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CONTENT, CONTROL, AND THE SOCIALLY NETWORKED FILM

*Jon M. Garon**

Art must be both fresh and inevitable; you must surprise an audience in an expected way.
*– William Goldman, The Season***

I. INTRODUCTION

The influence of digital distribution of content has begun to redefine the music industry in a highly visible battle between record producers and consumers, leaving musicians standing at the sidelines. Given the high cost of production, and relatively limited number of theatrically distributed feature films each year, motion picture producers are exposed to a much greater risk from digital piracy than music artists. At the same time, changing technology has created new opportunities for film producers, filmmakers, and audiences to interact. These same trends may grow to subsume the traditional notion of prime-time television entertainment as well.

To develop the new motion picture medium, changes must occur in the contractual provisions that shape the motion picture industry. All the parties involved in the filmmaking process must begin to recognize that just as Hollywood was forced to reinvent itself after the collapse of the studio system in the 1970's, another reinvention is required under the pressure from digital piracy, smart phones and personal video players, YouTube, and social networks.

Some producers will find this new way of doing business very frustrating. Advertising will no longer be sufficient to guarantee a large opening weekend, and a large opening weekend may no longer translate to a picture's long-term ability to earn income. Some filmmakers will find that the ubiquity of digital cameras and Internet blogs is a violation of the privacy they need to complete their work.

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* Professor of Law, Hamline University School of Law; J.D. Columbia University School of Law 1988. The author wishes to thank the producer/director teams of *Sensation of Sight* and *Mystery Team*, two films recently represented by the author, for the insights into independent film production and distribution.

** WILLIAM GOLDMAN, THE SEASON: A CANDID LOOK AT BROADWAY 119 (2d ed. 1994).

Other filmmakers and producers will embrace these new technologies to help build a direct, potentially interactive relationship with their audience. They will utilize the technology to circumvent the traditional studio-distributor-exhibitor information chain to hear directly from their fans. They may choose only to listen to the feedback, or they may actively engage the audience with nontraditionally packaged content to keep the fan base engaged in a new content/product cycle. Whatever the choice, the producer and filmmaker must make it in the context of the expensive, challenging, and time-consuming process required for high-quality feature films and episodic television. This Article reviews the technological influences that have transformed the motion picture and television industry. Based on these influences, it recommends approaches to the business and contractual arrangements that will allow filmmakers and producers to succeed in the modern, digital environment.

II. INFLUENCES RESHAPING THE MOTION PICTURE INDUSTRY

A. Studio Filmmaking and the Star Wars Legacy

Throughout its history, Hollywood has been shaped by power struggles between the well-financed impresarios in control and the renegades challenging the status quo. The first organized film consortium was built in 1908 by Thomas Edison.[1] Using his patent over the motion picture projector, he entered into exclusive agreements with Eastman to tie the sprockets in the film stock to the Edison projectors.[2] Edison's Motion Pictures Patents Company was a combination with the Biograph Company and American Mutoscope.[3]

The Motion Picture Patents Company helped institute a highly restrictive content code and attempted to control both the content and commerce of all motion picture exhibitions in the country.[4] Filmmakers unwilling to pay the fees or submit to the content control eventually fled Edison's New York stronghold for the dry, sun-filled beaches of Southern California. By the time the Motion Picture Patents Company was finally broken for its antitrust violations, New York had conceded its dominance of

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[1] *See* MERLE RAYMOND THOMPSON, TRUST DISSOLUTION 256–57 (Richard G. Badger ed., 1919).

[2] *Id.* at 252–58 ("The combining interests controlled sixteen patents, ten of which were not important. The remaining six controlled films, camera, the 'Latham loop,' and projecting cameras.").

[3] Thomas Armat, *My Part in the Development of the Motion Picture Projector*, *in* A TECHNOLOGICAL HISTORY OF MOTION PICTURES AND TELEVISION: AN ANTHOLOGY FROM THE PAGES OF THE JOURNAL OF THE SOCIETY OF MOTION PICTURE AND TELEVISION ENGINEERS 21 (Raymond Fielding ed., 1967).

[4] *See* RUTH VASEY, THE WORLD ACCORDING TO HOLLYWOOD 1918–1939, at 22 (1997).

the silent film to Hollywood. The most successful new movie impresarios were the theater-chain owners who needed content uncontrolled by the Motion Picture Patents Company.[5]

The Hollywood studio model replicated the assembly-line efficiency of Ford Motors. Studios employed actors, writers, directors, designers, and personnel for the various tradecrafts as salaried employees.[6] Under California law, these contracts could last no longer than seven years.[7] If another studio wanted an actor or director who was under contract to work on a picture, the studio holding the contract needed to "loan out" the person to the competitor. Since Hollywood was a small town with only seven major studios,[8] each studio was somewhat beholden to the others, so loan out agreements were often—but not always—available.

During the height of the studio system, the studios were also vertically integrated.[9] They owned many of the theater chains across the country, either by direct ownership or exclusive contractual arrangement.[10] The control of the premiere movie theaters and the marquee talent gave the studios nearly absolute dominance over independent filmmakers.[11]

Despite the advent of talking pictures, the censorship of the Hayes Commission, and two world wars, Hollywood remained essentially the same as when the principal studios were founded.[12] The first real change came

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[5] Robert Lindsey, *The New Tycoons of Hollywood*, N.Y. TIMES, Aug. 7, 1977, at SM4 ("These pioneers–Samuel Goldwyn, Jesse Lasky, Mayer, Zukor, Harry Cohn of Columbia, Jack Warner of Warner Brothers, Spyros P. Skouras of Fox, Carl Laemmle of Universal and others were to rule their studios as absolute monarchs. They had hundreds of actors, actresses, producers, directors and writers on contract. And, with the theaters they owned, they had a guaranteed market for their movies.").

[6] *See id.*

[7] CAL. LAB. CODE § 2855(a) (West 1937); *see generally* De Haviland v. Warner Bros. Pictures, 153 P.2d 983 (Cal. Dist. Ct. App. 1944).

[8] *See* Lindsey, *supra* note 5.

[9] *See generally* United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), *aff'd in part, rev'd in part*, 334 U.S. 131 (1948).

[10] United States v. Loew's, Inc., 705 F. Supp. 878, 880 (S.D.N.Y. 1988) ("Commenced in July 1938, just over fifty years ago, this case . . . concerned widespread anti-competitive behavior in the motion picture industry. At that time, a few studios, which owned production, distribution and exhibition facilities, dominated and controlled the industry. The eight Paramount defendants [Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Loew's Incorporated, Radio-Keith-Orpheum (RKO), Warner Brothers, Columbia Pictures Corporation, Universal Pictures Corporation, and United Artists] regularly accounted for over 65% of the national market for motion pictures. . . . The court found that the defendants had restrained and monopolized the distribution and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act.") (citing *Paramount Pictures*, 66 F. Supp. at 334).

[11] *See id.*

[12] Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 650 (2002). ("[T]he major studio[s] [are] Columbia (now Sony), Metro-Goldwyn-Mayer, Paramount, RKO (now also owned by Paramount's parent

with the advent of television. An industry controlled by the Radio Corporation of America (RCA),[13] the motion picture companies largely conceded the broadcast business to the radio networks and initially refused to license their movies for rebroadcast on television once color was introduced, perceiving the new medium as a direct threat to their distribution.[14] "During this period Hollywood studios viewed television as a competitor to motion pictures, and attempted to crush the medium."[15] Walt Disney was not yet leader of a major Hollywood studio, so he broke ranks to provide content to the fledgling ABC television network in exchange for investment in his theme park, Disneyland.[16] The theme park received its needed funding, and the television show *Disneyland* became a hit for ABC.[17]

Walt Disney was an independent filmmaker who transformed his endeavors into a studio. Rather than changing the system, he was absorbed by it. By the late sixties, however, the old system was breaking down.[18] Stars were emerging from television rather than from within the studio's own payroll ranks. Low budget films were being made by directors who were not under studio contract.[19] And the content of the studio pictures had stultified, failing to keep up with the demands of a very different, new audience.[20]

The independent director took control of Hollywood.[21] With this change, the old studio system nearly disappeared. But a funny thing

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company Viacom), Twentieth Century-Fox, United Artists, Universal, and Warner Bros. With the addition of Disney and the merger of United Artists into Metro-Goldwyn-Mayer, the list has remained essentially unchanged."); *see* GERALD MAST, A SHORT HISTORY OF THE MOVIES 107 (4th ed. 1986).

[13] The invention of the television properly belongs to Philo T. Farnsworth, who received Patent Number 1,773,980 for his system of horizontal scanning lines. *See Hall of Fame*, INVENT NOW, http://www.invent.org/hall_of_fame/56.html (last visited Dec. 06, 2010). Critically important work was also provided by RCA engineer Vladimir Zworykin. RCA fought Farnsworth on the patents, but licensed his patent in 1939. *See* Paul Schatzkin, *The Farnsworth Chronicles, Suspended Animation*, THE FARNSWORTH CHRONICLES, http://www.farnovision.com/chronicles/tfc-part07.html (last visited Mar. 6, 2010). Farnsworth's pioneering work was not recognized in his lifetime, but he has posthumously been recognized for his inventive genius. INVENT NOW, *supra*.

[14] Sean Griffin, *Walt Disney Programs*, MUSEUM OF BROADCAST COMM., http://www.museum.tv/eotvsection.php?entrycode=waltdisneyp (last visited Dec. 6, 2010).

[15] *Id.*

[16] *Id.*

[17] Griffin, *supra* note 14.

[18] PETER BISKIND, EASY RIDERS, RAGING BULLS 13–17 (1998).

[19] *See id.* at 15–17.

[20] *See id.* at 16–20.

[21] *Id.* at 15. ("Before anyone realized it, there was a movement—instantly dubbed the New Hollywood in the press—led by a new generation of directors."). The director's role in the transition, however, has been criticized as overstated. *See* RICHARD MALTBY, HOLLYWOOD CINEMA 176 (2d Ed. 2003) ("The economic crisis [in the late 1960s] was most frequently explained as a consequence of having too many old men controlling production. Between 1966 and 1973 all the majors acquired new, much younger production heads, most of them

happened on the way to Hollywood's funeral: A fiercely independent director fought Hollywood for independence and, in doing so, reinvented it. George Lucas challenged Hollywood notions of filmmaking twice in his young career. In his first commercial film, *American Graffiti*,[22] Lucas replaced a properly scored soundtrack with the popular songs of his youth—the hit records of the fifties.[23] Studio executives were appalled at both the lack of proper filmmaking techniques and the potential cost for licensing the composition and synchronization rights to so many songs.[24] Highly successful, *American Graffiti* placed George Lucas squarely in the same independent-director class as his friends Francis Ford Coppola and Steven Spielberg.

For his next film, Lucas returned to the studio system, making an expensive action movie highly reminiscent of the 1930s' science fiction serials. It was a difficult shoot, with both a largely unknown cast and model makers who struggled to capture the action. Filming went over budget. Pressured by an unhappy board of directors, Alan Ladd, Jr., head of Fox, wanted to limit his losses on a movie he expected to have limited appeal to a young audience. In exchange for covering a greater portion of the costs of the film, Lucas retained 75% of the gross income,[25] the literary rights for all subsequent productions, and the merchandising rights.[26]

Not only did *Star Wars*[27] go on to set box office records,[28] it reinvented the science fiction and action genres. More importantly from a studio standpoint, Lucas demonstrated how to build a proper business franchise from his film.[29] Built from that initial story, Lucas has gone on to produce

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drawn from outside the immediate confines of Hollywood. The public search for young auteurs concealed a more enduring palace revolution giving power to a younger generation of executives whose previous careers were most likely to have been in television, talent agencies, or 'creative management' . . . . These figures, rather than the 'movie brat' auteurs, guided the direction of the New Hollywood, but the full impact of their decision-making was not evident until the late 1970s, and the illusion that an auteurist American cinema might provide serious social and political comment through mainstream movies persisted throughout the 1970s.").

[22] AMERICAN GRAFFITI (Universal Pictures 1973).

[23] *See* DALE POLLOCK, SKYWALKING: THE LIFE AND FILMS OF GEORGE LUCAS 118 (1999).

[24] *Id.*

[25] Phillip Kerr, *Starbucks and Filthy Lucas*, NEW STATESMAN, Apr. 29, 2002, *available at* http://www.newstatesman.com/200204290030.

[26] *See* Amy Wallace & Marla Matzer, *Lucas Cuts Deal with Fox for Next 'Star Wars'*, L.A. TIMES, Apr. 3, 1998, at D1.

[27] STAR WARS (20th Century Fox 1977).

[28] David A. Kaplan, *The Force Is Still With Us*, NEWSWEEK, Jan. 20, 1997, at 52.

[29] MALTBY, *supra* note 21, at 190.

six additional films, television specials, video games, toys, and novels.[30] The *Star Wars* brand has been exploited in virtually every possible medium.[31]

Alan Ladd Jr. was reportedly fired over his inopportune decision to relinquish control to Lucas, but the model of building brand franchises out of successful scripts has redefined the modern Hollywood.[32] These include youth-oriented franchises like *Harry Potter*,[33] *Indiana Jones*,[34] *Star Trek*,[35] and *Batman*[36] as well as more adult fare including *Rocky*,[37] *The Terminator*,[38] and *The X-Files*.[39]

The franchise model is often described as a "tent pole," that is, a central pillar for the business that holds up the structure.[40] In film, a tent-pole project covers all the development costs for the other products in the market.[41] The tent pole is necessary because the economics of studio

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[30] *See* David A. Kaplan et al., *The Selling of Star Wars*, NEWSWEEK, May 17, 1999, at 61.

[31] See *id.*

[32] MALTBY, *supra* note 21, at 190.

[33] HARRY POTTER AND THE SORCERER'S STONE (Warner Bros. Pictures 2001); HARRY POTTER AND THE CHAMBER OF SECRETS (Warner Bros. Pictures 2002); HARRY POTTER AND THE PRISONER OF AZKABAN (Warner Bros. Pictures 2004); HARRY POTTER AND THE GOBLET OF FIRE (Warner Bros. Pictures 2005); HARRY POTTER AND THE ORDER OF THE PHOENIX (Warner Bros. Pictures 2007); HARRY POTTER AND THE HALF-BLOOD PRINCE (Warner Bros. Pictures 2009).

[34] RAIDERS OF THE LOST ARK (Paramount Pictures 1981); INDIANA JONES AND THE TEMPLE OF DOOM (Paramount Pictures 1984); INDIANA JONES AND THE LAST CRUSADE (Paramount Pictures 1989); INDIANA JONES AND THE KINGDOM OF THE CRYSTAL SKULL (Paramount Pictures 2008).

[35] STAR TREK: THE MOTION PICTURE (Paramount Pictures 1979); STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982); STAR TREK III: THE SEARCH FOR SPOCK (Paramount Pictures 1984); STAR TREK IV: THE VOYAGE HOME (Paramount Pictures 1986); STAR TREK V: THE FINAL FRONTIER (Paramount Pictures 1989); STAR TREK VI: THE UNDISCOVERED COUNTRY (Paramount Pictures 1991); STAR TREK: GENERATIONS (Paramount Pictures 1994); STAR TREK: FIRST CONTACT (Paramount Pictures 1996); STAR TREK: INSURRECTION (Paramount Pictures 1998); STAR TREK: NEMESIS (Paramount Pictures 2002); STAR TREK (Paramount Pictures 2009).

[36] BATMAN (Warner Bros. Pictures 1989); BATMAN RETURNS (Warner Bros. Pictures 1992); BATMAN FOREVER (Warner Bros. Pictures 1995); BATMAN & ROBIN (Warner Bros. Pictures 1997); BATMAN BEGINS (Warner Bros. Pictures 2005); THE DARK KNIGHT (Warner Bros. Pictures 2008).

[37] ROCKY (United Artists 1976); ROCKY II (United Artists 1979); ROCKY III (United Artists 1982); ROCKY IV (United Artists 1985); ROCKY V (United Artists 1990); ROCKY BALBOA (MGM/Columbia Pictures/Revolution Studios 2006).

[38] THE TERMINATOR (Pacific Western/Orion Pictures Corp. 1984); TERMINATOR 2: JUDGMENT DAY (Pacific Western/TriStar 1991); TERMINATOR 3: RISE OF THE MACHINES (C-2/Warner Bros. Pictures 2003); TERMINATOR: SALVATION (Halcyon Co./Warner Bros. Pictures 2009).

[39] THE X FILES: FIGHT THE FUTURE (20th Century Fox Film Corp. 1998); THE X FILES: I WANT TO BELIEVE (20th Century Fox Film Corp. 2008).

[40] *See* MALTBY, *supra* note 21, at 209–10; *see also* Manohla Dargis, *Defending Goliath: Hollywood and the Art of the Blockbuster*, N.Y. TIMES, May 6, 2007, at 2A, *available at* http://www.nytimes.com/2007/05/06/movies/moviesspecial/06darg.html (equating the "tent pole" to the summer blockbuster).

[41] *See* MALTBY, *supra* note 21, at 209–10.

filmmaking is very unforgiving.[42] Film remains a highly risky business, but a successful tent-pole picture can grow into a franchise, guaranteeing returns for years to come.[43] This provides a critically important level of predictability in an otherwise volatile setting. A company that can guarantee a certain annual income is a much better partner for investors and creative talent than a company that may go out of business if any of its movies flop.

B. From Vertical Integration to Disintermediation

Hollywood's early success in separating itself from Edison's control came from its vertical integration.[44] Many of the Hollywood studios controlled both the production of films and the theatrical distribution of those films.[45] The ownership of both the major exhibition chains and the studios gave these film companies a significant advantage in the marketplace.[46] The studios used this influence to dominate the movie business and control most of the film output.[47] Only the intervention by the Department of Justice ended the studios' monopolistic practices.[48]

Hollywood continued to fight others who tried to control the distribution of motion pictures. Just as the studios perceived television as a threat,[49] the studio heads reacted to the video tape recorder (VTR) as another attack on their hegemony.[50] "Jack Valenti declared that it was a parasite likely to kill moviegoing."[51] The studios did not want to give up control over distribution to the television networks or to the public. In *Sony Corp. of America v. Universal City Studios, Inc.*,[52] the studios identified their fears of video tape libraries replacing the need to buy tickets at movie theaters. As the district court explained, "[p]laintiffs predict that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative. Here plaintiffs assume that people will view copies when they

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[42] *Id.*

[43] *Id.*

[44] *See* ALLEN J. SCOTT, ON HOLLYWOOD 27 (2005).

[45] *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948).

[46] *Id.* at 145–48.

[47] *See id.* at 149–50.

[48] *See id.* at 140, 162, 178.

[49] MALTBY, *supra* note 21, at 192 ("Initially fearing the effects of a distribution system that they did not control, the industry reacted to video with the same apparent hostility it had shown to television in the early 1950s.").

[50] *Id.*

[51] *Id.*

[52] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 453 & n.39 (1984).

would otherwise be watching television or going to the movie theater."[53] But the district court simply would not accept the logic, accurately predicting: "There is no factual basis for this assumption."[54]

The future described by the district court in *Sony* has proven accurate, but the fears of the industry were not unfounded. As the court observed, the studios understood that "with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'"[55] The studios did not accept the factual interpretation of the district court that time-shifting of recorded broadcasts would have little impact on audience and revenue or that the recordings would increase interest in the shows rather than diminish the interest.[56]

The technologies have changed since the district court first heard the litigation regarding the Betamax. Then, the VTR could record only one hour, although one of the models could slow the tape, allowing two hours of recording.[57] Despite the somewhat limited machines before the court, the market had matured. "Betamax II with two hour recording time was introduced in March 1977, answered almost simultaneously by four hour VHS systems from Matsushita."[58] "[F]rom 1977 to 1981, each one of the MPAA film-distributing members entered the home video distribution of prerecorded cassette market."[59] It was speculated that the decision in *Sony* had become moot. By the time of the 1984 decision, the movie studios were already licensing their content for distribution on VHS and, to a lesser extent, on Betamax tapes.[60] The VCR was too popular to remove from the marketplace. Had the studios won the lawsuit, they likely would have been forced to continue licensing their content to the VCR manufacturers. In the absence of such a license, Congress likely would have required a compulsory license as part of the Copyright Act[61] just as it created

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[53] Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 466 (C.D. Cal. 1979) *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

[54] *Id.*

[55] *Id.* at 467.

[56] *Id.*

[57] *Id.* at 435 (explaining that of the four Betamax models, the "SL 8600, for example, has a built-in timer and a remote pause control. The SL 8200 has a slowdown capacity which allows one to record two hours of material on a one-hour tape. These recorders range in price from approximately $875-$1000."). *See generally* JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR 136-37 (1987) (discussing the evolution of video tape recorders).

[58] PETER GRINDLEY, STANDARDS, STRATEGY, AND POLICY 84 (1995).

[59] FREDERICK WASSER, VENI, VIDI, VIDEO 95 (2001).

[60] GRINDLEY, *supra* note 58, at 86. ("Starting in 1977 it pushed for a range of 1000 Betamax prerecorded titles. Despite this effort the higher demand for VHS tapes eventually displaced Betamax.").

[61] *See, e.g.*, Bill Holland, *High Court 'Betamax' Review Won't Deter Solons, Lobbyists*, BILLBOARD, June 26, 1982,

compulsory licenses for recorded compositions[62] and jukeboxes.[63] The movement in the marketplace served as boots on the ground, allowing the device manufacturers to stake out their financial interests.

Sony stands as an important milestone in the history and jurisprudence of fair use for its groundbreaking recognition that a device "merely capable of substantial noninfringing uses" is not subject to secondary copyright liability.[64] But the case may be even more significant for its cultural significance. The *Sony* decision reflects the modern trajectory of fair use jurisprudence, expanding the consumer-focus role that fair use can play in media consumption.[65]

In recent years the music industry, rather than the motion picture industry, has led the controversial charge against unlicensed technological innovations. Congress attempted a compromise with the Audio Home Recording Act of 1992,[66] which made analog or cassette taping non-actionable and required a fee on media and devices designed for digital reproduction of music— namely the digital audio tape players that were cutting edge technology at the time.[67] In *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*,[68] the Recording Industry Association of America and the Alliance of Artists and Recording Companies (collectively, "RIAA") challenged the sale of the Diamond Rio, one of the first commercial MP3 players, for its failure to comply with the Audio Home Recording Act.[69]

As the Ninth Circuit explained, "[t]he dispute over the Rio's design and function is difficult to comprehend without an understanding of the

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at 3.

[62] 17 U.S.C. § 115 (2000 & Supp. 2007). The compulsory license was originally created as part of the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), in response to similar concerns of copyright piracy and market monopoly. *See* Lydia P. Loren, *Untangling the Web of Music Copyrights*, 53 CASE. W. RES. L. REV. 673, 680–82 (2003).

[63] Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/Trips and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 199–203 (2000).

[64] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) ("The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.").

[65] *See* Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008).

[66] Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4247 (1992).

[67] 17 U.S.C. §§ 1003, 1008 (2006).

[68] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).

[69] *Id.* at 1073–74.

revolutionary new method of music distribution made possible by digital recording and the Internet; thus, we will explain in some detail the brave new world of Internet music distribution."[70] The court described this brave new world of music distribution and found that the Rio did not fall within the Audio Home Recording Act, the statutory licensing scheme designed for some new media.[71] The court reasoned that a computer, not the Rio, did the copying. Computers, whatever else they might be, had been categorized by Congress as devices statutorily exempt from the Act. As such, the sale of the MP3 players did not require the royalty payments specified under the statute.[72] More importantly, the Court extended *Sony* to the MP3 player category: "The Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."[73]

Although the Ninth Circuit focused on the fair-use notions embodied in the Audio Home Recording Act and the Act's congressional findings that private, noncommercial taping of albums should constitute fair use, the court understood these findings to be broadly based on public expectations rather than limited to audio home recording. The *Diamond* decision, therefore, extended the acceptance of fair use for personal copying. Where *Sony* did not extend fair use to "librarying" of copied works,[74] changes in technology and the dramatic decline in the cost of storage had reshaped public expectations. The Ninth Circuit understood this evolution in home electronics and the modern expectations of the consumer. Consumers today consider it their right to make multiple back-up copies of the media they own for protection of the contents' integrity and for the convenience of putting the media on computers, personal players, and car stereos.[75] As the Ninth Circuit intimated in *Diamond*, the 1992 compromise in the Audio Home Recording Act now reflects a baseline assumption about consumer rights for any content in all media.

While the music industry struggled to address the paradigm shift, the movie studios understood that the technology was fast progressing. The film studios anticipated the transition to digital distribution, but sought copy

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[70] *Id.* at 1073.

[71] *Id.*

[72] *Id.* at 1081; *see* 17 U.S.C. §§ 1001(3), 1003(a).

[73] *Recording Indus. Ass'n of Am.*, 180 F.3d at 1079 (internal citations omitted).

[74] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 453 & n.39 (1984).

[75] *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1895–1901 (2007).

protection to help limit the easy reproduction of their content.[76] For the film studios, the transition to DVDs had double benefits. First, it was a less expensive and higher quality medium on which to record movies for home distribution. Second, DVD players had no recording capability. Nonetheless, the studios understood the risks of unfettered digital copying as much as the record companies. They implemented DVD distribution only after an encryption system was put in place.[77] From the first introduction, however, DVDs have been the target of decryption and piracy.[78] Since DVDs play on computers as well as stand-alone DVD players, the medium has been the aggressive target of software designed to disable digital rights management technology and allow unauthorized copying of digital content onto computers and distribution on peer-to-peer systems.[79] Through their careful planning, the studios have been successful in enforcing legal restrictions, but they have had only a modest impact on the ability of unauthorized users to post digital content or share digital files.[80]

Moreover, the DVD has become a transitional technology.[81] By 1999, the first personal digital video recorders ("DVRs") such as TiVo were introduced into the market. These set-top boxes use computer hard drives to store consumer-selected content digitally for later playback.[82] The machine's content is limited to the size of the hard drive. As such, the ability to library content for permanent storage is limited and its primary purpose is for time-shifting. TiVo fit squarely into the staple of commerce predicted in *Sony*, so the studios declined to challenge the legality of the home storage

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[76] *See generally, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

[77] *Id.* at 436 ("[Studios] enlisted the help of members of the consumer electronics and computer industries, who in mid-1996 developed the Content Scramble System ('CSS').").

[78] *Id.*

[79] *Id.* at 439 (nothing that software to eliminate CSS, known as DeCSS, was posted to hundreds of websites by 1999).

[80] *See* Niva Elkin-Koren, *Making Room for Consumers under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1133–34 (2007); Jon M. Garon, *What If DRM Fails?: Seeking Patronage In The Iwasteland And The Virtual O*, 2008 MICH. ST. L. REV. 103, 109 (2008); Brandon Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS. L. REV. 171, 217–19 (2008); Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 AM. BUS. L.J. 331, 345 (2008).

[81] *See, e.g.*, Chris Foresman, *Netflix CEO: We'll Offer Streaming-only Plan by 2010*, ARS TECHNICA, Feb. 23, 2009, http://arstechnica.com/media/news/2009/02/netflix-ceo-well-offer-streaming-only-plan-by-2010.ars ("Netflix appears to be one company that sees the on-demand content-distribution-model writing on the wall. In a bid to remain relevant in a world of broadband connections and instant gratification, the company is likely to offer a subscription option that skips DVDs entirely, and allows access to its 'Watch Instantly' on-demand streaming videos by 2010. 'We've got one singular objective, which is "Be successful in streaming,"' Netflix CEO Reed Hastings told *Bloomberg* in a recent interview.").

[82] *See generally* Joseph P. Liu, *Enabling Copyright Consumers*, 22 BERKELEY TECH. L.J. 1099 (2007).

on these devices, presumably recognizing the legitimacy of the technology and the fair use outcome under a *Sony* analysis.[83]

Technologically, DVRs can do much more. Software can predict and eliminate commercials or make the playback of the device available over a local network or even the Internet.[84] Unlike the mere time-shifting aspects of early DVRs, the industry has taken quick action to stop commercial-skipping devices and devices that transfer the copied broadcast across households or over the Internet.[85] The movie studios and television networks have used their economic clout to stop ReplayTV, a brand of DVR, from having features that allow commercial skipping or redistribution of the stored content to a second device.[86] These additional tools have not been tested under the current fair-use doctrine. While they exceeded the situation in *Sony*, there was disagreement regarding the fair-use implications of these additional services.[87] SONICblue, the manufacturer of the devices, simply could not finance the battle, and the products were withdrawn from the market as the company filed for bankruptcy.[88]

The drive to control uses of their content and the incentive to extract a price premium for enhanced services has motivated the studios to try to stop an on-demand DVR system for television.[89] In essence, although the studios were willing to let the consumer buy these desk-top devices, they were unwilling to let Cablevision provide this service to its customers without a purchased license.[90] The studios failed. The Second Circuit

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[83] *Id.*

[84] Ned Snow, *The TiVo Question: Does Skipping Commercials Violate Copyright Law?*, 56 SYRACUSE L. REV. 27, 36 (2005) ("One DVR model that can skip advertisements is the ReplayTV 5000. Although it is no longer being manufactured, the ReplayTV 5000 includes a feature called 'Commercial Advance,' which allows viewers to automatically skip advertisements."); Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 835 (2008) (describing "new 'space-shifting' technologies, like the new 'TiVoToGo' feature that allows TiVo owners to transfer their recorded programs to personal computers and portable media players for later playback. A new generation of digital 'space-shifting' products, such as the Sling Media 'Slingbox,' promises to make any audio or video source in your living room available remotely by transmitting the material to you, wherever you may be, over the Internet.").

[85] *See* von Lohmann, *supra* note 84 at 833–35.

[86] *See* Dawn C. Chmielewski, *Mired in Debt, Sonicblue Files for Bankruptcy; Main Product Lines to be Sold to Repay Firm's Creditors*, SAN JOSE MERCURY NEWS, Mar. 22, 2003, at 1C.

[87] *E.g.*, Snow, *supra* note 84, at 36–37.

[88] Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921 (C.D. Cal. 2004). *See also* Chmielewski, *supra* note 86.

[89] *See, e.g.*, Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 2890 (2009).

[90] *Id.*

found that the customers, rather than Cablevision, were the direct copiers because Cablevision had no control over what its customers copied.[91]

Perhaps even more interesting than the outcome, however, was the litigation posture. As the Court explained, "[c]ritically for our analysis here, plaintiffs alleged theories only of direct infringement, not contributory infringement, and defendants waived any defense based on fair use."[92] The plaintiffs wanted the financial benefit of any cable-wide system of DVRs, but were unwilling to even suggest that the private use of DVRs violated the rights of the audience.[93]

Whether the DVR is on the TV-stand or at the cable station may be moot. Licensed tools now available to consumers provide access to an increasingly larger amount of on-demand content directly from Netflix and a variety of Internet sites.[94] The Netflix content is commercial-free (at least for now). To stay competitive, the cable systems are offering similar commercial-free services. Video on demand "enables viewers to order and watch content on demand and to pause, rewind, and fast-forward the content."[95] Comcast, TimeWarner, and most cable systems are providing free or low cost versions of services that provide the consumer the same experience as those that were blocked only a few years earlier.[96]

Not only has the rapid advancement of technology changed the role of Hollywood, but the economic power within the distribution industry has also changed. Nowhere is this more apparent than in the legal battle between Viacom and YouTube regarding the unauthorized posting of broadcast content on the Internet.[97] YouTube has become a subsidiary of Google, giving the video social-networking channel the backing of the advertising sales organization that controls one-third of the $23.4 billion U.S. online advertising.[98] Unlike the bankruptcy-shaped battle over ReplayTV, this dispute will focus on the meaning of the Copyright Act and

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[91] *Id.* at 132.

[92] *Id.* at 124.

[93] *Id.*

[94] SYLVIA M. CHAN-OLMSTED, COMPETITIVE STRATEGY FOR MEDIA FIRMS: STRATEGIC AND BRAND MANAGEMENT IN CHANGING MEDIA MARKETS 146 (2006).

[95] *Id.* ("It is different from pay-per-view in that it allows 'anytime' flexibility, whereas PPV is consumed at preset times.").

[96] *Id.* at 150–54.

[97] Complaint for Declaratory and Injunctive Relief and Damages at 1, Viacom Int'l. Inc. v. YouTube, Inc., 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (No. 1:07CV02103), 2007 WL 775611.

[98] Jessica E. Vascellaro, *Radio Tunes Out Google in Rare Miss for Web Titan*, WALL ST. J., May 12, 2009, at A1.

the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA").[99]

The copyright owners claim to have "identified more than 150,000 unauthorized clips of their copyrighted programming on YouTube that had been viewed an astounding 1.5 billion times."[100] There has never been any factual dispute that at least tens of thousands of files have been uploaded to YouTube without the copyright owners' consent. The real question is whether YouTube's efforts have been sufficient under the take-down provisions of the DMCA to provide it safe harbor protection from liability. And just as *Sony's* importance has been eroded by technological advances and contractual licenses, the decision in the dispute will be largely irrelevant to the long-term evolution of video-media distribution.

Nonetheless, the legal interpretation of the DMCA will have a significant impact on other intellectual-property companies relying on the safe harbor provisions in their efforts to comply. Section 512 of the Copyright Act creates a safe harbor for an Internet service provider that serves to transmit Internet traffic, temporarily cache content on its system, or host content "at the direction of a user."[101] The term "service provider" means, *inter alia*, "a provider of online services or network access,"[102] which is not particularly illuminating, but likely to include YouTube. YouTube serves as a host to the videos uploaded by the public. It provides tools to upload but does not edit or select content.

As a result of its service-provider function, YouTube would be immune from monetary damages or injunctive relief if it did not have knowledge of the infringing material of its users, received no direct financial benefit from the infringing activity, and took expeditious steps to remove the infringing material upon receipt of proper notice of the infringement.[103]

Given the scale of unauthorized traffic on YouTube's site, it is hard to imagine that a fact-finder would believe that YouTube had no knowledge of infringing activity. Indeed, like the facts in *A&M Records v. Napster*,[104] it may become clear that the bulk of YouTube traffic was focused on the most

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[99] *See* 17 U.S.C. § 512 (2000).

[100] Complaint, *supra* note 97, at 1.

[101] 17 U.S.C. § 512(a)(1).

[102] *Id.* at § 512(k)(1)(B).

[103] *Id.* at § 512(c) (listing conditions under which a service provider is not liable for monetary relief, including notice requirements under subsection (A)(iii)); *see also* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1111 (9th Cir. 2007).

[104] A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

popular television shows.[105] YouTube acknowledges the significant copyright infringement on the site, but counters that it has been diligent in responding to notices to remove the infringing material, even when those notices did not necessarily meet the statutory requirements.[106]

> YouTube has long said it removes such proprietary clips when owners demand it, but [in October 2007], the company took a more conciliatory stance. It announced a program under which copyright holders can provide YouTube with advance copies of their programming for identification purposes. Using new software, YouTube said, it can then automatically remove clips as users post them.[107]

The scale of the problem faced by YouTube is enormous, but it could be even worse without YouTube. Were YouTube not in existence, there would be an even larger multitude of video-hosting sites, increasing the burden on copyright holders to police the Internet. Company attitudes have changed over time.

The interesting fight in the litigation is the extent to which the content owners can prove that YouTube staff were "aware of facts or circumstances from which infringing activity is apparent."[108] Any quick search on YouTube will generate content that was not posted by the copyright holders. Type in a song title and many different performances of the song will appear. In such cases, not only does the copyright holder in the video have a copyright infringement claim (against the unauthorized uploader, if no one else), but in many cases so do the composer and lyricist of the song.[109]

In the months following the initial filing of *Viacom v. YouTube*, a number of agreements were made involving licensed music videos and other content on YouTube, changing the relationship among the litigants to that of business partners.[110] For example, a website named Vevo.com has been under development through a joint effort of YouTube and Universal Music

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[105] *See id.* at 1013 ("The record supports the district court's determination that as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs.") (internal quotations omitted).

[106] *See* 17 U.S.C. § 512(c)(3) (providing notification requirements).

[107] Thomas Mulligan, *Viacom To Offer All Clips of 'Daily Show' Online*, L.A. TIMES, Oct. 18, 2007, at C1, *available at* http://articles.latimes.com/2007/oct/18/business/fi-mtv18.

[108] 17 U.S.C. § 512(c)(1)(A)(ii).

[109] Unless the rights to perform the song on television included the rights to perform the song on the Internet, the composer and lyricist have an independent cause of action. *See, e.g.*, 17 U.S.C. § 512(f).

[110] Adam Satariano & Brian Womack, *Bono Plays Matchmaker as YouTube, Universal Create Music Site*, BLOOMBERG (Apr. 14, 2009), http://www.bloomberg.com/apps/news?pid=20601109&sid=aaEHAG7vyT94.

Group.[111] Though owned by Universal, the project will allow Universal to participate in the online environment developed by YouTube using YouTube's technology and expertise.[112] Rather than serving to redefine market dominance in the entertainment field for upcoming generations, this titanic litigation is likely to merely shift money from one company to another, based on historic business practices. The result will alter the influence each litigant has at the bargaining table, but it will do little to shift the transition in media relations among content producers, distributors, and consumers.

Since the introduction of the Betamax, the audience has slowly but inexorably gained control over the content it consumes. This was the fear described by the plaintiffs in *Sony*.[113] The process gained momentum with the general disintegration of the traditional information infrastructure. In *Strategy and the New Economics of Information*,[114] Philip Evans and Thomas Wurster identified that information serves as the "glue" linking supply chains together and making consumers reliant on particular retailers.[115] The richness – or breadth of content – had been inversely related to the size of the audience – or reach of the message.[116] The Internet has reduced the costs of building content robust in both richness and reach to the point that there is no longer any correlation between the two.[117] The Internet has allowed content creators to replace supply chains with direct one-to-one relationships between content suppliers and the consumers.[118] Only the use of some exclusive property interests, such as copyrights, trademarks or patents, can keep a company from having its products commoditized.[119]

The *Viacom* litigation ignores these central precepts. It assumes that both the corporate-content creator and the content distributor have a monopoly

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[111] Miguel Helft, *YouTube and Universal to Create a Hub for Music*, N.Y. TIMES, Apr. 10, 2009, at B3, *available at* http://www.nytimes.com/2009/04/10/technology/internet/10google.html.

[112] *Id.*

[113] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467 (C.D. Cal. 1979)) ("Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'").

[114] Philip B. Evans & Thomas S. Wurster, *Strategy and the New Economics of Information*, HARV. BUS. REV., Sept.–Oct. 1997, at 70–82.

[115] *Id.* at 72.

[116] *Id.* at 73–74.

[117] *See* Jon M. Garon, *Reintermediation*, 2 INT'L J. OF PRIVATE LAW 227 (2009).

[118] *Id.*

[119] *See* JON M. GARON, OWN IT: THE LAW & BUSINESS GUIDE TO LAUNCHING A NEW BUSINESS THROUGH INNOVATION, EXCLUSIVITY, AND RELEVANCE 15 (2007).

position over the content and the method of distribution, such that only an agreement between those two parties will determine the distribution of the content. The content owner relies on the copyright in the work as the legal basis of the exclusivity.[120] The distributor relies on a combination of license agreements, DMCA safe-harbors,[121] and *Sony* engendered fair use as a staple in commerce.[122] Where the content owners once relied upon the cassette tapes and DVDs to control the supply chains, the physical medium no longer matters and therefore no longer defines the distribution strategy.[123] Similarly, the cable systems previously competed only with terrestrial broadcasters and satellite broadcasters over the signals into the homes.[124] From each monopoly position, negotiations were regularly conducted over the cost of the owner's content on the distributor's infrastructure. This was the true lesson of the Cablevision litigation in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* The parties never wanted to litigate the legal limits of time-shifting or DVR capabilities; they merely wanted to know which party had the superior bargaining power regarding the licensing fees.[125]

III. BARBARIANS AT THE GATES OR THE RISE OF THE CURATORIAL AUDIENCE

The battles among the content creators and distributors reflect the traditional supply-chain tension, but they ignore the external threat from commercial piracy[126] and consumer disobedience.[127] The radical growth in choices for consumers to obtain content, and the disintermediation of media supply chains, forced the content owners to compete with illegal peer-to-

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[120] *See* 17 U.S.C. § 106 (2006).

[121] *See* 17 U.S.C. § 1203 (2006).

[122] *See* Ginsburg, *supra* note 65, at 581.

[123] *See* Jonathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 633 (2009).

[124] *See* Andrew Wise & Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite—It's More Complicated than You Think* 20 (Jan. 2005) (FCC Media Bureau Staff Research Paper No. MB 2005-1; FCC Int'l Bureau Working Paper No. IB-3), *available at* http://ssrn.com/abstract=658342 and follow "One-Click Download" hyperlink.

[125] *See* Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 134 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 2890 (2009).

[126] *See, e.g.*, Ponte, *supra* note 80, at 337 ("Optical disc piracy concerns bricks-and-mortar factories typically operated by organized crime gangs, often readily found in Russia and Asia.").

[127] *Id.* at 337–39 ("There are three main forms of movie piracy: (1) camcorder piracy, (2) optical disc piracy, and (3) Internet piracy. . . . Although one hears a great deal about illegal file sharing, it is the source of less than ten percent of pirated copies of first-release movies.").

peer file sharing services rather than rely on the law to close them down.[128] The threat from piracy and unauthorized copying has been extensively discussed.[129] Some commentators have argued that the business model of media distribution is broken and, by extension, the copyright infringement of illegal uploading and downloading should be excused, or that the potential marketing benefits of the illegal downloading should therefore convert such activity into fair use.[130] Others have pointed out that whatever the economic benefits of peer-to-peer distribution on media sales, the control over such distribution remains within the exclusive rights afforded copyright owners.[131] Regardless of the merits of the debate, however, the economic and technological realities require that content distributors recognize that unauthorized distribution serves as a limiting market force. Free, unauthorized content affects the prices that can be charged for content and the strategies available for shaping the outlets for distribution.[132]

The audience wants greater control over the availability of content and the price they are willing to pay.[133] While record producers felt that thematic albums were an artistic model worth protecting, the consumers preferred purchasing singles so that they were not forced into buying the unwanted filler cuts.[134] With the rise of iTunes as the leading music retailer, the audience has carried the day.

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[128] *Id.* at 348 ("Perhaps the time has come for the industry to consider different approaches in their battle against movie piracy. If the industry . . . considered the 'business model' of piracy, it might easily find several self-help remedies that would improve customer satisfaction and deter piracy without draining public law enforcement resources. By looking at piracy as a business model, the movie industry can analyze the strategies that have made piracy a global success and fashion new and innovative efforts to compete with this potent global force.").

[129] *See generally*, Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Niels Schaumann, *Copyright Class War*, 11 UCLA ENT. L. REV. 247 (2004).

[130] *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 284 (2002); Sheila Zoe Lofgren Collins, Note, *Sharing Television Through the Internet: Why the Courts Should Find Fair Use and Why It May Be a Moot Point*, 7 TEX. REV. ENT. & SPORTS L. 79, 102–03 (2006); Andrew C. Humes, Note, *The Day the Music Died: The RIAA Sues Its Consumers*, 38 IND. L. REV. 239, 249 (2005); Maria Termini, Note, *Time-Shifting in the Internet Age: Peer-to-Peer Sharing of Television Content*, 38 COLUM. J.L. & SOC. PROBS. 415, 433–34 (2005).

[131] *See, e.g.*, Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 683 (2005).

[132] Ponte, *supra* note 80, at 348.

[133] *Id.*

[134] *See, e.g.*, Ethan Smith & Nick Wingfield, *More Artists Steer Clear of iTunes*, WALL ST. J., Aug. 28, 2008, at B1, *available at* http://online.wsj.com/article/SB121987440206377643.html.

The control over the distribution of motion pictures from first-run theaters to the smaller movie houses gave way to the various presentation windows on television.[135]

> A typical distribution sequence for a major's film in the USA will be an initial theatrical release of around six months, followed by a DVD/video window (which remains open for an indefinite period). This is followed by pay-per-view telecasts anywhere from two to three weeks after a film goes on video release, and a premium cable movie channel window (for approximately one year), a network TV window and, finally, a syndicated TV window.[136]

Television itself was once organized around a time schedule that shaped the audience's behavior.[137] This model began to change when first-run syndication shows began airing the same episode multiple times in a week.[138] Other networks began licensing same-week reruns on cable-only channels.[139] On Demand services added television episodes, TiVo simplified time-shifting, and the notion that television needs to be watched on the schedule of the network has simply dissipated.[140] Pushed by distribution technologies, the motion picture and television industries have seen both the technology and content adjust to meet the changing distribution challenges. As history shows, shifts in distribution modality are accompanied by shifts in content. These changes impact the sources of material and the manner in which those materials are developed.

> The threats have changed over the years—from television to music videos, comic books, digital technologies and so on—yet what has remained constant is the idea that the movies are under siege. But if the movies have taught us anything it is that they are brilliant adapters. They mutate and shift, stretch and adjust, and they neutralize those threats the way an organism absorbs nutrients, by assimilating them. We call some of these movie mutations comic-book flicks and compare still others to music videos, sometimes with a sigh, sometimes with a smile. We complain about car chases and forget that D. W. Griffith was among the first to put

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135 AN INTRODUCTION TO FILM STUDIES 21 (Jill Nelmes ed., 3d ed. 2003).

136 *Id.*

137 *See, e.g.*, SHELLY PALMER, TELEVISION DISRUPTED: THE TRANSITION FROM NETWORK TO NETWORKED TV 145 (2006) (describing the alleged myth of New York water pressure being affected by the popularity of *I Love Lucy*—and bathroom use during commercial breaks).

138 *See, e.g.*, DEREK KOMPARE, RERUN NATION: HOW REPEATS INVENTED AMERICAN TELEVISION 133 (2005).

139 *See, e.g.* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 221 n.59 (7th ed. 2007).

140 Michael Morgan, James Shanahan & Nancy Signorielli, *Growing up with Television*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 34, 46 (Jennings Bryant & Dolf Zillmann eds., 3d ed. 2008).

> pedal to the metal on screen. And we condemn blockbusters for, if we're lucky, doing the very thing we say we want from the movies: giving us a reason to watch.[141]

For example, the recent decline in syndication revenue has been a leading cause of "reality" programming, which reduces the cost of per-episode production, allowing television producers to be profitable at the first airing of an episode rather than at syndication.[142] Just as distribution has reshaped the options for the content producers, changes in technology have also changed the behavior of the consumer, which in turn creates new opportunities for content producers to interact with their audience.

A. Amateur Productions, Garage Bands, and Fan Fiction

The most dramatic aspect of this change has come with the active, participatory segment of the audience. As each medium developed, a small segment of the audience wanted to join in. Some took their shot at joining the professional ranks; others found ways to participate as fans. The start of this modern trend may be traced back to the social phenomena of comic book conventions[143] and "fan fiction."[144]

Originating in 1936, the first informal science fiction fan meeting took place in Philadelphia, according to participant and leading science fiction author Fredrick Pohl.[145] The fans attending the predecessor of the science fiction convention were the same fans who would write their own stories to share amongst themselves while awaiting the next edition of *Amazing Stories* or *Astounding Science Fiction*.[146] The fans shaped the science fiction and comic book genres. Increasingly, the annual conventions have become launching pads for genre films such as *Iron Man*[147] and *Star Trek*,[148] with the initial

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[141] Dargis, *supra* note 40, at 2A.

[142] TOM PENDERGAST & SARA PENDERGAST, ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 596 (2008).

[143] *See, e.g.*, RON GOULART, COMIC BOOK CULTURE: AN ILLUSTRATED HISTORY 199 (2000); STEPHEN WEINER, FASTER THAN A SPEEDING BULLET: THE RISE OF THE GRAPHIC NOVEL 18–19 (Chris Couch ed., 2003).

[144] *See, e.g.*, HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 188–89 (2006); *see generally* Francesca Coppa, *A Brief History of Media Fandom*, *in* FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS 41, 42–43, 46 (Karen Hellekson & Kristina Busse eds., 2006).

[145] Coppa, *supra* note 144, at 43.

[146] *Id.* at 42.

[147] IRON MAN (Paramount Pictures 2008).

[148] *See supra* note 35.

screenings serving to bless or undermine the market potential of these high-budget projects.[149]

While the conventions allow fans to interact, buy and sell memorabilia, and meet the authors, actors, and producers; fan fiction encourages the audience to actually create new literary works. These works are based on the literary worlds created by authors, filmmakers, television networks, comic book writers or other copyright owners. "When authors write stories featuring characters from other stories, movies or TV shows in new situations or adventures, these works of 'fan fiction' . . . may run into legal challenges because the borrowed characters, scenes or plots may be protected from unauthorized use under intellectual property laws."[150]

The line between a legal work based upon preexisting works and copyright infringement stemming from unauthorized derivative works is a somewhat hazy border. That line was recently explored in a lawsuit stemming from a Harry Potter fan website[151] that had grown into an unofficial, academic "Lexicon".[152] As the court explained its attempt to define this line, "[a] work is not derivative . . . simply because it is 'based upon' the preexisting works. If that were the standard, then parodies and book reviews would fall under the definition, and certainly 'ownership of copyright does not confer a legal right to control public evaluation of the copyrighted work.'"[153] Both Warner Bros. and *Harry Potter* author J.K. Rowling had praised the Harry Potter Lexicon website created by Steven Vander Ark,[154] but when a publisher planned to publish substantial content from the website as a book, the plaintiffs successfully enjoined the publication.[155] The commercial exploitation through publishing was too

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[149] Originally a small comic book convention, Comic-Con has arguably grown to become the leading pop culture event in the United States. *See* Scott Bowles, *Ready To Toll at Comic-Con; Superheroes Do Attract Nerds, and This Pop-Culture Confab Will Be full of Them*, USA TODAY, July 22, 2009, at 1D, *available at* http://www.usatoday.com/life/movies/news/2009-07-21-comic-con_N.htm.

[150] *Fan Fiction*, CHILLING EFFECTS, http://www.chillingeffects.org/fanfic/ (last visited Dec. 7, 2010). ChillingEffects.org is co-sponsored by the Internet law clinics at Harvard, Stanford, the University of California at Berkeley, the University of San Francisco, et al.

[151] THE HARRY POTTER LEXICON, http://www.hp-lexicon.org (last visited Dec. 7, 2010).

[152] Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008). The work intended to be published by the defendants, which was based entirely on the website, was to be entitled simply "The Lexicon." *Id.* at 519–20.

[153] *Id.* at 538 (quoting Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 521 (7th Cir. 2002)).

[154] *Id.* at 521. ("Rowling posted on her website praising his Lexicon website as follows: 'This is such a great site that I have been known to sneak into an internet cafe while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing). A website for the dangerously obsessive; my natural home.'").

[155] *Id.* at 554.

much for the copyright owner to bear. Ironically, this was not a case of changing from a noncommercial to commercial use, however, because the Lexicon website had generated significant advertising revenue.[156]

Generally speaking, fan fiction has been tolerated more often than litigated. Fair use would apply to some works but not others, depending on the amount of the original source material copied, the transformative nature of the fan's work, and the potential market impact. Copyright owners, in turn, have learned that it is good business to promote audience engagement rather than to protect the copyright in their works to the n^{th} degree. Different copyright owners have different levels of tolerance for fan fiction, leaving the entire genre without clear boundaries as to legality or likelihood of enforcement.

As illustrated by the Harry Potter Lexicon, commercial publication is often the trigger for litigation.[157] Moreover, the attempted publication of a competing work highlights the negative impact the defendant's work could have upon the source material, since the publication changes the activity into a competitive endeavor.[158] The relevance of the publishing step may also disappear with the sudden growth of digital book readers. Led by e-book readers such as the Sony eReader and Amazon's Kindle, publishing industry experts expect significant growth of digital content—augmenting and even supplanting print publication.[159] If *Harry Potter* can be read on a digital device, and that same digital device has full access to fan sites such as the Harry Potter Lexicon, then what role does publication play as either a legal or practical distinction between permissible and impermissible fan content? As publishing continues to expand digital markets, the historic distinction between commercially published professional content and self-published fan content will be less clearly demarked. How publishers respond to the change remains to be seen.

Even older than fan fiction is the genre of nonprofessional theatre. A playwright has been recognized to own the rights to a play's public performance since the eighteenth century.[160] The right was first referenced

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156 Russell Smith, *The Thin Green Line Between Print and the Web*, GLOBE AND MAIL, Apr. 17, 2008, at R1.

157 *See RDR Books*, 575 F. Supp. 2d at 519–21.

158 *Id.*

159 *See, e.g.*, Jim Milliot, *The United States in 2012: The Coming Battle Between Publishers and Booksellers*, FRANKFURTER BUCHMESSE, http://buchmesse.de/en/anniversary/history/01641/index.html (last visited Mar. 5, 2010).

160 *See* Palmer v. De Witt, 47 N.Y. 532, 542-43 (1872). The law recognizing public performance as a statutory right and subject to limited times was enacted in England during the reign of William IV. The law may have been recognized as early as 1770. *See also* Ferris v. Frohman, 223 U.S. 424, 432 (1912).

in the U.S. Copyright Act of 1856.[161] The performance of the play did not result in a publication of the script, so unpublished playwrights held perpetual copyright until the 1976 Copyright Act extended federal jurisdiction to unpublished works.[162]

Playwrights regularly control the productions of their works during the development of a play's commercial life.[163] Audience participation comes in the form of "tryouts" "to get audience response so that the show could be fixed before it was subjected to the grueling attention of the Broadway critics."[164] Sometimes audience responses were general reactions, while in other cases specific comments could lead playwrights and directors to revise productions.[165] The audience plays an important, active role by providing feedback, but generally does not provide creative input.

After a period in which a play has been commercially exploited, however, the playwright will typically license the play to a publishing house, such as Samuel French, to be made available for modest royalties to non-union and amateur theatres across the United States.[166] Amateur theatre allows thousands of actors, directors, and designers to participate in the creative process, while preserving the right to allow such productions for the playwright. Some of these productions are done as part of secondary schools and undergraduate education while others are volunteer productions by nonprofit organizations. The licensing agreement with Samuel French actually treats Los Angeles and New York with special rules, reflecting the potential impact amateur productions might have on potential professional revival productions or motion picture adaptations.[167] These amateur theatres also stage new works, giving aspiring playwrights the opportunity to find their voice.

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[161] Supplemental Act of Aug. 18, 1856, 11 Stat. 138, 138-39 (repealed); *see also* 13 C.J. § 107 n.37 (1917) ("this act conferred on the proprietor of a copyrighted dramatic composition exclusive performing rights in addition to the publishing rights alone conferred by former laws.").

[162] *See* 17 U.S.C. §§ 101-02 (2006).

[163] BUZZ MCLAUGHLIN, THE PLAYWRIGHT'S PROCESS: LEARNING THE CRAFT FROM TODAY'S LEADING DRAMATISTS 243 (Dale Ramsey ed., 1997).

[164] DONALD C. FARBER, PRODUCING THEATRE: A COMPREHENSIVE AND LEGAL BUSINESS GUIDE 129 (3d ed. 2006).

[165] *See, e.g.*, EVERY LITTLE STEP (Endgame/Sony Pictures Classics 2008) (describing how a comment by Marsha Mason to Michael Bennett led to his revising the end of *A Chorus Line*. After changing the ending, audiences began regularly awarding the show standing ovations and it has gone on to become the longest running musical in Broadway history.).

[166] *See, e.g.*, *Royalties & Rights Information*, SAMUEL FRENCH, INC., http://www.samuelfrench.com/store/royalties.php (last visited Dec. 7, 2010).

[167] *Id.* ("All productions in New York City and Los Angeles require special clearance and license (royalty) fees. Please apply well in advance of production to the New York or Hollywood office.").

In a much less structured manner, music has its equivalent as well, with thousands of garage bands, weekend bands, volunteer orchestras, church choirs, and a myriad of ways in which nonprofessionals take part in the active production and performance of music. The participants are heavily engaged in the medium.

These amateur artists are both the audience for the professional content and active participants in the art form. One of the benefits of changing technology has been a reduction in the barriers to entry for new film artists.[168] With improved-quality video and editing equipment, the cinema has opened its doors to this same, dedicated following. Costs have dropped for high-quality music recording, filmmaking, and publishing. Access has increased. The next wave of film projects will be content that derives directly from the smallest screen. Writers, directors, and producers honing their craft on YouTube shorts will begin expanding to theatrical films.[169] Some will develop into the next wave of professional artists, while others will remain interested amateurs.

B. The Curatorial Audience

Despite the importance of the garage bands, community theatres, fan fiction magazines, and now YouTube videos, these projects reflect the work of only the most dedicated portion of the audience. Because of the time and effort involved, the vast majority of the audience does not become so actively engaged. Instead, the larger portion of the audience do not become creators in their own right, but try to become involved in less demanding ways. The new technologies and social media have affected the behavior of the consumer, which in turn afforded new opportunities for content producers to interact with their audience.[170] In 2006, Bill Ivey and Steven J. Tepper described this new audience behavior as the "curatorial me," in which the people on the other side of the broadcast cameras are participating in a manner different from either audience or authorship.[171]

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[168] *See, e.g.*, JAY ROSE, PRODUCING GREAT SOUND FOR FILM AND Video 84 (Elinor Actipis ed., 2008).

[169] *See, e.g.*, Anthony Breznican, *Sundance May Be a Little Cloudy; Festival's Odd, Low-Budget Films Could Be Lost in Audience Escapism, Studio Woes*, USA TODAY, Jan. 15, 2009, at 1D. (describing various film projects including *Mystery Team* from the New York based YouTube comedy group Derrick Comedy).

[170] *See generally*, ROBERT H. WICKS, UNDERSTANDING AUDIENCES: LEARNING TO USE THE MEDIA CONSTRUCTIVELY 74 (2000).

[171] Bill Ivey & Steven Tepper, *Cultural Renaissance or Cultural Divide?*, CHRONICLE OF HIGHER ED., May 19, 2006, at B6, *reprinted in* GRANTMAKERS IN THE ARTS READER, Summer 2006, *available at* http://www.scribd.com/doc/16220004/Cultural-Renaissance-or-Cultural-Divide); *see also* Laura Grindstaff, *Cultural Sociology and its Diversity*, 619 ANNALS AM. ACAD. POL. & SOC. SCI. 206 (2008).

"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."[172] The curatorial participant is an active partner in the promotion and dissemination of works they value.

The curatorial audience is not primarily comprised of amateur performers, garage band musicians or fan fiction authors (although a person who is an amateur artist is likely also to be a curatorial audience member). Instead, the curatorial audience is comprised of active fans collecting content, sharing their opinions with others on social media sites, and promoting their favorite artists.[173] They have more similarity to the fan clubs of the 1950's, but with the power and connectedness of today's social media, the curatorial audience has the potential to reshape the marketing and eventually the green-lighting process for new media.

The curatorial participant has become a critical part of the Hollywood experience. The industry has transitioned from the era of major newspapers controlling the opinions and box office of the public[174] and past the era of *At the Movies*.[175] The diffusion of opinion has made the influence of any particular critic far less influential than before. Instead, the socially networked curatorial audience influences decisions with previews and posts. Comments on trailers posted to YouTube, ratings on Netflix, and other feedback systems fuel the information loop.

The curatorial participant has only begun to flex her muscle.[176] Large groups on MySpace and Facebook, press briefings in Second Life, and

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[172] *Id.*

[173] Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 924–25 (2009) (citing Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008)) ("User-generated content can be found on wikis, blogs, Twitter feeds, YouTube, Facebook, and pirate websites, as well as in virtual worlds, reactions to news stories, reactions to others' reproductions of news stories, and ratings for products or ratings for seller reputations – not to mention many more places yet to be described or envisioned. They are part of emerging social networks of self-expression that are the foundation of our online political and social culture. All these networks, sites, and virtual worlds raise issues of creativity, ownership, collective authorship, and illegal appropriation of previously copyrighted works.").

[174] Stephen Foley, *The Writing's on the Wall for the Old-style American Newspaper*, THE INDEPENDENT, Dec. 15, 2008, at 41 ("15,000 jobs have been lost this year, according to Paper Cuts, a website monitoring lay-offs—more than one out of every eight.").

[175] *At the Movies* (syndicated TV broadcast 1982-1990); *see also Siskel and Ebert*, MUSEUM OF BROADCASTING COMMUNICATIONS, http://www.museum.tv/archives/etv/S/htmlS/siskelandeb/siskelandeb.htm (last visited Jan. 5, 2008) (the show had its greatest impact when hosted by Gene Siskel and Roger Ebert from 1982-1990; it continues with other hosts).

[176] *See* Anita Watts, *Interactive Impact: Web Promotions and Today's Cinema*, FILM J. INT'L, Feb. 1, 2008, at 52.

Internet-only promotions all help fuel the participation of the online, socially networked audience.[177] These activities will continue to expand as traditional media contracts in scope and influence. Moreover, film companies will invariably develop affinity programs to help create anticipation in their more loyal audience members to participate more actively in their social networks.

C. Affinity: The Audience as Marketing & Distribution Partner

The most effective media companies will adopt the reintermediation model which "uses exclusivity to improve affinity."[178] Under this model, producers of goods, services, and content can eliminate the traditional supply chain that supported their distribution and instead create a direct relationship with the consumer.[179] To compete in this open marketplace, the producer needs to differentiate itself from the competitors. "The Internet is the first true interactive commercial medium, and it appears that the general gratifications frequently identified in studies of non-interactive media must now be supplemented with ... socialization."[180] "Reintermediation strategy [utilizes] contracting strategies, consumer data information, and structural business approaches to encourage additional steps in the consumer transaction which build an ongoing relationship between the enterprise and the consumer."[181]

The most defensible way to differentiate a company comes from exclusive contracts or other proprietary regimes, but customers often dislike exclusive dealing agreements, such as two-year cell phone contracts or proprietary DRM systems like those originally used on iPods. While the reintermediation model builds the relationship on a small amount of exclusivity, the primary tool is an affinity relationship that rewards the consumer for affiliation and engaged behavior.

Disney has provided some of the best examples of affinity-based audience development through the advertising it uses on its basic cable

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177 *Film Marketing: Roaring Success*, NEW MEDIA AGE, June 26, 2008, at 21.

178 Garon, *supra* note 117, at 233–34. The description of Amazon's strategy is illustrative: "Amazon.com has moved the furthest to introduce its reintermediation strategy, creating an intuitive user interface which pulls consumers into the website with highly customized e-mail communications and an equally customized home page; a proprietary product distribution device and increasingly control over products sold on its platform." *Id.* at 233.

179 *Id.* at 233-34; *see also* Evans & Wurster, *supra* note 114, at 73–74.

180 Thomas F. Stafford & Marla Royne Stafford, *Identifying Motivations for the Use of Commercial Web Sites*, *in* BIJAN FAZLOLLAHI, STRATEGIES FOR ECOMMERCE SUCCESS 63 (Mehdi Khosrow-Pour et al. eds., 2002).

181 Garon, *supra* note 117, at 231.

channel to promote its television, motion pictures, theme parks, teen music sensations, cruise line, merchandise, and other ventures.[182] The interaction of each media builds the social and online community for the other media ventures.[183] Using a similar model for a different demographic, Harley-Davidson has become masterful at building communities of motorcycle enthusiasts around their brand of bikes.[184]

An innovative approach to theatrical distribution involves the Brazilian film exhibitor, Moviemobz.[185] Each week, participants vote on the independent film they would like to see in their local-film art house, and the winning selection is digitally distributed to that theatre for the weekend showings.[186] The model allows the audience to participate directly in the programming of the theatre. Different films are shown at different theaters because local tastes differ. Another approach is the "inverted" film festival, From Here to Awesome (FHTA), described as a "discovery and distribution festival."[187] Like Moviemobz, online viewers vote for their favorites, building an audience for their success. In both cases, the promoters are using the interactivity of the Internet to build communities around the content. SnagFilms provides opportunities for documentaries to be seen before they appear in theaters. SnagFilms has declared that its online documentary site has served one billion page views.[188] Other examples are also growing, including iTunes, Amazon Video on Demand, Netflix, YouTube, Hulu, Joost, Babelgum, Jaman, IndiePix, The Auteurs and the previously mentioned SnagFilms.[189]

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182 *See, e.g.*, Jon Caramanica, *Tween Princess, Tweaked*, N.Y. TIMES, July 19, 2009, at AR1, *available at* http://www.nytimes.com/2009/07/19/arts/music/19cara.html.

183 *Disney Draws Kids into Branded Virtual Worlds*, NEW MEDIA AGE, Dec. 6, 2007, at 1 ("We used to look at the internet as a distribution and marketing channel,' said Cindy Rose, senior VP and MD of Walt Disney Group EMEA. 'Now we also see it as a platform to create unique content, both expansions of existing franchises and new content.'").

184 *See* CHIP CONELY, PEAK: HOW GREAT COMPANIES GET THEIR MOJO FROM MASLOW 139 (2007).

185 John Hopewell, *Website Sets Brazilian Screenings*, VARIETY, Sept. 1-7, 2008, at 8, *available at* http://www.variety.com/article/VR1117991371.html.

186 *Id.*

187 Eric Melin, *Experimental Distribution*, DIGITAL CONTENT PRODUCER, June 1, 2008, at 22, *available at* http://digitalcontentproducer.com/displaypres/revfeat/experimental_distribution/index.html.

188 *SnagFilms Celebrates Anniversary—and One Billion PageViews—By Featuring Exclusive, Limited-Time Showings of Major Unreleased Documentaries, Such As "The Entrepreneur,"* BUS. WIRE, July 16, 2009, http://www.businesswire.com/news/home/20090716005313/en/SnagFilms-Celebrates-Anniversary—Billion-PageViews--.

189 Andrew O'Hehir, *Movies Online: The Future Is (Almost) Here*, SALON.COM, June 17, 2009, *available at* http://www.salon.com/ent/movies/btm/feature/2009/06/17/digital_dist/index.html ("Online movie delivery has exploded in the last year, at least compared to its virtual nonexistence before that. Within a few clicks from this page, you could be watching a documentary about barehanded fishing in Oklahoma, the Soviet-era magic-

These examples and others on the Internet use different distribution models. Some are free content services,[190] while others charge a monthly subscription[191] or a per-picture fee.[192] Some are streamed while others allow the audience member to own a copy of the picture. All the different Internet-based distributors, however, share something in common with each other that theatrical motion picture releases and television lack, which is the ability for the audience to talk amongst themselves and provide popularity and rating feedback. The social feedback engages the members of the audience, making them care more about the content.[193] The time spent by audience members rating their choices and writing reviews predisposes them to those websites. "Receiving online attention can make people feel closely bonded to a virtual community and add new dimensions to their sense of self."[194]

The difficulty with this innovation is its interaction with the established norms for theatrical film distribution. One simple example of this relates to rules for Oscar eligibility.

> The Academy of Motion Picture Arts and Sciences requires that to be eligible for the prestigious Oscar, a movie must be a feature film of more than 40 minutes in length, publicly exhibited exclusively for at least seven days for paid admission in a commercial theater in Los Angeles County. The rules are very clear about activities that will make a film ineligible for consideration:
>
> Films that, in any version, receive their first public exhibition or distribution in any manner other than as a theatrical motion picture release will not be eligible for Academy Awards in any category. (This includes broadcast and cable television as well as home video marketing and Internet transmission.) However, ten minutes or ten percent of the running time of a film, whichever is shorter, is allowed to be shown in a nontheatrical medium prior to the film's theatrical release.[195]

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realist classic *Shadows of Forgotten Ancestors* or *Hotel for Dogs*. Come September, Sally Potter's new film *Rage* will premiere as a series of episodes on Babelgum, at the same time it's released in theaters and on DVD. The Palestinian film *Laila's Birthday*, an international festival favorite with no theatrical deal, was recently made available for three weeks on the Auteurs, a new cinephile streaming site that's currently in beta.").

190 *E.g.*, HULU, http://www.hulu.com; YouTube, http://www.youtube.com.

191 *E.g.* NETFLIX, http://www.netflix.com.

192 *E.g.* iTUNES, http://www.apple.com/itunes/overview/; AMAZON, http://www.amazon.com.

193 *See* CONLEY, *supra* note 184, at 139.

194 LISA JOHNSON & CHERI HANSON, MIND YOUR X'S AND Y'S 160 (2006).

195 JON M. GARON, THE INDEPENDENT FILMMAKER'S LAW AND BUSINESS GUIDE: FINANCING, SHOOTING, AND DISTRIBUTING INDEPENDENT AND DIGITAL FILMS 314 (2d ed. 2009) (quoting Academy of Motion Picture Arts and Sciences, 82nd Academy Awards of Merit for Achievements During 2009, Rule Two,

As a result of the traditional rules for the Academy Award, the use of Internet streaming to build a market and attract theatrical release will also result in the film losing its Oscar eligibility. This may not affect a great many films, but considering how few artistically recognized films actually receive theatrical distribution,[196] the problem is real. There may very well be both narrative and documentary films that have the potential to achieve national recognition if the standing policies of the motion picture industry were more open to the new modalities of distribution.

IV. CONTENT AND CONTROL FOR THE FILMMAKER

The rules for creating, marketing and distributing films derive from a host of different sources. The Academy of Motion Picture Arts and Sciences controls the rules for the Academy Awards statuette, the Oscar, while collective-bargaining agreements with various trade unions require that their members participate only in projects that meet with the approved production contract terms and conditions. Some of these rules come from industry collective-bargaining agreements, while others come from terms and conditions of contracts that have become standardized throughout the industry. Creators of new media need to understand these norms and anticipate how to seek accommodations to achieve their goals.

A. Union Jurisdiction

In the latest round of collective-bargaining agreements involving the Alliance of Motion Picture and Television Producers ("AMPTP" or "Producers") with the various trade unions, the unions and Producers agreed to allow the existing unions jurisdiction over new media, while allowing the Producers to negotiate on a project by project basis for many of the members' services. Among the unions involved are the Writers Guild of America (WGA), the Directors Guild of America (DGA), International Alliance of Theatrical Stage Employees (IATSE), the American Federation of Television and Radio Artists (AFTRA),[197] and after a much delayed agreement, the Screen Actors Guild (SAG).[198] As described by IATSE

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section 3, *available at* http://www.oscars.org/awards/academyawards/rules/82aa_rules.pdf).

[196] Michael Cieply, *Movies Sell Slowly at Sundance*, N.Y. TIMES, Jan. 26, 2009, at B3, *available at* http://www.nytimes.com/2009/01/26/business/media/26sundance.html.

[197] *See* INT'L ALLIANCE OF THEATRICAL STAGE EMPLOYEES, ET AL. (IATSE), FACTS ABOUT THE NEW BASIC AGREEMENT 5, http://www.iatse-intl.org/news/Basic-Facts%20about%20the%20New%20Contract%20FINAL.pdf.

[198] *See* Dave McNary, *SAG eyes guild ties*, DAILY VARIETY GOTHAM, June 12, 2009, at 1; Dave McNary, *SAG Talks to Start 9 Months Early*, DAILY VARIETY GOTHAM, June 19, 2009, at 11.

International President Matthew D. Loeb, "[t]his new agreement both protects members and allows new media to evolve."[199]

The terms provided in the WGA agreement are representative. The agreement includes a new media sideletter guaranteeing payment minimums and residuals for its members.[200] The WGA side letter differentiates residuals based on three categories of content: "New Media Productions Derivative of Dramatic Programs (other than Daytime Serials)"; "New Media Productions Derivative of Comedy-Variety Programs and Daytime Serials"; and "All Other Types of Derivative New Media Productions."[201]

Because of the transitional nature of productions created for the Internet, the collective-bargaining agreements are flexible regarding their coverage:

> Coverage shall be at the Company's option with respect to "Experimental New Media Productions." An "Experimental New Media Production" is defined as any Original New Media Production (1) for which the actual cost of production is either: (a) $15,000 or less per minute of program material as exhibited, or (b) $300,000 or less per single production as exhibited, or (c) $500,000 or less per series of programs produced for a single order; and (2) the literary material for which has not been written under employment by, or acquired from, a "professional writer," as that term is defined in Article 1.C.1.b. of the [Minimum Basic Collective Bargaining Agreement].[202]

Signatory companies that make original content with a lower budget without using protected union members can do so without following the collective-bargaining agreement. If the budget is higher, or if the writer meets the collective-bargaining definition as a "professional writer," then the WGA will try to require the producer to pay the writer according to the motion picture provisions of the collective-bargaining agreement.

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[199] Press Release, IATSE & AMPTP, IATSE, AMPTP Agree to New 3-Year Contract (Nov. 19, 2008), *available at* http://www.iatse-intl.org/news/Joint%20IATSE-AMPTP%20Release.pdf.

[200] Sideletter from WGA to J. Nicholas Counter III, President, Alliance of Motion Picture and Television Producers on Literary Material Written for Programs Made for New Media (Feb. 13, 2008), *available at* http://www.wga.org/contract_07/NewMediaSideletter.pdf.

[201] *Id.* § 2 ("A 'Derivative New Media Production' is a production for New Media based on an existing television motion picture that was produced for 'traditional' media—*e.g.*, a free television, basic cable, or pay television motion picture (the 'Original Production')—and is otherwise included among the types of motion pictures traditionally covered by the MBA.").

[202] *Id.* § 1.

Similarly, the 2009 collective-bargaining agreement between SAG and AMPTP has many of the same provisions.[203] Among the terms included in the 2009 SAG Basic Agreement were those related to new media, defined as "audiovisual entertainment programs that are made for the Internet, mobile devices or any other 'new media' platform known" on the date of agreement ratification.[204] Because significant disagreement exists whether SAG and the other unions have jurisdiction over new media,[205] the tentative compromise includes a provision that derivative works from covered productions are within SAG's jurisdiction,[206] as well as original productions that are below a certain dollar threshold[207] or use SAG members who have limited production credits.[208] By implication, as with the WGA sideletter, those productions made by AMPTP signatories to the 2009 SAG Basic Agreement that fall outside the two categories of productions would be treated by the union as covered by the theatrical motion picture provisions

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[203] Tentative Agreement Between the Producers Represented by the AMPTP and the Screen Actors Guild for Successor Agreements to the 2005 Producer–Screen Actors Guild Codified Basic Agreement and the 2005 Screen Actors Guild Television Agreement (Apr. 16, 2009) (hereinafter 2009 SAG Basic Agreement), *available at* http://www.sag.org/tvtheatrical-negotiations (follow hyperlink to TV/Theatrical Tentative Agreement).

[204] *Id.* § 7.

[205] *Id.* § 7.A n.1 ("During negotiations, the parties expressed their disagreement as to the proper interpretation of the recognition and scope provisions of the Codified Basic and Television Agreements, the jurisdiction of SAG and AFTRA with respect to New Media Productions and the applicability of the SAG Codified Basic Agreement and Television Agreement to such New Media Productions. Pursuant to Paragraph H. below, the parties reserve all of their respective positions on these issues. Nothing in this provision is intended to expand or contract the scope of SAG's jurisdiction over New Media Productions. Rather, this provision establishes terms and conditions of employment applicable to those New Media Productions to which the Codified Basic and Television Agreements otherwise apply.").

[206] *Id.* § 7.B ("A 'Derivative New Media Production' ('DNMP') is a production for New Media based on an existing motion picture that was produced for 'traditional' media (other than one produced for basic cable) (the 'Original Production'), to the extent that such production is covered under the terms of the Codified Basic Agreement or Television Agreement.").

[207] *Id.* §7.C ("Coverage shall be at the Producer's option with respect to 'Experimental New Media Productions.' An 'Experimental New Media Production' ('ENMP') is defined as any Original New Media Production (1) for which the actual cost of production does not exceed: (a) $15,000 per minute of program material as exhibited, and (b) $300,000 per single production as exhibited, and (c) $500,000 per series of programs produced for a single order; and (2) does not utilize a covered performer.").

[208] *Id.* ("A 'covered performer' is an individual who has been employed pursuant to the terms of a collective bargaining agreement covering his or her employment as a performer and who. . . has at least two (2) television (including free television, pay television, basic cable or direct-to-video) or theatrical credits; has at least two (2) credits in a professional stage play presented on Broadway, off Broadway (as that term is understood in the live theater industry), under the LORT, COST or CORST contracts or as part of an Equity national tour; has been employed as a performer on an audio book; or has been employed as a principal performer, announcer, singer or dancer in a national television or radio commercial, interactive game or non-broadcast/industrial production. The Producer shall be entitled to rely on the representation of the performer as to whether he or she meets the definition of a 'covered performer.'").

of the 2009 SAG Basic Agreement. The result is continued ambiguity and expectations for a difficult negotiation when the contract is revised in 2011.

Like the other unions, AFTRA extended its jurisdiction to new media under the most recent round of negotiations.[209] In addition, AFTRA is a more significant union for video games and interactive content.

> The AFTRA Interactive Media Agreement covers performers who perform primarily in interactive programs [sic] i.e., personal computers, games, arcade games, etc., as well as entertainment programming such as computer and video graphic animation and/or tape video animation that portray characters for the purposes of a microprocessor based game which [can] be manipulated by the user.[210]

AFTRA's jurisdiction may be more relevant to the Internet than some of the other trade unions; however, it is unclear whether it has had much impact on forcing producers of videogames and interactive content to sign its collective-bargaining agreement.[211]

Regardless of the particular union involved, the terms of the various new media agreements provide significant payment obligations for the re-use of content, which was created for one online project, in another project.[212] Producers willing to enter into collective-bargaining agreements must be mindful of these financial obligations that will continue well past the initial time window for the online distribution. Although the unions did not achieve many of their goals during the recent collective-bargaining-agreement negotiations,[213] the jurisdictional concessions over Internet media will likely prove historically critical to their continued role.[214]

B. On-Set Marketing and Promotion

Just as the collective-bargaining agreements set out a normative rule set for production and the payments for cast and crew, the standardized

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[209] Armin Shimerman, *AFTRA's Proposed New-Media Covered-Performer Clause*, BACK STAGE EAST, July 3, 2008, at 8.

[210] *About Interactive Media*, AFTRA, http://www.aftra.com/C55C656DECC041639C2E2974813AC58A.htm (last visited Dec. 9, 2009).

[211] *See generally* TAY VAUGHAN, MULTIMEDIA: MAKING IT WORK 458–61 (Tim Green et al. eds., 7th ed. 2006).

[212] *See, e.g.*, 2009 SAG Basic Agreement, *supra* note 203, § 7.D.3.

[213] Dave McNary, *Guild Won't Budge*, DAILY VARIETY, June 16, 2008, at 7; Meg James, *Strike Report: Studio Chiefs Act as Peacemakers; News Corp.'s Chernin and Disney's Iger are Integral in Crafting a Labor Deal with Writers*, L.A. TIMES, Feb. 11, 2008, at C1.

[214] *See* Leslie Simmons, *SAG Outlines New-Media Value*, HOLLYWOOD REP., Apr. 25, 2008.

agreements common to film production companies and distributors tend to have this same effect. While the particular provisions may vary somewhat from transaction to transaction, these agreements are roughly the same throughout the industry. For producers hoping to take full advantage of the growing curatorial audience involvement, some of the standard contractual provisions could produce unanticipated problems and need to be revised to achieve the producer's goals.

One of the most significant aspects for a film involves the intersection of social media and the promotion of that film. Modern technology proves both a benefit and bane for traditional filmmaking. Filmmakers complain that they can rarely shoot scenes in public without those scenes being recorded on cell phone cameras and posted to YouTube or other sites.[215] "Of all the battlefronts in the spoiler wars, location shoots are the places where filmmakers and show creators feel the most exposed, the most overtly under siege—and maybe the most powerless to plug leaks."[216]

Producers working in this environment have only a few options. They can move the scenes to indoor sets, relocate to exterior private property that is well away from public access and view, or change their marketing strategies.[217] The change in marketing strategy may mean releasing more information about the filming during production.

> Comic-book movies, a dominant genre these days, can't set foot outside without first doing controlled photo shoots to show off the snazzy hero and villain getups that fans are anxious to see. Otherwise, the Net will be full of fuzzy, grainy amateur shots within hours of filming, and soon after that, inevitably, posts complaining that the movie looks like crap. "It directly affects PR, and drives when you release images to the public," says [Marvel Studios production chief Kevin] Feige. "We want to be the first ones to unveil it. Not some scooper with a camera phone."[218]

Better, the theory goes, to be the source of the information than to play catch-up with it.

Inevitably, film companies must learn to embrace this aspect of production marketing. The marketing of a modern movie begins well

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[215] Steve Daly, *Movie Sets Under Siege!*, ENT. WKLY, June 6, 2008, at 89 ("Anyone working on a high-profile movie or TV show these days dreads seeing two words in a script: Exterior shot. Filming a hot project at an outdoor location has become a swim in a giant, incredibly public fishbowl.").

[216] *Id.*

[217] *Id.*

[218] *Id.*

before the film is finished. New media can help. Social networking tools such as tweeting, blogging, and posting videos to YouTube and other websites can be used to build awareness of a production and develop a following for the film.[219] The indie cult hit *The Blair Witch Project*[220] is generally credited with initiating this trend:

> In 1998, a year before *The Blair Witch Project* was released, its creators built a bogus Web site based on the film's plot about three missing documentary filmmakers and their found footage. Visitors fell for it hook, line and sinker, creating an urban legend and, unintentionally, the first viral marketing campaign.[221]

Although the modern audience may be too savvy to fall for most fictionalized websites, the use of a website can play an important role as a theatrical playbill to highlight important aspects of story, cast and crew. After distribution, the Internet presence can provide the extra elements currently distributed on the DVDs.

> The film company should maintain a Web site with select photographs and stories that emphasize the central marketing elements of the movie. The writers, director, and producer may wish to make selective event appearances to promote those same central elements.
>
> Film companies tend to get caught up in the details of making of the movie, but marketing is about reinforcing the reasons to attend the finished film. Rather than providing a weekly update on principal photography, an e-mail newsletter should focus on reminding the core audience why the forthcoming movie will benefit their community and be worth the wait.[222]

The challenge for producers to control on-set marketing may come from within the production as well as from the outside. When things go wrong on the set, too many personal cameras, cell phones, and other devices are at the ready to spread the gossip.[223] Producers generally obtain

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219 *See* Mark de la Viña, *Selling 'Sarah Marshall'*, SAN JOSE MERCURY NEWS, Apr. 13, 2008; *cf.* Adrian McCoy, *Viral Videos Ensnare Millions of Viewers in their Net*, PITTSBURGH POST-GAZETTE, Dec. 26, 2008, at C1.

220 THE BLAIR WITCH PROJECT (Haxan Films/Artisan Entertainment 1999).

221 Steve Persall, *Publicity Stunts: Made You Look!*, ST. PETERSBURG TIMES, July 9, 2009 at 6W.

222 GARON, *supra* note 195, at 312.

223 *See, e.g.*, Mickey O'Connor, *Christian Bale Apologizes: "I Acted Like a Punk,"* TV GUIDE (Feb. 6, 2009, 10:28 PM), http://www.tvguide.com/News/Christian-Bale-Apologizes-1002543.aspx (responding to his rant at the director of photography during the filming of *Terminator Salvation*).

legal control over information regarding their projects, as illustrated by the typical contractual provision:

> 21. Confidentiality; Publicity. Company shall have the exclusive right to issue and to license others to issue advertising and publicity with respect to the Picture, and Artist shall not circulate, publish, or otherwise disseminate any such advertising or publicity without Company's prior written consent. Artist hereby grants to Company the right to issue and authorize publicity concerning Artist, and to use Artist's name, voice, and likeness and biographical data in connection with the distribution, exhibition, advertising, and exploitation of the Picture. Without limiting the generality of the foregoing, Company may use Artist's name, voice, and likeness provided reference is made to the Picture or the literary property or screenplay upon which the Picture is based, or any part thereof, or to Artist's employment hereunder, and provided Artist is not represented as using or endorsing any product or service.[224]

Despite the legal rights, however, little can be done to stop such posts. Future versions of these provisions will include language that makes blogs, tweets, photographs, and video/film explicitly within the control of the production company.[225] At the same time, however, building audience interest through well-chosen content could build the fan base.

Just as production companies are expected to deliver hundreds of on-set publicity photographs for use by the distributor, some distributors may expect production companies to begin building an audience with on-set blogs, tweets, e-mail, and posts.

Some of these posts will come from the cast and crew. Others could potentially come from the characters themselves. An interesting example of this marketing tactic has been deployed for the Focus Features film, *9*,[226] an animated film directed by Shane Acker.[227] Well before the film's release, "The 9 Scientist," the lead human character in this animated feature, began updating "his" Facebook page.[228] According to the Facebook Statement of

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[224] GARON, *supra* note 195 at 396-97 (provision in Sample Actor Employment Agreement for SAG Modified Low Budget Agreement).

[225] *See* Halbert, *supra* note 173, at 933 ("YouTube has catapulted into prominence as . . . a complex area of original work, videoblogs, discovered talent, as well as unauthorized video content. In other words, it is a content owner's nightmare in terms of controlling what is available.").

[226] 9 (Focus Features 2009).

[227] *9 (2009)*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0472033/ (last visited Dec. 9, 2010). *See generally* Gina McIntyre, *Tim Burton's Descent into the Rabbit Hole*, L.A. TIMES (Aug. 1, 2009), http://articles.latimes.com/2009/aug/01/entertainment/et-burton1.

[228] Peter Bowen, Editor's Blog, *The 9 Scientist on Facebook*, FILM IN FOCUS (June 9, 2009),

Rights and Responsibilities,[229] "[f]acebook users provide their real names and information, and we need your help to keep it that way. . . . You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission."[230] By the terms of the Facebook license, to run the marketing campaign used in *9*, Focus Films is required to obtain Facebook's permission. Since The 9 Scientist is clearly a fictional character describing the prestory of the film, there is likely to be little confusion among Facebook users. For other projects, however, the ability to use social media to generate interest in the film and to create the impression of a true-life story using fictional posts is quite powerful. Producers using the technique should, however, be cognizant of the terms of service agreements if they choose to blur the lines between fact and fiction.

C. Marketing Control—Producer v. Distributor

The challenge for the film producer is that potential distributors may have different goals regarding the marketing of the project. If the prerelease campaign does not work, the failed marketing will add an additional impediment to the sale of the film.[231] In essence, the independent producer needs two hits; she must bank on both the quality of the film and the quality of the campaign in order to attract distribution. If the marketing approach is successful, however, and a large following has been built for the production, then it should be less expensive to promote and therefore attract more potential distributors.[232]

Once the production finds a distributor, the locus of control will switch to the distributor. The typical distribution agreement will require total transfer of any copyrightable material to the distributor for the term of the agreement in all media, including the Internet and all social media.[233]

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http://www.filminfocus.com/blog/the__em_9__em__scientist_on_facebook; *9 Scientist*, FACEBOOK, http://www.facebook.com/9scientist (last visited Aug. 11, 2009).

229 *Statement of Rights and Responsibilities*, FACEBOOK, http://www.facebook.com/terms.php?ref=pf (last visited Dec. 9, 2010).

230 *Id.*

231 GARON, *supra* note 197, at 313.

232 *Id.*

233 *See, e.g.*, TAG Entertainment, Inc., Distribution Agreement- Worldwide- Motion Picture & Television, *available at* http://www.sec.gov/Archives/edgar/data/1001133/000095013605002099/file007.htm (hereinafter TAG Distribution Agreement):

> [Producer] sells, grants, sets over and assigns to [Distributor] throughout the Territory and during the Term, the sole and exclusive right, grant and privilege, under copyright and otherwise, to exhibit, distribute, market, reissue, transmit, perform and otherwise deal in and exploit the Picture and trailers thereof, and excerpts and clips therefrom, in any and all languages and versions (including dubbed, titled and narrated), in all sizes and gauges of film, tape and other material now known or hereafter devised, on or with respect to which a motion picture or any part thereof is printed,

Although the term "social media" and its components (such as blogs, tweets, posts, etc.) are not yet typically described in these agreements by name, the contracts utilize the concept of *all media now known or hereafter created*, which sufficiently covers these evolving technologies.[234]

Producers hoping to control their film's marketing campaigns throughout distribution must be much more explicit in terms of their plans. The agreement between the producer and distributor should specify which of the companies will pay the costs of the Derivative New Media Productions and be responsible for the payment of the residual fees.[235] The agreement should also identify which company will be posting the content and managing the content online. The distributor will expect that the producer has control over all content involving the production and media surrounding the production.[236] As a result, blogs, tweets, websites, and other material based on the content of the production created by cast and crew during the shoot may be considered part of the material that the distributor acquires as part of the distribution agreement. (Comments about life on set and other personal tweets and blog entries should not be said to fall within these standard agreements.[237]) If the producer has allowed this material to be created by cast and crew without any control or oversight,

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recorded, reproduced, duplicated or otherwise preserved for:

I. Theatrical purposes of any and all kinds;

II. Non-theatrical, educational, industrial, commercial and trade purposes of all kinds;

III. Television in all forms . . .

IV. Audiovisual discs and cassettes and other similar devices intended primarily for home use (in accordance with a separate home video distribution agreement executed concurrently herewith, herein "The Home Video License"); and

V. All other methods of exploitation or distribution now or hereafter known; by every means, method, process, medium or device now or hereafter known, invented, contemplated or devised, and in connection with such uses (whether the same be for profit or otherwise) to use and perform any and all music, lyrics and musical compositions contained in the Picture and/or recorded in the sound track thereof.

Id. § 4(c).

[234] *Id.* § 4(c)(V); *see* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1611 (2009); Anthony diFrancesca, *New Use in Copyright: A Messy Case*, 14 MEDIA L. & POL'Y 34, 35 (2005).

[235] *See* 2009 SAG Basic Agreement, *supra* note 203, § 7.

[236] *See, e.g.*, TAG Distribution Agreement, *supra* note 233, § 5(f) ("[Producer] has not sold, assigned, transferred or conveyed, and will not sell, assign, transfer or convey, to any party, any right, title or interest in or to the Picture or any part thereof, or in or to the dramatic or literary material upon which it is based adverse to or derogatory of the rights granted [Distributor], and [Producer] has not authorized and will not authorize any party during the Term to distribute, exhibit or exploit in any language in any part of the Territory by any means, the Picture, or any remake or sequel thereto, or any motion picture of any type or kind *based in whole or in part on such literary or dramatic material*, or any of the characters depicted therein, and has not authorized and will not authorize any other party to exercise any right or take any action which derogates from or competes with the rights herein granted or purported to be granted [Distributor].") (emphasis added).

[237] "Real world" content such as personal or biographical information about the cast and crew is not part of the literary work created by the producer and cannot be assigned to the distributor as additional literary material.

there may be a problem between the distributor, who believes the contract assigns it exclusive ownership of this ancillary content, and the individual creators of the material, who may not consider it to be within the scope of the employment agreements they signed.

Also important to productions utilizing social networking is the obligation to police the use of the content by third parties. While it is naïve to expect that any company can successfully remove all content from the Internet that was once lawfully posted but no longer desired, the duty to take down the company's own material and request removal by other companies should be specified. This difficulty is one of the topics unfortunately not dealt with in the collective-bargaining agreements regarding "New Media" productions.[238] The contracts provide for residuals based, at least in part, on the number of weeks particular material is posted to the Web.[239] Such methodology ignores the viral nature of the Internet, the ability of the curatorial audience to collect and repost this content, and the diffuse control inherent in online communities. A more realistic definition would set the number of weeks as based on the producers or distributors own websites and the content that is directly under the contracting party's control. Unions, however, may legitimately fear that this would incentivize producers and distributors to actively encourage the *theft* of this content so that the content could be posted in a residual-free manner. At the moment, this ambiguity remains yet another potential trap for the unwary producer.

The control over Derivative New Media Productions can create problems in other ways as well. Film distributors generally require a guarantee that the material is original. The delivery requirements for a typical film distributor will provide that "[n]either the Picture nor any part thereof has been released, distributed or exhibited theatrically, non-theatrically, by means of television or by any other medium in the Territory, nor has it been, and it will not be, banned by the censors of, or refused import permit or entry into, any part of the Territory."[240] If material has been distributed online during the production, however, then that material will fail to meet the obligation that it has not been previously seen.

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238 *See* 2009 SAG Basic Agreement, *supra* note 203, § 7.B.

239 *Id.*

240 TAG Distribution Agreement, *supra* note 233, § 5(e).

The best way to anticipate this problem will be for the producer to collect all the material that the production company has posted online and include that material, along with a written index, as a set of exceptions to the originality provision of the distribution agreement. A producer should not sign the distribution agreement if she knows that the production company is in breach. By adding a list of exceptions to the obligations, both parties to the agreement understand what has occurred prior to the film's sale. If too much material has been distributed, or if the distributor does not like the material distributed, it may lead to the distributor refusing to buy a film; but this is much better than the producer finding that she is in material breach of the agreement.

An additional wrinkle may be caused by the contractual obligation to deliver a film that meets a certain MPAA rating.[241] The Classification and Rating Administration (CARA) operated under the MPAA regulates both the content of motion pictures and the trailers shown before films.[242] Green Band trailers are rated "G" while Red Band trailers are rated above that, typically "R." Historically, theatrical exhibitors would not show Red Band trailers, even before R-rated movies.[243] Some distributors have elected to use the Internet to avoid the discomfort of the exhibitors, which is putting increased pressure on the exhibitors to allow more Red Band trailers.[244] Other distributors, however, are not so comfortable with this strategy. Moreover, the decision to post unrated material prior to the theatrical release may run afoul of the CARA rating system and further frustrate the expectations of the distributor. Again, the danger is not in the strategy so much as in adopting a strategy without a clear understanding between producer and distributor.

If the standard agreement is signed without having discussed these topics and modifying the form agreement, legal liability may attach for content the producer is using online. Equally important, however, is the recognition that fear of this liability may lead to underutilizing the tremendous potential for audience development. To maximize the opportunity for the project, the producer and distributor must agree in advance on the curatorial-audience development strategy, including the

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[241] For a comprehensive explanation of the MPAA rating system, see Colin Miller, *FILM & TV: A Wolf in Sheep's Clothing: Wolf v. Ashcroft and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison*, 6 VAND. J. ENT. L. & PRAC. 265, 273 (2004). *See also* Jack Valenti, *The Movie Rating System, as reprinted in* Swope v. Lubbers, 560 F. Supp. 1328, app. 1 at 1335–41 (W.D. Mich. 1983).

[242] *See* Robert W. Welkos, *Web Trailers Pull Out All the Stops*, L.A. TIMES, Oct. 26, 2007, at E1.

[243] *Id.*

[244] *See* Patrick Goldstein, *A Red Sea of Online Trailers*, L.A. TIMES, Sept. 20, 2008, at E4.

amount of material that will be posted, the various technologies to be used, and the impact such material will have on the rating process. If these steps are taken, the production will maximize its chance of building an audience.

D. The Never-Ending Final Cut

At the other end of a motion picture's life cycle comes the increasingly common phenomenon of alternate cuts. *Billboard* reports that the practice of simultaneously releasing two or more versions of a video release began with an unrated director's cut of *The Lawnmower Man*[245] in 1992.[246] Up until that point, "special edition" versions of a movie were released "subsequent to [the] regular home video release."[247] Throughout the early 1990s other distributors also expanded the use of NC-17 or unrated versions as part of their video release.[248] With the ability to market unrated versions of movies on the Internet, the practice has grown increasingly popular.

The continued improvement in technology will lead to an increase in the amount of editing that can be done by the filmmaker after the movie has been released. Third party software can be legally used to skip select content on a film.[249] Though not specifically allowed under the Copyright Act, it may also be possible to add additional material and program the playback device to incorporate this new material into the version presented.[250] Undoubtedly, if a party were to create an unauthorized version of a film with additional material, that new work would be an unauthorized derivative work, constituting copyright infringement.[251] If, instead, the new material was never added to a copy of the original work, and was available for home viewing only, not for public performance, then a legitimate question remains whether or not the composite private performance is also an unauthorized derivative work.

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[245] THE LAWNMOWER MAN (Allied Vision 1992).

[246] Jim McCullaugh, *New Line Offering 2 Cuts of "Lawnmower Man" Video*, BILLBOARD, July 4, 1992, at 59.

[247] *Id.*

[248] STEPHEN VAUGHN, FREEDOM AND ENTERTAINMENT: RATING THE MOVIES IN AN AGE OF NEW MEDIA 213 (2006).

[249] Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9 § 202, 119 Stat. 218, 223–24 (2005); *see* Sara Gansheimer, Comment, *The Family Entertainment and Copyright Act and Its Consequences and Implications for the Movie-Editing Industry*, 8 TUL. J. TECH. & INTELL. PROP. 173, 178 (2006) ("FECA expressly permits digital filtering, while physical or digital cut-and-splice editing of movies is noticeably absent from the legislation.").

[250] *Id.* at 177–78. ("In addition to removing offensive material, the filtering technology is capable of adding in new material to cover up what one finds offensive ('filtering plus'). . . . [T]he implications and consequences for 'filtering plus' under copyright law are markedly different than for subtractive filtering.").

[251] 17 U.S.C. § 106 (2006) (the right to prepare exclusive works is one of the enumerated rights of the copyright owner).

The question may be more than theoretical. The distinction between narrative film and video games is eroding. Software exists to create composites of materials from various files on a computer hard drive or hosted on the Internet.[252] All that remains is an innovative artist to create video mash-ups that integrate material destined for new versions of the work into the original work. If the creative artist building this model is the producer, however, the distribution agreement would need to be significantly modified. These inserts would likely be covered in the material assigned to the distributor, requiring the distributor's acquiescence to build such an enterprise.

If the producer and distributor were both agreeable, then the use of this technology could enable the participation of the audience in creating content to be uploaded and integrated into the content already produced. Such an integration of audience content with professional content would create a new genre of material, essentially a form of motion picture fan fiction. While such a new medium would require careful negotiations with the trade unions and creators involved in the project, the potential is tremendous.

A second variant on the never-ending story is the continuation of storylines using web-posted vignettes and other short projects created as derivative works from the original. These Derivative New Media Productions are the primary focus of the collective-bargaining agreements and likely to be exploited by a growing number of production companies.[253] These additional vignettes or webisodes may be created by the original film producer, or the content owners may encourage fans to create their own related content.[254] These producers encourage the audience to stay involved with the characters, to expand the scope of the story, and to legitimize fan fiction in a variety of media. Nonetheless, to be successful, these webisodes will still require a good deal of time, effort, and creativity to be successful. The most popular of these projects will enhance the brand.[255]

As the line between marketing and original content further erodes, producers and distributors can exploit the natural behavior of the curatorial

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252 *See, e.g.*, OMNISIO, http://www.omnisio.com/ (last visited Mar. 7, 2010) (Omnisio, a web-based video/presentation compilation service, was acquired by Google in March 2009).

253 Nicole LaPorte, *The Strike Scenario*, L.A. TIMES, Nov. 19, 2008, at S20.

254 *See, e.g.*, *The Force is With These Videos: Atom.com and Lucasfilm Ltd. Announce Finalists for 2009 'Star Wars Fan Movie Challenge'*, ENT. & TRAVEL, July 18, 2009, at 170.

255 The good news is that all failed efforts will have small audiences and should do little to tarnish or dilute the brand.

audience to assist in content distribution. At the 2009 Comic-Con, for example, producers of the ABC television show *Lost*[256] staged live-action skits to accompany the webisodes they aired at the event.[257] The producers fully expected the panel to be filmed by news outlets and audience members and posted on YouTube and other sites across the Internet.[258] The webisodes and live-action content engaged the live audience at the panel, which in turn deployed a powerful distribution army after the event. The goal, as the producers explained, was not to find a new audience, but to keep *Lost* relevant to the audience in its final season.[259] The model highlights the importance of maintaining an affinity relationship with the audience—not merely introducing new content.

E. Total Engagement—Financing Through the Crowdfunding Presale

In addition to the standard delivery terms, which may need to be modified to allow social-media savvy producers to engage the curatorial audience, there is one last opportunity for filmmakers to connect directly with their fans. Using the technique known as "crowdfunding," a producer can presell credits in the film or other goods and services in an effort to prefinance the production.[260]

For example, the website buyacredit.com was created to support three young British filmmakers: Adrian Bliss, Benjamin Robbins and Toby Stubbs.[261] The filmmakers are approximately ten percent of the way to their goal of £1 million, raising a reported £100,000 ($149,000 U.S.) from more than 10,000 donors.[262] Others have also had some success with crowdfunding their projects:

> Franny Armstrong, a documentary director, raised £450,000 for "The Age of Stupid," a recently released film on global warming, through gifts from hundreds of donors. Casey Walker, a Canadian director, has been raising money for a romantic comedy called "Free for All ... but

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256 *Lost* (ABC television broadcast 2004-2010).

257 Brooks Barnes, *Months of Script Sessions and Rehearsals Later, 'Lost' Goes to Comic-Con*, N.Y. TIMES, July 27, 2009, at C1.

258 *Id.*

259 *Id.*

260 Kristina Dell, *Crowdfunding*, TIME, Sept. 15, 2008, at 51; Sarah Kershaw, *A Different Way to Pay for the News You Want*, N.Y. TIMES, Aug. 24, 2008, at WK4 ("In crowdsourcing, the people supply the content; in crowdfunding, they supply the cash.").

261 *See* Eric Pfanner, *Buy a Credit and Help Finance a Film; Media Cache*, INT'L HERALD TRIB., Apr. 20, 2009, at 15.

262 *Id.*

You" selling individual frames from the film for $10 each, via the Internet.[263]

Crowdfunding works by selling something directly to the public. In the case of buyacredit.com, the item sold is the purchaser's name in the end credits. That's it: £10 buys you your name on the list.[264] The purchaser is not an investor in the movie. For very low budget projects, crowdfunding can replace the much more technically challenging sale of securities to fund the production company.

The more traditional method of publicly funding a motion picture would require a public offering, complete with the requisite filing with the Securities and Exchange Commission (SEC), usually through a securities broker.[265] Even if the securities are units in a limited liability company, the seller will be required to draft a private-placement memorandum to provide extensive information regarding the seller and its key executives, the use of the funds, and the financial risks associated with project.[266] The purchasers are then entitled to an ownership interest in the seller as explained in the securities filing and the prospectus provided to every buyer.[267] Selling film-company securities or other company stock can be done directly over the Internet, but such a public sale results in a public offering of the stock and requires a full registration of the securities with the SEC and the states in which the securities are sold,[268] or else one risks liability.[269]

If the buyacredit.com project is ninety percent short and the sale of corporate securities is too difficult, an aspiring filmmaker or musician should avoid offering profits and instead presell goods. The crowdfunding concept can be expanded by growing the list of products available to the curatorial audience supporting the project. Instead of merely offering a

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263 *Id.*

264 *Id.*

265 1A HANDBOOK OF THE ECONOMICS OF FINANCE 257 (George M. Constantinides et al. eds., 2003).

266 *See* JAMES E. BURK & RICHARD P. LEHMANN, FINANCING YOUR SMALL BUSINESS 89–96 (2006).

267 *Id.* at 89.

268 JOHN E. MOYE, THE LAW OF BUSINESS ORGANIZATIONS 197 (6th ed. 2004).

269 *See* SELLABAND, http://www.sellaband.com (last visited Dec. 9, 2010). This company provides a similar model for bands. Fans pay $10.00 towards the production of an album. The band sets a monetary goal, and when the band receives that amount, it can use the proceeds to record. Fans of successfully recorded albums receive a copy of the album. But Sellaband also gives fans an interest (though a small one) in the profits of the album, which may make the payment an investment rather than merely an advance purchase of the album. *Cf.* The Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (2006) ("(a) . . . When used in this chapter, unless the context otherwise requires—(10) The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement."); SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (Forty-two persons purchased interests in a citrus grove to participate in profits from the grove.).

special thanks credit, the audience member could be sold a DVD, contingent on the completion of the project, of course. For $50, a supporter could receive a credit in the film and an advance copy of DVD prior to its general release. Depending on the nature of the project, filmmakers could also consider adding a copy of the screenplay or production t-shirts into the package (necessarily at a higher cost). Only 20,000 purchasers are needed for a $50 purchase to get the $1 million needed to produce the film. Add ticket sales at advance screenings and the income can really make a difference.

To make the participatory aspect of the project even more interesting, producers using crowdfunding to finance their films could offer both a rough cut and a final cut of the film to their supporters. Each copy of the rough cut should be watermarked to help discourage unauthorized distribution on peer-to-peer or other Internet sites. The embedded identification number would allow the supporter to respond to the rough cut by answering a survey and encouraging submission of the crowdfunder's own suggestions for changes prior to the lock of the picture. In this manner, the crowdfunding completes the circle; connecting the curatorial-audience-member supporters directly with the funding of the content, feedback during the creation of the content, recognition in credits of the content, ownership of the finished product, and ownership of memorabilia (in the form of t-shirts or mugs, etc.) promoting the content. Premium crowdfunding utilizes the social media and ties the audience support directly to the goals of the artist—representing affinity marketing at its best.

V. CONCLUSION

Crowdfunding is just one of the many ways in which producers of motion pictures can utilize the tools of social media to connect with their curatorial audience and build opportunities to succeed in the increasingly challenging media environment. Whether they use blogging, Twitter accounts, dedicated websites, or Derivative New Media Production vignettes of any other combination of media and technology, the goal is to build an audience for their production who will pay to see the movie and encourage their friends to do the same.

The standard terms in distribution agreements have yet to adapt to these changes, but the types of arrangements are rapidly becoming apparent. Distributors must modify their standard agreements to allow producers to utilize the social media on the Internet. Producers, in turn, must be very explicit with the distributors regarding the content they have posted during production and the content they plan to release separate from

the distributor. Only when the producer and distributer have come to a meeting of the minds should the distribution plan go forward. The changes to union agreements anticipate some of these changes, but those agreements continue to leave many questions unanswered. Producers must continue to work through those questions on a project-by-project basis.

The necessary changes to the contract practices are coming. Even as Jack Valenti was decrying the introduction of videocassette players, the studios were creating video distribution subsidiaries. Today, these companies are developing their own platforms to participate in social media. History is repeating itself. Just as changes to media and mores transformed Hollywood in earlier generations, the curatorial audience is reshaping media expectations. The pressure from YouTube, iPhones, social networks and digital piracy cannot be ignored. For those producers who prefer the status quo, the traditional support for a picture through advertising will continue to work, at least for a while. But as the audience increasingly relies on social media for its content, its influence will only grow.

The filmmakers, producers, and distributors who embrace these new technologies will find an eager audience, ready to grab the tools that will allow them to become active participants in the creative process. The audience is not just listening; it is joining in.