www.cbpp.uaa.alaska.edu/afef/ba635-long\\_tail.htm](http://www.cbpp.uaa.alaska.edu/afef/ba635-long_tail.htm) (“Unfortunately, in recent decades such alternatives have been pushed to the fringes by

audiences to find niche products or drill down to more obscure content.<sup>81</sup> Even though the retailers pose no barrier to having one's content made available to a worldwide audience, the structure and incentives make it harder than ever for an audience to discover new work. A first time author, musician or filmmaker can be available to more people than ever in history, yet ironically it may be harder for that creative artist to be discovered than ever before.<sup>82</sup>

The blockbuster economic model in music, publishing, television, and film means that far fewer dollars are being invested by production and distribution companies in new talent.<sup>83</sup> There simply is no economic reason to invest in new talent. Instead, the distributors are waiting for the next generation of artists to emerge on their own. The decision to sign an author who managed to sell millions of self-published titles is economically far more rational than to sign an untested author, even if the successful self-publisher is more expensive. In sum, the risk is greatly reduced and the existing audience base is established.

As a result, the blockbuster based retail model actually discourages both expansion of the audience and development of the talent. While it is economically successful in the short-term, the long-term effects are to decrease the audience size and range of content available.<sup>84</sup>

As an alternative, some online distributors are looking to aggregate audiences by increasing the number of titles available to the public. While an online site with only a modest collection will not attract enough audience members, neither will a site that has thousands of shows no one wants to see. The development of the film library must be closely aligned with the

pumped-up marketing vehicles built to order by industries that desperately need them.”); CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 16 (2006).

81. *The Long Tail*, WIRED, *supra* note 80 (arguing “[u]nlimited selection is revealing truths about what consumers want and how they want to get it in service after service.” The model, however, assumes that the audience can find the content and that timeliness is not a factor for media consumption. Neither assumption is supported by market trends).

82. Jacob Ganz, *2010 Was A Very Bad Year For Trying To Sell Music*, NPR (Jan. 6, 2011, 11:30 AM), <http://www.npr.org/blogs/therecord/2011/01/06/132694660/2010-was-a-very-bad-year-for-trying-to-sell-music>. The tremendous sales for Susan Boyle attracted an audience that has become statistically invisible to the marketing driven approach in modern media distribution. Some people still buy physical albums. Like, for example, people who buy Susan Boyle records. Another name for these people might be older purchasers, but it's hard to know and we wouldn't want to make anyone upset, since they're basically single-handedly keeping the music industry afloat. Whatever the demographic of her audience, Boyle sold 1.852 million copies of her Christmas-themed album *The Gift* in 2010. Of those sales, 1.820 were CDs, cassettes or LPs (we're just being formal; it's all CD, since *The Gift* wasn't issued on cassette or LP). That leaves just 32,000 copies sold digitally, a tiny 1.7% of the album's total sales.

83. *See A world of hits*, *supra* note 59, at 81.

84. *See, e.g.,* Matt Martin, *Cerny: Blockbuster game economics no longer make sense*, GAMES INDUS. INT'L (Feb. 11, 2011, 8:35 PM), *available at* <http://www.gamesindustry.biz/articles/2011-02-11-cerny-blockbuster-game-economics-no-longer-make-sense>.

development of creative talent, so that the site can promote high quality projects of interest to the public. This will only occur if the creators are incentivized to create projects for a particular distributor through financial and creative support.

#### E. The Subscription Model and the Consumer Review

Netflix, Spotify, Pandora, Saavn, and other subscription-based services have a fundamentally different model that avoids much of this problem.<sup>85</sup> Financially, subscription services earn their revenue with monthly or annual payments.<sup>86</sup> Audience members can watch as much as they wish during the membership period. Music services often allow consumers to even download songs during the subscription period which cease to be available when the subscription ends.<sup>87</sup>

Since the payment is earned for the right to consume content rather than for the actual consumption of any particular work within the catalog, the subscription service has no incentive to promote a particular title to its existing subscribers.<sup>88</sup> The service wants to have headlining titles to keep members from cancelling their subscriptions but there is no financial incentive to encourage the audience to watch those works. To the extent the subscription service has to pay a premium for the most popular content, the subscription service has an incentive to encourage its audience to watch less expensive content – typically content that is older or less popular.<sup>89</sup> Under this model, niche programs and programs that are attractive to small audiences can compete with the blockbusters.

For audience members dedicated to less popular genres, the subscription service that carries a broad range of niche content may be even more valuable than any other service.<sup>90</sup> If a subscription service carried films in Telugu, Catalan, Hakka or other languages, the native speakers may be

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85. See HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 60, 158 (8th ed. 2010).

86. *Id.* at 276.

87. *Id.*

88. Moreover, to the extent that the label or distributor is paid a fee for the right to enter the license, such fee might not be attributed to the value of any producer or artist represented in the collection of works, further reducing revenues for the creative artists. See *Id.*

89. See WILLIAM HOYNES, DAVID CROTEAU & STEFANIA MILAN, MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES 318, 328 (4th ed. 2011) (discussing difficulties of audience awareness and identifying examples of niche market success in various music markets across the globe).

90. See Jon M. Garon, *Revolutions and Expatriates: Social Networking, Ubiquitous Media and the Disintermediation of the State*, 11 J. INT'L BUS. & L. 293, 301 (2012) (“[O]rganized communities can increasingly maintain the cohesive culture or substantive beliefs of their neighborhood while living in a geographically distinct area”).

willing to pay a premium for that content.<sup>91</sup> Programming that emphasizes communities, cultures, peoples or interests may create a strong affinity with its audience. At the same time, these are smaller communities and will not be well served by broad national advertising.<sup>92</sup> Such communities will be best served by being aggregated on a common subscription service.

Amazon built its business on a variation of the subscription model. Rather than relying primarily on advertising to drive sales, Amazon cultivated user reviews and user ratings.<sup>93</sup> Considered more credible than most other feedback, the consumer ratings and reviews have provided Amazon customers a reason to rely on that service over its competitors. A customer can follow the interests of other readers, listeners or viewers who have similar tastes. The customer can discover new content based on the interest of similar customers. These reviews build a community much like the niche markets on the subscription service.

Together, the niche programming and customer reviews combine to build strong engagement between the consumer and the retailer, developing a relationship beyond the blockbusters, best-sellers and chart-toppers.

## II. DISTRIBUTION 2.0

Distribution 2.0 is built upon the power of social media and the lessons provided from the audience reference model of Amazon and the pricing incentives of the subscription model. The next generation of distribution picks up where the current niche programming leaves off. It works for both subscription models and retailers, building on the public recommendation model of Amazon and the cultural phenomenon of social media. Amazon founder Jeff Bezos explained Amazon “could use advance[d] technology to dramatically improve the odds that a customer could find a book ‘because we will not just let readers find books, we will let books find readers.’”<sup>94</sup> Not just books, but movies, music, and communities must find their audiences the Amazon way.

Facebook, the leading social media service, boasts over one billion regular users of the service,<sup>95</sup> which allows individuals to connect and communicate with family, friends, and people of similar interests. Like

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91. See DONALD M. NONINI, *THE GLOBAL IDEA OF ‘THE COMMONS’* 7 (2007) (“Intellectual and cultural commons are organized around shared intellectual and cultural resources . . . intellectual and cultural resources can be created and regenerated only through social exchange and sociability – and often the more intense and frequent the social interactions, the greater the use-value”).

92. See generally *EXPLORATIONS IN NEW CINEMA HISTORY: APPROACHES AND CASE STUDIES* (Richard Maltby et al. eds., 2011).

93. See ROBERT SPECTOR, *AMAZON.COM: GET BIG FAST* 144-46 (2002).

94. *Id.* at 145 (quoting Jeff Bezos).

95. Geoffrey A. Fowler, *Facebook: One Billion and Counting*, *WALL ST. J.*, Oct. 4, 2012, at B1, available at <http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html>.

Facebook, Google+, Orkut (most popular in Brazil and India), 51.com (China), and Skyrock (France), each provide users a way to connect with each other and with the creative artists they support. Taken together, the lessons from social marketing and social networking frame the future of distribution 2.0.

### A. Understanding Direct Access

Because social media enables artists to reach their fan base easily and with little expense or mediation, social media will sit at the heart of the next generation of content distribution.<sup>96</sup> But direct access is actually no different than having the artist's audience read an advertisement in a music magazine or newspaper story.<sup>97</sup> While there is a correlation between the size of an artist's online following and his actual sales, the correlation is only loosely associated.<sup>98</sup> The followers of a Facebook page have not actually committed to that artist with their time or money.<sup>99</sup> Similarly, there is only a loose correlation between the number of free downloads an artist can achieve and the actual sales of that artist's work to a paying audience.

Social media can be used to monetize sales of content in ways that have not been fully utilized. For example, although the social media sites link to content sales, many do not integrate the content sales function and the social community function. Presently, social media sites tend to treat creative content more as advertisements than as part of the social experience. For example, when someone purchases a song from his or her social media site, the software and music license could provide that everyone else on that person's network receives an invitation to listen to the entire work for

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96. See Roxane Divol, David Edelman & Hugo Sarrazin, *Demystifying social media*, MCKINSEY Q. (Apr. 2012), available at [http://www.mckinseyquarterly.com/Demystifying\\_social\\_media\\_2958](http://www.mckinseyquarterly.com/Demystifying_social_media_2958) (last visited Jan. 28, 2013) ("We have identified its four primary functions—to monitor, respond, amplify, and lead consumer behavior—and linked them to the journey consumers undertake when making purchasing decisions").

97. See Olivier Blanchard, *Social Business vs. Social Marketing: Understanding the fight over "content,"* BRAND BUILDER BLOG (Mar. 30, 2011), <http://thebrandbuilder.wordpress.com/2011/03/30/social-business-vs-social-marketing-shattering-myths-about-content/>

(Old media was 100% about messaging and distribution. Marketing was a monologue, primarily because the media used by marketing didn't give consumers a voice. ... Social media channels are very different. Dialog rules in the social space. Marketing is at best suspect, and tolerated only if it doesn't come across as exploitation of the channel by a company).

98. See Divol, Edelman & Sarrazin, *supra* note 96. The four stages of social media marketing are: 1. Monitor; 2. Respond; 3. Amplify; and 4. Lead. *Id.*

99. The fan sites of most artists provide monitoring for the artist but little or no ability for the artist to respond to the feedback, amplify the positive feedback, or lead the audience to specific actions – whether to buy content or engage in social action campaigns. *See id.*

free.<sup>100</sup> More powerfully, the network could have collective coupons such that for each person on the network who purchases the content, the size of the discount increases (up to a maximum discount). For instance, one person may receive a 10% coupon, but if used by five people on the same network, the coupon increases in value to twenty percent. The use of such techniques reinforces the network effects on the social media platform and makes the consumption of the content a communal activity.

Beyond the mere aggregation of followers, the Amazon approach provides some useful insights into the business models that may propel success. First, audience ratings and comments engage the audience member much more directly than “Like” buttons or other click-on steps.<sup>101</sup> The time spent to write about an artist tends to make the writer more thoughtful and more interested in the outcome of that artist.<sup>102</sup> Audience members who write useful reviews (as indicated by other users on the network) should be encouraged through discounts, free offers, and premium services.

Second, the retailer can learn critical information about each audience member which can be used to suggest the content to be of the greatest interest to that audience member. The audience member’s own postings regarding interests and favorites may be quite informative, but as Malcolm Gladwell noted in *Blink*,<sup>103</sup> individuals do not necessarily recognize their own interests and biases. A person may suggest she likes high-brow drama when in fact her actual television consumption favors romantic comedies. Another person may say she avoids sports programming but in fact watches a good deal of boxing and football. Netflix customers often received DVDs that they never watched because the customer “knew he should watch it,” or the customer “was waiting for the right time to watch it,” only to have the disk sit unwatched for weeks at a time.<sup>104</sup> Since actual behavior is a much

100. *Id.* (This is an example of amplifying the social response. “Once a consumer has decided which product to buy and makes a purchase, companies can use social media to amplify their engagement and foster loyalty”).

101. See Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 102-05 (2010).

102. See Bill Ivey & Steven Tepper, *Cultural Renaissance or Cultural Divide?*, CHRON. OF HIGHER EDUC., May 19, 2006, at B6, available at <http://chronicle.com/article/Cultural-Renaissance-or/6435> (“Although not producing art themselves, citizens have developed the skills and expertise to be connoisseurs and mavens—seeking out new experiences, learning about them, and sharing that knowledge with friends”).

103. See MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 12–13 (2005) (“The mind operates most efficiently by relegating a good deal of high-level, sophisticated thinking to the unconscious . . .”) (quoting TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 6 (2002)) (internal quotation marks omitted).

104. Xavier Amatriain & Justin Basilico, *Netflix Recommendations: Beyond the 5 stars (Part 1)*, NETFLIX (Apr. 6, 2012), <http://techblog.netflix.com/2012/04/netflix-recommendations-beyond-5-stars.html> (explaining how streaming viewers made different value choices about what to watch than those customers who requested DVDs by mail, stating that DVD “selection is distant in time from viewing, people select carefully because

better predictor of future behavior than what a person reports he or she will do, the actual behavioral data will be a much stronger guide to future content consumption.<sup>105</sup>

Third, tracking the actual content consumption among users provides a strong predictor of the potential for future content. Data analysis of audience members' collective behaviors should provide strong predictors for what other content similarly situated consumers would invest in for time and money. (As discussed below, this information will also help predict what content should be developed, not just what should be distributed.) Amazon applies this type of data analysis by pairing books or other products with incipient purchases.<sup>106</sup> When a person reads the price of an item, Amazon offers the consumer a discount to buy a related product at the same time. Apple does a version of this by offering the "Complete My Album" discount if the person purchases the remaining tracks of a song's album within a limited time.<sup>107</sup> But the album pricing is built on the seller's choice of combinations rather than the consumer's choice or the predicted algorithmic choice.

Fourth, Netflix and Redbox recognize that entertainment choices are dictated by convenience and often a just-in-time purchasing experience. At the point of consumption, consumers typically complete the purchase with the vendor to which they are most accustomed. Price becomes just one aspect of the convenience decision.<sup>108</sup> To remind its customers that Redbox is a convenient alternative to Netflix's streaming service, it regularly sends its customers free rental coupons.<sup>109</sup> Their goal is to entice the audience members to rely more heavily on Redbox rather than relying on other sources. As audience members rely more heavily on Redbox, they may cancel their subscriptions to other services and increase the Redbox usage. The social media distribution platforms should emphasize return-customer

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exchanging a DVD for another takes more than a day,"); Mike Masnick, *Why Netflix Never Implemented The Algorithm That Won The Netflix \$1 Million Challenge*, TECHDIRT (Apr. 13, 2012, 12:07 AM), <http://www.techdirt.com/blog/innovation/articles/20120409/03412518422/why-netflix-never-implemented-algorithm-that-won-netflix-1-million-challenge.shtml> (providing an analysis of the Netflix explanations).

105. See Amatriain & Basilico, *supra* note 104 (Netflix could not use the same rating system when the audience had the ability to preview a title and select something else).

106. See Jennifer Derrick, *25 Ways to Save Money at Amazon*, SAVINGADVICE.COM (Oct. 1, 2012), [http://www.savingadvice.com/articles/2012/10/01/1012068\\_25-ways-to-save-money-at-amazon.html](http://www.savingadvice.com/articles/2012/10/01/1012068_25-ways-to-save-money-at-amazon.html).

107. *iTunes Store: Complete My Album Frequently Asked Questions (FAQ)*, iTUNES, <http://support.apple.com/kb/HT1849> (last visited Jan. 31, 2013).

108. MULPURU, *supra* note 72, at 4 ("Retailers with exclusive or new products should think twice about what is the most lucrative opening price, not merely what margin goal they seek").

109. See *Redbox Codes*, INSIDE REDBOX, <http://www.insideredbox.com/redbox-codes/> (last visited Jan. 31, 2013).

pricing with discounts, premiums, and other offers to reward active engagement and loyalty.

## B. Social Media During the Creative Process

The lessons of online social media distribution can be brought directly into the creative process. Hollywood has begun to do something like this when it uses the previewing of movie trailers at comic book and gaming conventions to engage those core audiences.<sup>110</sup> Hoping to keep the most passionate audience members excited and interested in a project, these trailers and discussion panels provide a very different way for the audience to interact with the medium.

In much the same way, the use of books or comic books as the basis for films shares this attribute.<sup>111</sup> Reading is a very personal experience. Motion pictures that rely on book adaptations start with an audience deeply familiar with the content and carrying strong positive expectations for the finished work. The strategy will not work if the adaptation is not a successful creative project in its own right, but the pre-release audience engagement is a tremendous tool to generate audience interest.

Creative artists today can choose to harness these types of tools and begin the audience engagement at the start of the creative process. Behind the scenes coverage of chapter readings, recording sessions or on-set production can generate a wealth of content to make the social media sites much more vibrant and dynamic. A few artists may wish to make this process interactive, eliciting feedback from the audience to inform the creative team on the direction of the project. Other artists will still receive rapid feedback on their decisions and gain insights into the opinions of their audiences. In both models, these audience members will be highly engaged in the process.

The behind the scenes interactivity may have the most pronounced effect on episodic content (what today is delivered primarily on television). Online episodic content can take feedback directly from the audience and incorporate that feedback into the content development over time. This does not mean that immediately after each episode is aired the audience needs to be polled, or that the suggestions should be available soon enough be incorporated into the following episode. But using the social media content

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110. See Kevin P. Sullivan, *Comic-Con Preview Night: A Sneak Peek of Geek Event of the Year*, MTV NEWS (July 12, 2012, 10:31 AM), <http://www.mtv.com/news/articles/1689419/comic-con-2012-preview-night.jhtml>.

111. See, e.g., *What is an Adapted Screenplay?*, WISE GEEK, <http://www.wisegeek.com/what-is-an-adapted-screenplay.htm> (last visited Jan. 31, 2013) (listing *Brokeback Mountain*; *Sideways*; *Million Dollar Baby*; *The Lord of the Rings: Fellowship of the Rings*, *The Two Towers*, and *The Return of the King*; *The Departed*; *Traffic*; *Chicago* [stage play]; *The Constant Gardener*; *The Pianist*; and the *Harry Potter* series). The *Hunger Games* trilogy and the various superhero franchises also fall into this category.

to develop ideas and to understand trends can be productive.<sup>112</sup> For some content, real-time feedback can create powerful drama.

The socialized media experience can lead directly to content distribution. Advance sales can begin as soon as these materials are posted, enabling audience members to order the content before it is available elsewhere.<sup>113</sup> Take for example, an episodic series that is available only through the Internet (including computers, tablets and smart phones). Audience members who purchase an episode immediately after viewing the previous episode receive a small discount. The week to week comparison of those sales may provide some meaningful insight into the success of each story arc and the enthusiasm being built toward the story's climax. More than the written comments, the behavior of the audience towards the content should be a source of great knowledge for the creative artists.

### C. The Crowd-Sourcing Solution

The engagement with the author can move one step earlier in the development chain to the actual funding of content. Crowd funding is a method for funding business and creative projects wherein the public votes to support the launch of a project by providing the project money.<sup>114</sup> Crowd sourcing is not limited to cash; it may also serve to provide materials or labor necessary to complete a project.<sup>115</sup> The money is typically provided in one of three ways: gifts, purchases, or capital investments. If a member of the public wants to see the venture succeed, she will simply send some money. If the recipient is a charity, the gift is likely a tax exempt charitable donation. Even if it is a for-profit company, however, a person may simply give it a gift to help it succeed. It is not uncommon for locally popular artists to be given funds to help record albums, publish books, or complete film projects.

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112. See *Sheri Candler Brings Independent Films to Market – Part 1*, FILMMAKERS NOTEBOOK (Feb. 19, 2011), <http://www.filmakersnotebook.com/sheri-candler-brings-independent-films-to-market-part-1/> (“First step, do something or make something people choose to talk about. The key here is not spreading your message to people who don’t want to hear it. It is to inspire people to WANT to talk about it”).

113. This form of networked-audience promotion represents a form of “distributed commerce” which “allows a merchant to enable anyone to activate a group (or social network) to sell products on their behalf; essentially Avon for all sites.” MULPURU, *supra* note 72, at 7.

114. See JEFF HOWE, *CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING BUSINESS* 258 (2008); Stuart R. Cohn, *Essay: The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 FLA. L. REV. 1433, 1434-35 (2012); Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 881-82 (2011).

115. See Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, <http://www.wired.com/wired/archive/14.06/crowds.html>.

The second method of receiving crowd-sourced funding is through advance sales. The members of the public who wish to see the venture succeed can purchase a product, service or artistic work.<sup>116</sup> The payment is made immediately and the venture agrees to deliver the purchased item as soon as it is available, at a specified time. The purchaser assumes some risk that the product will never be completed and the seller will not have any funds available to refund the purchase price, but purchasers understand this risk and are willing to make the purchase because of altruistic benefits.

The final method of receiving crowd-sourced funding is through the sale of capital ownership in the company itself. To sell an ownership interest in a company constitutes the sale of a security.<sup>117</sup> Under recent U.S. legislation, however, such a sale is legal without federal or state registration of the security so long as it meets the criteria specified by the Securities and Exchange Commission (SEC).<sup>118</sup> As of the date of this writing, the final regulations to make such sales lawfully have not yet been published. These rules are anticipated to be available in Spring 2013.

For all types of financing, crowd-sourcing is generally promoted on a public website, such as Kick-Starter or IndieGoGo. These sites promote the projects, use social media to build public enthusiasm, and provide very specific feedback to the creative artists and entrepreneurs seeking support. For creative artists, the crowd-funding portal may provide an excellent first test regarding the marketability of a project. If the audience for a particular work will not provide any seed capital or engage in any advance purchases, then it may be a very hard project to market once completed. If the social network supports the projects with the necessary funds, it reduces the risk for the creative artist and indicates a strong level of support for the completed work.

For creative artists working in niche markets, it will be important to engage the target audience and acculturate them towards the crowd-funding resources. It is likely that the current projects tend to be focused on either technology or Internet culture. These are the early adopters for crowd-funding, so projects that engage this audience will do best in this environment. So if a project is written in Kannada, then the creative artists needs to reach out to the Kannada-speaking community at the inception of the project, to engage the potential audience, and to convince that audience of the importance of crowd-sourcing the support to launch the project.

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116. Although there is risk that the item will not be shipped, there is no financial participation, so the pre-sale is not a security. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (“an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . .”).

117. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)); *see* Heminway & Hoffman, *supra* note 114, at 882.

118. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

#### D. The Costs of Transmedia

The greatest opportunity for creative artists in the next generation of distribution is also its greatest risk.<sup>119</sup> A filmmaker during Hollywood's golden age could be successful as an actor, writer or director. Some of the greatest became powerful because they wrote, directed, and acted in their own work. Most, however, succeeded in only one area of expertise. Even fewer were also successful in producing their own works. Each step in the process is creative, time consuming, and demanding.<sup>120</sup>

Like their golden age counterparts, few twenty-first century producers will succeed as writer, director, producer, social media artist, web designer, marketing director, financial director, distributor, and retailer.<sup>121</sup> Each job requires a skill set that does not necessarily translate from one task to the next. More importantly, many of these tasks must be accomplished concurrently and some require significant infrastructure.

Louis C.K. may well be an anomaly. Although financially successful, he has been working professionally as a performer since 1984.<sup>122</sup> He had the finances to risk investing in each step of a process to shoot his own special, to build his own website, to launch his own marketing, to reach out to his fan base and the media, and to reap the rewards for a low-priced high volume campaign of independence. He controlled each step, but he also invested heavily in a team he controlled, at considerable expense.<sup>123</sup>

Even for Louis C.K., the time this has taken necessarily takes away from his other endeavors. He may prefer to spend less time creating new comedy routines or working on his television show, but the cost remains the same.

For most artists this model is untenable. Instead a new crop of competitive distributors must develop to provide these services for the creative artists. Some of these services are being provided by the existing

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119. See *Sheri Candler Brings Independent Films to Market*, *supra* note 112 (“The role of a digital distributor is getting audience awareness . . . . Too many times they concentrate on getting films, of varying quality, and forget about marketing the platform. . . . The business aspect is bloody hard work and if you want to shirk it, it will probably be to your peril.”); Henry Jenkins, *Seven Myths About Transmedia Storytelling Debunked*, FAST COMPANY (Apr. 8, 2011), <http://www.fastcompany.com/1745746/seven-myths-about-transmedia-storytelling-debunked> (“Transmedia has been closely linked to the industry’s new focus on “audience engagement” and sometimes uses ‘viral’ (or ‘spreadable’) media strategies. But, the best transmedia is driven by a creative impulse. Transmedia allows gifted storytellers to expand their canvas and share more of their vision with their most dedicated fans”).

120. See JON REISS, THINKING OUTSIDE THE BOX OFFICE 41 (2009) (calling for establishment of Producer of Marketing and Distribution as part of an independent film’s creative team).

121. *Id.* (“Just like you most likely did not make the film on your own, you should not be distributing and marketing the film on your own”).

122. See Carr, *supra* note 6, at B1.

123. *Id.*

distributors and retailers, but none has yet to fully embrace the next generation of content distribution and artist support.

### III. THE IDEAL DISTRIBUTOR

The ideal distributor will likely be a collaborative enterprise, primarily owned by the creative artists themselves.<sup>124</sup> For purposes of the hypothetical, the entity can be named DUArt, short for the Digital reinvention of United Artists. DUArt should operate as a collective so that financially it does not devolve into a company that exploits artists rather than their content. As a collective, each of the recommended decisions described in this section must be agreed-upon by the distributor and the creative artist in advance of the project. Standardization and simplification will benefit the creative artists if they are protected from having certain artists able to negotiate better terms. So the standard terms should be public, transparent, and universal for all the participating artists.

As a collective, net profits will be split between investors in DUArt and the creative artist members of DUArt. (As discussed below, member artists will be encouraged and financially incentivized to also reinvest, so the financial investors will reflect a number of the more successful creative artists supported by DUArt.) To be successful, the enterprise must provide a solid return on investment to the investors and the creative artists alike.

The DUArt model should be a vertically integrated producer/distributor/retailer. To compete with the existing oligopoly, DUArt must be a viable, reliable, convenient source of content. To aggregate enough content to make DUArt.com a destination, it will likely serve as distributor/retailer for content it does not produce, but it should serve all three functions for some artists and the distribution function for others.

DUArt should also be a global source of content. This will affect how content is acquired, since often times the territorial restrictions are caused by limitations in the underlying rights. To create an effective worldwide distribution network, however, the creative artists must be able to provide worldwide rights. DUArt may still be required to work with artists regarding differing national laws on censorship issues and mandatory royalty payments in various jurisdictions.

Nonetheless, global distribution should be the goal. Content censored in a particular country should be the exception rather than the rule. A decentralized approach to the DUArt platform should empower creative artists who face limited distribution outlets caused by the marketing power

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124. See, e.g., Daniel James Scott, *It's a New Day: Collective Distribution*, DOCUMENTARY.ORG (2011), <http://www.documentary.org/magazine/its-new-day-collective-distribution> ("At a time when technological advancements have made it easier for filmmakers to make films but harder to make a profit distributing them, the cooperative has become an attractive option for filmmakers looking to maximize the impact--and income--of their works" (discussing the New Day film collective)).

of Hollywood throughout the world. Content in a multiplicity of languages and formats will further the global reach and networked power of the DUArt platform.

#### A. Sources of Revenue

The revenue for distribution will include fees for downloading particular content, subscriptions for subscribers to download anything in the subscription service, and advertising. Using data analytics, the content from each creative artist should have a predictable mix of free, subscription, and per-download pricing that will maximize the revenue for each work.<sup>125</sup> The mix will differ from audience to audience, artist to artist, work to work, and between life cycles of each work. Under the modern model, for example, a motion picture moves from theatrical exhibition to DVD to premium cable to broadcast in a rather set series of steps.<sup>126</sup> This scheduling often ignores the calendar, which may have a strong impact on some content, such as holiday specials. A few projects have begun to use Internet distribution to build audience awareness for theatrical release, but such techniques are rare and difficult to negotiate under the standard distribution agreements.<sup>127</sup>

By using data analytics, audience interest in particular projects can be predicted much more precisely. The DUArt.com software can determine when to move a particular title from free to subscription to pay-per-download and back in real time. Safeguards in the algorithms, of course, would assure that subscription members did not lose access to content too rapidly. One-stop shopping also dictates the choice to have both pay-per-download and subscription services in addition to free and advertising-supported content.

Having advertising supported content would enable DUArt.com to continue to build the audience. The public tends to seek out content in one of very few places, so being a first-choice for new material becomes essential to success. Advertising is also important to underwrite general costs and provide funding irrespective of the success of a particular work on the site. The mix of advertising should also be closely monitored to see

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125. See *Authors Guild v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Nov. 4, 2009). The initial proposed settlement raised additional antitrust concerns because Google would use such a pricing algorithm for all publishers on the Google books platform. Google removed this method from consideration as part of the amended settlement proposal. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011). See also, Jon M. Garon, *Google, Fairness and the Battle of the Books*, in *THE IP BOOK* 41, 55 (2010); Statement of Interest by the U.S. Dept. of Justice Regarding Proposed Amended Settlement Agreement at 16 *Authors Guild Inc. v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y. Feb. 24, 2010).

126. See Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 *AM. BUS. L. J.* 331, 354 (2008).

127. See Michelle Kung, *Internet Releases Join Cineplexes*, *WALL ST. J.*, Aug. 22, 2012, at B8.

which advertising content, formats, and placement will improve audience engagement and which will discourage viewership.

## B. Audience Engagement

The portal should provide a one-stop shopping experience regardless of the pricing for a particular piece of content. To serve the audience well, each member should have to spend less time to find the content he or she wants. A viewer should be able to read about a project and put it on his or her watch list. When a title becomes available, the viewer is notified (by whichever method is selected by that viewer, e.g., email, text, Facebook post, etc.), and notified again when the delivery method changes. The user interface enables the audience member to engage directly with the content.

A good user interface is only the beginning of a strong social media presence. For many audience groups, media becomes a focal point in the community interaction. As a result, the DUArt.com website must closely integrate with existing social media services and provide users the ability to create affinity groups, post reviews, and build networks. The site should do the same for the creative artists, providing easy to adapt templates so each artist can engage the public without a significant time or financial commitment.

By supporting both sides of the artist/audience community, the site will be a useful source for strong engagement. This will drive repeat traffic and make the site a destination that audience members use first when making an entertainment purchasing decision.

As a corollary of this approach, it is likely that such a site will forego digital rights management, as has been done in much of the music industry.<sup>128</sup> Like the Louis C.K. experiment, the ability for the paying audience to experience the work without the barriers to moving the content from one device to another likely overcomes the loss caused by unauthorized sharing.

Despite years of anti-piracy efforts, almost every work that has ever been digitally distributed can be found on peer-to-peer bit torrent sites.<sup>129</sup> So the portion of the audience that wants to steal the work has full access to the work. Digital rights management has the effect of interfering with the enjoyment of the work for those people who wish to acquire the work legally and do the right thing. Given the arts collective philosophy, DUArt

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128. Peer-to-peer file sharing may be evolving as part of an independent distribution strategy as well. See Ryan Holiday, *BitTorrent Speaks: The Future of Marketing and Monetizing Content Distribution*, FORBES (June 6, 2012, 9:17 AM), <http://www.forbes.com/sites/ryanholiday/2012/06/21/bittorrent-speaks-the-future-of-marketing-and-monetizing-content-distribution/>.

129. See, e.g., Jill Pantozzi, *HBO's Game of Thrones Is The Most Pirated Television Show Of 2012*, THE MARY SUE (May 12, 2012, 12:55 PM), <http://www.themarysue.com/game-of-thrones-piracy/>.

is much better at encouraging responsible audience behavior than using ineffective technological tools to discourage bad behavior.

### C. The Creative Artist Agreement

As suggested earlier, there should be only one set of terms for each of the participating artists. This does not mean that they will never change; only that this agreement has a “most favored nation clause” so that an improvement for one artist becomes an improvement for all the artists. For some of the financial decisions, the approach may make sense to use calculations, tables or other formulas so that the financial decisions are proportionate. The formula would be the same for all artists even if a \$20,000 project and a \$3,000,000 had different obligations.

The key attributes of DUArt include:

- a. Each project should have some level of crowd-sourced financing. The percentage can range from 10-100% depending on the costs of the project, but each should have some audience buy-in before production begins.
- b. The goal for each project is to be profitable. Budgets should be based on projected audience size and potential level of commitment.
- c. Content will be created throughout production to help nurture the online community. There will be some behind the scenes content, readings or other opportunities provided by each project to connect directly with the audience during pre-production and production to support promotion and build excitement for the project.
- d. When a creative artist deems it appropriate, DUArt and the creative artist will develop a strategy to support the project across a range of media, including publishing, music and film. DUArt’s centralized model for content will facilitate the exploitation in various media.
- e. The creative artist must acquire worldwide, perpetual rights for DUArt to distribute the content.
- f. DUArt is granted exclusivity over distribution. The rights are global and perpetual.
- g. Revenues are apportioned on a standardized schedule, helping the filmmaker recoup expenses, DUArt operate, and participants earn income from the first earnings.
- h. DUArt has the ability to support theatrical distribution in addition to its online distribution, which it may do at any point during its distribution for the project.

The duty on creative artists to acquire worldwide, perpetual rights for DUArt to distribute the content may create the most disruption to the status quo for independent film production. Presently, music is often licensed only after a project is sold to a distributor. The costs for popular songs can run into the hundreds of thousands of dollars, destroying the economic viability of the project. A filmmaker could choose to pay for these rights. Additional problems, however, arise if the compositions are subject to non-transferrable public performance royalties. Such royalties must be paid for public performances. Both DUArt and the filmmaker would be obligated to anticipate these expenses and allocate payments for them.

To solve this problem somewhat, DUArt could create an opt-in system for composers and musicians to make their music available to filmmakers and other musicians on a standard fee-participation basis. For example, DUArt could establish that music rights in a motion picture were entitled to 15% of the earned revenue for any film, split equally between the composers and the performers. The filmmakers could choose from any song in the DUArt catalog (among those artists who opted into the system). Each composer and each performer featured would receive a proportionate share of the 15% music royalty. The filmmaker would not incur a music fee to make the work. And DUArt would serve as publisher of those songs, working with the performing rights societies to collect royalties in venues where they are collected.

The ability of DUArt to gain a significant body of work should enable it to become a premier distributor for theatrical distribution in addition to online retail of content. The data analytics that a web host can provide should enable the distributor to provide much greater information to the exhibitors regarding the ability to support a smaller film marketed through word-of-mouth rather than through large ad campaigns. While this will not be a panacea, the model should provide greater success than currently exists for independent films, concerts, and other events in the marketplace.

#### IV. GLOBAL IMPLICATIONS

Creating a truly global distribution company is fraught with challenges. Markets and audience interests vary significantly from country to country. Nonetheless, the importance of borders has waned in the digital environment, and a global content distributor has the opportunity to create and distribute content that will bring indigenous people together with their cousins in the diaspora. Having content under a common umbrella may even encourage some cross-cultural dialogue and opportunities for shared experiences.

### A. Societal Risks – the Lack of Intermediaries and Return of the State

At the same time, the world has learned that an amateurish, fake movie trailer can incite communities across many nations.<sup>130</sup> Google chose not to remove an offensive video from its YouTube site even after protests in Egypt spread throughout the region – resulting in deaths and riots – because its rules ban hate speech targeted at individuals, not groups or religions.<sup>131</sup> Instead, Google merely blocked the video in Egypt and Libya, while allowing continued access to many other Islamic nations where protests continued.<sup>132</sup>

Unlike YouTube, DUArt is an active producer and distributor, so its governing board will need to struggle with these tensions to provide its creative artists guidance before productions are undertaken. To be a global distributor, DUArt will need to develop and adhere to an internal set of content guidelines and content categories.

The decisions made by Google to selectively remove the video drew criticisms from many quarters.<sup>133</sup> Free speech advocates objected to the censorship.<sup>134</sup> The Iranian government, in contrast, which has blocked sites such as Facebook and YouTube, is using the protest over the anti-Muslim film to block Google.<sup>135</sup> It has announced that it will develop a nationwide intranet that will be separated from the global Internet to control content.<sup>136</sup> The response also stems from Iranian efforts to block targeted cyberwarfare

130. Suliman Ali Zway & Rick Gladstone, *In Libya, Chaos Was Followed by Organized Ambush, Official Says*, N.Y. TIMES, Sept. 14, 2012, at A10, available at <http://www.nytimes.com/2012/09/14/world/africa/libya-attacks-came-in-two-waves-official-says.html?pagewanted=all> (“[A]nti-American protests convuls[ed] the Middle East, inspired by an inflammatory anti-Islamic video, “The Innocence of Muslims,” that has spread on the Internet in recent days since it was publicized in Egypt”).

131. See Claire Cain Miller, *As Violence Spreads in Arab World, Google Blocks Access to Inflammatory Video*, N.Y. TIMES, Sept. 14, 2012, at A12, available at [http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html?\\_r=0](http://www.nytimes.com/2012/09/14/technology/google-blocks-inflammatory-video-in-egypt-and-libya.html?_r=0).

132. *Id.*

133. See Craig Timberg, *Google’s restricting of anti-Muslim video shows role of Web firms as free-speech arbiters*, WASH. POST (Sept. 14, 2012), [http://www.washingtonpost.com/business/economy/googles-restricting-of-anti-muslim-video-shows-role-of-web-firms-as-free-speech-arbiters/2012/09/14/ec0f8ce0-fe9b-11e1-8adc-499661afe377\\_story.html](http://www.washingtonpost.com/business/economy/googles-restricting-of-anti-muslim-video-shows-role-of-web-firms-as-free-speech-arbiters/2012/09/14/ec0f8ce0-fe9b-11e1-8adc-499661afe377_story.html).

134. Eva Galperin, *Why Google Shouldn’t Have Censored The Anti-Islamic Video*, TECHCRUNCH (Sept. 17, 2012), <http://techcrunch.com/2012/09/17/why-google-shouldnt-have-censored-the-anti-islamic-video/> (“Eva Galperin is the International Freedom of Expression Coordinator for the Electronic Frontier Foundation”).

135. *Iran Readies domestic Internet system, blocks Google*, REUTERS (Sept. 23, 2012, 3:01 PM), <http://www.reuters.com/article/2012/09/23/net-us-iran-internet-national-idUSBRE88M0AO20120923>.

136. *Id.*

viruses such as the Stuxnet virus used to disable Iran's system of centrifuges developed to enrich uranium.<sup>137</sup>

If DUArt is successful at promoting regional content and content supportive of traditionally underrepresented communities, it is likely to find itself the subject of governmental scrutiny and pressure in some parts of the world. The strategy may require the company to have both a traditional and an underground presence, so that communities blocked from access have the ability to engage in community building and have access to DUArt content. At the same time, however, the editorial policies of this company must be respectful of the audience it is trying to build and make choices about content that could be pornographic, deeply offensive or blasphemous to some of its audience. A well respected board of artists and community activists should operate in an open and transparent manner to anticipate these problems and grapple with particular issues as they arise. The policies drafted must be clear and the responses must be reasonable for broader DUArt community of artists, investors and subscribers.

## B. Intellectual Property– the New Transaction

At a more pragmatic level, the international nature of the enterprise will require that DUArt take steps at each stage of content development to comply with the differing nature of copyright rules that exist. Despite wide adherence to the Berne Convention, many details of copyright law vary from country to country.

The length of time that a source work is protected by copyright will vary from country to country.<sup>138</sup> Some books are in the public domain in Europe while protected by copyright in the United States.<sup>139</sup> Other works have fallen into the public domain in the United States but still enjoy copyright protection in Argentina and India. Since the distribution will be global, the copyright in a source work must be secured by anyone hoping to exploit that work if it is protected anywhere in the world.

There are many other inconsistencies between copyright laws as well. For example, U.S. law recognizes the ability of an author to assign the authorship of a work in certain situations. In the United States, the work-

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137. See David Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1, available at <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=all> (“The last of ... [the] attacks, a few weeks after Stuxnet was detected around the world, temporarily took out nearly 1,000 of the 5,000 centrifuges Iran had spinning at the time to purify uranium”).

138. See WIKIPEDIA, *List of countries' copyright length*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_countries%27\\_copyright\\_length](http://en.wikipedia.org/wiki/List_of_countries%27_copyright_length) (last visited Jan. 31, 2013).

139. While most modern laws provide either a copyright length of the life of the author plus fifty years or life of the author plus seventy years, copyrighted works created in earlier decades were based on a fixed term following publication. See, e.g., 17 U.S.C. §1 (1925-26) (superseded).

for-hire doctrine applies to audiovisual works (and some other types of works) even those created outside of the employment relationship.<sup>140</sup> Few other countries would recognize this type of transfer, so such provisions would generally not work for non-U.S. authors.<sup>141</sup>

Many countries do recognize public performance rights for sound recordings and for musical performers, rights that do not exist in the United States. In India, the new copyright act has gone a step further and made the obligation to pay public performance rights non-transferrable.<sup>142</sup>

Perhaps the most challenging aspect of the law will be in the area of fair use and fair dealing. These laws vary significantly from country to country.<sup>143</sup> In the case of a documentary filmmaker, for example, the use of unlicensed photographs, background music, and film clips will require a very fact-specific analysis that will potentially change depending on the jurisdiction in which the questions arise.

Despite these challenges, a standard operating procedure can be developed to identify the rights that must be acquired for global distribution. There may need to be some variations depending on the country from which the creative work originates, but these can also be specified in advance of any project's approval.

Finally, to the greatest extent permitted, the use of internal mediation and arbitration fora should be utilized to minimize the nation-by-nation rules for copyright and create a uniform system for disputes. These should be available both to address disputes among the creative artists as well as disputes between the creative artists and DUArt. Much like the arbitration services provided by the unions representing some professional artists, panels comprised of peers will often provide a more thoughtful understanding of the issues involved and more effectively achieve a fair and final determination. This process would also tend to reduce costs and inconsistency.

## CONCLUSION

The next generation of independent content distribution for creative artists across the globe will need to come together around a centralized, empowering collective that will enable them to reach their audience and reduce the difficulties audience members have finding and supporting those audiences. The DUArt model provides a structure that any collective can follow, whether for film, music, book or other art forms. The key is to

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140. See Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 B.C. INT'L & COMP. L. REV. 29, 30 (1993).

141. *Id.* at 33.

142. See India Copyright (Amendment) Act, 2012, No. 31, 31A (relating to compulsory licensing), available at <http://copyright.gov.in/>.

143. See, e.g., Patrick Masiyakurima, *The Free Speech Benefits of Fair Dealing Defences*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 237 (Paul Torremans ed., 2008).

create the same source for free, full-priced and premium priced opportunities, so the payment choice does not affect the decision to visit the portal.

Using strong social engagement, the audience can support its preferred artists and enable smaller niche communities to embrace and support artists important within that community. This will help overcome the power of broad Hollywood marketing which is necessarily geared at those audience members most likely to pay for Hollywood content; a marketing strategy that drives out attention for smaller projects and narrower interests.

By understanding the legal, business, and network implications of the new model, the distributors that integrate the exhibitor and retailer models will outperform their rivals and propel the global content revolution empowered by social media networks.

The audience is listening. If done correctly, the audience will be participating as well.

