

**WGA Deal: Analysis**  
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The Writers Guild has released a deal summary at [http://www.wga.org/contract\\_07/wga\\_tent\\_summary.pdf](http://www.wga.org/contract_07/wga_tent_summary.pdf), and actual contract language (not posted, but I can email it to you). Below is my analysis of the contract language, generally in the same order as in the deal summary.

Note that this is just a summary; for definitive answers, refer to the actual contract language (which is over 50 pages in length, in three separate documents). Also, more information, and updates, are available on my blog, at <http://www.jhandel.com>.

### **Made-For New Media Provisions**

#### **Made-For New Media Jurisdiction**

If a professional writer writes original programming for new media (such as Internet and cell phones), the work will be covered by the Guild agreement, even if the budget levels for the programming are low. This has a rough equivalent in the DGA deal.

Derivative works for new media – i.e., spinoffs of existing TV shows – are covered regardless of budget level; and original programming for new media is covered above certain budget levels (must be over \$15,000 per minute and \$300,000 per single production and \$500,000 per series). These provisions are the same as the DGA deal. (It's unclear how, or if, derivative works based on theatrical or direct-to-video, product are covered.)

Some writers have criticized the budget levels for original programming as high, but bear in mind that the studios have to compete at lower budget levels with content generated by non-union Silicon Valley startups and with user-generated content (UGC), the latter of which is often produced at little cost and not for profit. Union jurisdiction would arguably hamstring the companies. Also, as the Internet grows as a venue for original programming, budget levels will likely increase, just as they have for video games.

#### **Made-For New Media Compensation**

For derivative works, relatively low compensation minimums apply, on a per-minute basis, with a floor of two minutes' compensation. Not great for writers, but better for them than the current practice of often pressuring show staff writers to do this work for free.

For original works, compensation is negotiable. That's not so good for the writers – given the relatively high budget thresholds for jurisdiction, they would have hoped for some minimums.

Pension and health provisions apply to new media.

### **Made-For New Media Credits**

The Guild determines credits on new media programs within the above jurisdiction, and credits must appear on-screen or via a link if anyone else receives such credit. This provision is consistent with one of the WGA's core functions – recall that the Guild was founded 70-plus years ago with credit as a key motivator (to counter abuses in credit granting that were then common).

### **Made-For New Media Residuals – Derivative Works**

Initial compensation covers 13 consecutive weeks of ad-supported exhibition and 26 consecutive weeks of consumer-paid exhibition.

Thereafter, (a) reuse on ad-supported platforms within one year of expiration of the 13 week period requires payment of small fixed residuals; after the one-year period, the rate is 2% of distributor's gross. And, (b) reuse on consumer-paid platforms after the 26 week period, the rate is 1.2% of distributor's gross

When derivative new media programs are reused on television, residuals for television programs apply, with some modifications. No residuals are specified if such content is released on home video (quite conceivable) or even (albeit unlikely) theatrically.

### **Made-For New Media Residuals – Original Works**

Initial compensation covers 26 consecutive weeks of consumer-paid exhibition, and all uses on ad-supported platforms.

Thus, no residuals are payable for ad-supported uses. Also, no residuals are payable for uses on consumer pay platforms if the program is budgeted below \$25,000 per minute.

Above that budget threshold and after the 26 week period, the residual is 1.2% of distributor's gross.

When original new media programs are reused on television, residuals for television programs apply, with some modifications. No residuals are specified if such content is released on home video (quite conceivable) or even (albeit unlikely) theatrically.

Note – reuse on television is exemplified by *Quarterlife* (a backdoor series), and could also represent the situation where the Internet is used to create a backdoor pilot. This is important coverage, because such backdoor series and pilots may become increasingly common – for instance, as an alternative to traditional, expensive pilots.

### **Made-For New Media Separated Rights**

For derivative works, if the writer introduces a new character that is used as the basis for a new TV series, then separated rights apply. For original works, certain separated rights apply if separation of rights would have applied had the work been written for free television.

Also, if a writer writes for new media, then later writes a television program or theatrical motion picture based on the new media content he or she write, the fact that there was such source material will not preclude separated rights.

Note: separated rights are complex, even prior to the introduction of this concept into new media. The WGA's own booklet explaining separated rights is 40 pages. I can email you a copy of the booklet if you wish.

### **Made-For New Media – Other Provisions**

Writers of covered new media programs must join the WGA. Also, disputes are subject to arbitration (as with disputes in existing version of the Guild agreement).

### **New Media Residuals**

This applies to reuse of TV programs and theatrical movies in new media (it's unclear how made-for-DVD movies are treated). Pretty much the same as the DGA deal, with a couple notable exceptions, discussed below. Details are as follows:

#### **Definition of New Media**

Internet, mobile (such as cell phones or PDAs), and "any other new media platform known as of February 13, 2008." Thus, we can expect further discussion (or discord) as additional new media platforms are developed over the next several years and beyond.

#### **Distributor's Gross**

Note below that many of the formulas are based on distributor's gross, not producer's gross. This is excellent for the writers, because distributor's gross is higher, and is more transparent.

#### **Paid Rentals**

Residuals for paid rentals – i.e., downloads or streaming where the user pays on a subscription or per-picture basis, and the payment covers viewings for a limited time period or a limited number of viewings – are paid at 1.2% of distributor's gross.

#### **Electronic Sell Through (EST) (paid downloads, such as iTunes)**

0.36% of distributor's gross below certain thresholds for number of units sold. Not a great rate for talent, and same as existing DVD formula (more particularly, there are two existing DVD

rates, and this is the higher of the two). The thresholds are high, but probably become more likely to be met as this medium eventually replaces DVD/Blu-ray.

Note – “same as existing DVD formula” actually probably means less than the existing DVD residual payment (four cents on average DVD) per unit, because EST prices will probably be lower than DVD average selling price, at least eventually. (The four cent DVD residual is actually a percentage, not a fixed amount.) But, the total residual payment may be the same or higher, because unit sales would increase at lower per-unit prices.

Above the threshold number of units sold, the rates are higher: 0.65% (theatrical) or 0.7% (TV) of distributor’s gross. Not huge numbers, but an improvement for talent over DVD.

### **Theatrical Ad-Supported Streaming**

1.2% of distributor’s gross. Note – only applies to post-July 1, 1971 films (measure from start of principal photography). For older films, apparently no residuals.

### **Television Ad-Supported Streaming for Library Content**

TV library content is payable at 2% of distributor’s gross. Library content means programs that (a) are post-1977 (and, apparently, some prior programs, but it’s hard to determine which) but (b) as to which the literary material was written prior to February 13, 2008.

### **Television Ad-Supported Streaming for New Programs**

This area is complex, and was the subject of enormous conflict. That’s probably because, when such content is rerun on TV, a high fixed residual is payable. As reuse migrates to ad-supported new media, but still exists on TV, then studios will have to pay both the high fixed TV residual and the new media residual, so they feel burdened by high costs, in a business that already is under a lot of financial pressure.

Here’s the deal:

There’s an initial “streaming window” of 17 to 24 days where no residual is payable. This isn’t great for the writers, because much viewing will occur during this time, since viewers will probably not wait weeks before they catch up with TV programs they missed on TV (or that they prefer to watch on a PC in the first instance, which is the case with many young people).

After the streaming window, there’s a residual payable. For *network prime time shows*, it works like this: in the first year or second year of the WGA contract (WGA contracts are three years), the residual is a percentage of the applicable TV residual base. That translates into a fixed residual of roughly \$1400 per year for one-hour programs and roughly \$700-\$800 for half-hours.

In the third year of the new deal (literary material written on or after May 2, 2010), the residual is seemingly 2% of distributor’s gross, which would be an improvement for the writers as compared to the DGA deal. But what one hand gives, the other hand takes away: distributor’s

gross is deemed to be fixed at \$40,000 for one-hours and \$20,000 for half-hours, resulting in a fixed residual of \$800 or \$400, respectively. So, the residual doesn't actually scale as distributor's gross increases.

By setting out a distributor's gross framework, this provision arguably makes it (somewhat) easier for the WGA negotiators in three years to argue for true scaling (or, at least, an increase in the deemed level for distributor's gross).

For other than *network prime time shows*, there's a fixed residual. It's unclear whether this is lower than the residual for network prime time – I believe so, but the contract language is quite ambiguous.

### **Paid Streaming (Non Time-Limited) or Ad-Supported Downloads**

Unclear how (or if) residuals for these uses are paid, because the deal seems to assume that all streaming is ad-supported or for a limited time (in the latter case, it would be paid under the rental formula) and all downloads are user paid. I previously blogged that these assumptions were problematic, because this leaves a gap in the contract for paid streaming or ad-supported downloads. That could engender disputes, if the deal summary is accurate.

### **Transparency**

New media residuals based on transactions between divisions of the same company have to be based on a fair market value, and the issue would presumably be arbitrable. Also, the studios and networks have to provide the WGA with new media contracts and distribution statements, without redactions (deletions), and usage data. These provisions, I believe, were not even attained by the Guild previously in traditional media (nor in the new deal).

### **Clips**

Clip residuals are low for ad-supported streaming, which will hurt late-night writers when, for instance, a Leno monologue is made available online for free preceded by an ad. Where the user pays, the residual is 1.2% of distributor's gross, but this is an unlikely scenario on the Internet. Such a business model might be more common cell phones – i.e., the user could pay \$5 extra per month on your cell bill and get unlimited comedy clips.

There are provisions for residual-free clip usage when used to promote programming.

## **Other Issues**

### **Contract Expiration**

May 1, 2011 – synchronizes with likely SAG (and announced DGA) expiration of June 30, 2011. This arguably increases the WGA's negotiating leverage, because it allows for the threat of concurrent WGA and SAG strikes; but, on the other hand, it eliminates the WGA's opportunity to easily interrupt the fall TV season mid-stream or implode the awards shows.

## **Minimums**

Various minimum compensation levels will increase by 3.5% or 3% per year under the proposed deal. Appears to be generally the same as DGA increases.

## **Cable Minimums**

Basic cable minimums were not increased to the same degree as achieved by the DGA. Specifically, under the DGA deal, directors of high-budget basic-cable programs got a 12% pay increase. However, under the proposed WGA deal, writers of such programs do not receive an equivalent bump.

Given the increasing amount of scripted content on cable (basic cable, such as FX, USA and AMC, as well as pay TV such as HBO and Showtime) – and the decreasing amount on network TV, at least for the time being (since strike-replacement reality programming is occupying time slots formerly held by scripted programming) – it seems shortsighted and unfortunate for cable TV to suffer second-class citizenship.

## **Favored Nations**

If the Screen Actors Guild gets better deal terms in its upcoming negotiations than the writers, will the writers retroactively get the benefit of those improved terms? This is called “favored nations.” (See <http://digitalmedialaw.blogspot.com/2008/02/favored-nations.html> for discussion.)

The WGA says they achieved a limited form of favored nations – it applies only to the new media provisions of the proposed agreement. So, if SAG attains better terms in another area, such as DVD residuals (which SAG has highlighted as an issue it will focus on), the writers would not get the benefit of SAG’s efforts. The WGA deal on favored nations is apparently a handshake deal.

However, the issue may be academic – AFTRA has announced that it will negotiate separately with the studios, undercutting SAG’s leverage and perhaps reducing the likelihood of any gains. Still, this story is very much in flux, and it’s too early to know whether SAG might nonetheless achieve further benefit.

## **Other Technology-Related Issues**

The parties established a committee to address the reuse of movies and TV shows on alternative digital broadcast channels, which are new channels such as LA ch. 4.1, 4.2, etc. (controlled by ch. 4) which are broadcast digitally in spectrum space used for digital transmission.

The parties also agreed to meet on a company-by-company basis to discuss electronic data transfer of residuals information. The companies first expressed the intent to move to such transfer (as a replacement for the paper transfer of information that then has to be rekeyed by the

Guild) more than ten years ago, so it might not be realistic to expect a change in procedure anytime soon.

### **Foreign Remakes of TV Series**

The parties added a new sideletter setting out residuals for foreign remakes of U.S. TV series.

### **Other**

There are many other, more minor, changes; see p. 4 of the deal summary for information.

### **Reality and Animation Jurisdiction**

The WGA abandoned these demands, as I predicted back in October, and recommended. Thus, reality and animation jurisdiction are not part of the new deal.

### **DVD Residuals**

The WGA several months ago abandoned its demand to double the residual rate, so it remains the same as always: 0.3% of the studio's gross below a certain threshold, rising to 0.36%. No change from the previous version of the contract, and no difference from the DGA. Note that SAG considers this issue still on the table for its contract negotiations, as of their last published statement on the topic, a couple weeks ago. I have argued that this decision by the WGA was a mistake for writers; see [Slipped Disc: Why DVD Residuals Still Matter – and Always Will](http://digitalmedialaw.blogspot.com/2007/11/slipped-disc-why-dvd-residuals-still.html) (<http://digitalmedialaw.blogspot.com/2007/11/slipped-disc-why-dvd-residuals-still.html>).

### **Bargaining History**

Ambiguities in the Guild agreement (MBA) are usually resolved, or at least addressed, with reference to bargaining history, composed of notes taken or exchanged during formal negotiations. However, since much of the 2008 deal was worked out in informal sessions, it's unclear how much bargaining history will be available as disputes arise.

### **Administration and Enforcement**

As the complexity of the new media provisions suggests, this deal is going to be very complicated to administer and enforce, notwithstanding the transparency provisions. Expect errors in new media, especially early on, while studios implement and debug new computer software to pay these residuals and compensation minimums.

And, because of the low dollar amounts in new media over the next few years, individual audits will generally not be cost effective. Hopefully the Guild will develop sufficient in-house capability to conduct audits, perhaps as part of the Tri-Guild (WGA, DGA and SAG) audit process.

### **Format of Contract Language**

Interestingly, the new media provisions of the MBA continue to be contained in two Sideletters buried at the end of the contract. This will seem increasingly peculiar as the Internet grows in importance.

### **Strike Termination Agreement**

There is a separate Strike Termination Agreement that deals with return to work and extension of personal services agreements, among other issues.

### **Disclaimer**

This memo is not intended as legal advice, and may not reflect the opinion of TroyGould or its clients.