

## ***The Writers' Strike: What has Changed***

The Writers Guild of America (WGA) ended its fourteen-week strike after successfully negotiating a new Minimum Basic Agreement (MBA) which increases minimum rates paid to writers, and covers—for the first time—“new media.” The three-year contract, ratified by 93.6% of the 4,060 votes cast in Los Angeles and New York, is expected to make it easier for Guild members to maintain a steady stream of income as the digital download becomes the new DVD. In order to comprehend the effect of this conclusion, however, it is important to understand the background leading up to this fight over residuals and the role of the WGA.

The key policy behind copyright law is to maintain an incentive to create by compensating creators for the success of their work. This incentive comes in the form of royalties, payments made to an author of a copyrighted work each time the work is copied, distributed, performed, aired, or displayed. In the film industry, however, an interesting framework developed over the years. The nature of screenwriting, similar to song-writing, is that the author realistically only creates a commercially-successful script once every few years. The norm used to be that a producer would pay a flat fee to the screenwriter to develop the script into a film. The fee typically would represent a license to utilize the work in some way, while the writer would retain the copyright. This situation was negative for both the writer and the producer. For the producers, the most efficient way to exploit a work is to own the copyright. Most producers are not interested in even looking at a screenplay if the writer is unwilling to assign the copyright. Otherwise, the producer will be at risk of violating the writer's derivative rights. At the same time, the writer faced the choice of actually getting a script sold, or dealing with an upfront fee that was not commensurate with the long term value

of the script, as realized from years of reruns and profits from home distribution. Writers were losing incentive to write because they could no longer afford the sporadic income from receiving a flat fee once every few years.

To remedy this situation, the WGA exists as a labor union representing professional writers in film, television and radio in contract negotiations with producers. Membership is gained once a writer receives a certain amount of credit for being employed by a MBA signatory production company. Members can only write for producers who are signatories to the MBA, which includes most well-known producers. All contracts between member writers and signatory production companies are governed by the MBA in that they must meet all of its minimum requirements. Regardless of whether a script is commissioned or not, the writer is deemed an employee and his script a work-made-for-hire. This benefits producers because they no longer have to worry about violating the rights of the original author of the script. The writers, in exchange for giving up their copyright, receive credit for their contribution to the film, a pension, health benefits, and residual payments. Residual payments are akin to royalty payments. Residuals replaced royalties because, by statute, only an author of a copyrighted work can receive royalties, and under this new scenario, writers are employees

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## ***Trademark Rights in Kosovo***

The Kosovo Patent and Trademarks Office has announced that the term for revalidation of existing Serbian rights in Kosovo will expire on October 1, 2008. Kosovo is not expected to join the Madrid Agreement or Protocol in the near future since WIPO can only accept members of the UN.

## ***UDRP—Not for Correcting Administrative Errors***

A recent UDRP decision denying transfer of a company's domain name from a former employee illustrates the importance of properly maintaining the Registrant and contact details, along with the prudence of having more than one person administering corporation's domain name portfolio. In the National Arbitration Forum decision of *Hennion & Walsh, Inc. v. Robert Isom*, FA1118409 (2008), the company's domain name, hennionandwalsh.com, was registered by the firm's computer operator (Respondent), whose responsibilities included construction and maintenance of the firm's website. When registering the domain name with Registrar Network Solutions, the employee mistakenly used his name as the Registrant, while also setting password protection on the account. Upon leaving the company's employ, the employee did not leave the password or answer to the security question, nor did he remember them. Since the employee was the only person who previously knew the password or security question, the company was unable to make any changes to its website through Network Solutions. Network Solutions would only permit access to the website if Respondent renounced his interest in the domain name. Although the employee was being cooperative, Network Solutions required the filing of a UDRP for Respondent to officially renounce his rights to the domain name.

In the UDRP decision, the Panelist easily found that Complainant had established that the domain name was identical and/or confusingly similar to the common-law mark of HENNION AND WALSH, along with finding that the Respondent did not have rights or legitimate interests in the hennionandwalsh.com domain name. The claim was denied, however, based

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rather than authors. Residuals differ from royalties in that residuals are contractual, and only compensate for continued exploitation of the script. A writer does not receive residuals when the script is theatrically released; residuals are only paid for subsequent use, whether in reruns, on DVDs, in foreign markets, or on the internet.

One of the major changes brought about with the new MBA concerns the residuals, which the WGA is in charge of monitoring, distributing, and collecting on behalf of member writers. The MBA at any point in time sets the residual rate at a minimum amount that must be paid by the production studios to the writers taking into consideration the profits studios realize from exploiting the film, for instance, in movie theaters and on TV. Standard language in production contracts includes provisions ensuring the studios receive rights in any and all "new media, now known or yet undeveloped, throughout the universe." This means that the studio is not required to get permission from the writer to distribute the end-product each time a new form of media develops. As new media has developed, however, the WGA has found itself wanting to re-negotiate the residual rate in the MBA, to compensate for the increased profits studios were taking in due to new technology. For example, in the 1990s, the "new media" was DVDs. Home distribution being one of the largest profit generators, the WGA argued for a doubling of the residual rate, but to no avail. Production companies successfully argued that income from DVDs was necessary to offset the rising costs of manufacturing the DVDs. Today, on the other hand, the "new media" is the internet with little to no production cost. By striking, the writers sought to ensure the residual rate they received was in fair proportion to the amount actually being earned from home distribution using this new technology. While the studios argued

that it was too speculative to estimate how much profit internet distribution would actually generate, the writers won in the end. The fact that the writers were part of a union, one comprised of members whose skills could not so easily be out-sourced, gave them some bargaining power. As the writers' strike continued and the viewing audience shrank, production companies realized they would not be able to maintain their advertisement rates.

Now, member writers will share in the profits from re-airing their content online and via cellular technology. They already received residuals for DVDs, at 0.3% of the distributor's gross receipts. Under the new 2008 Minimum Basic Agreement, member writers will also receive 1.2% of distributor's gross receipts for download "rentals" (where the consumer pays for time-limited access to the media) and 0.65-0.7% of receipts for download purchases. The member writers will also receive 2% of distributor's gross receipts for ad-supporting streaming of television programs and feature films, but only after a seventeen-day window during which no residuals are paid. Also new to the 2008 MBA are "separated rights." As part of the minimum contract requirements, members who write material specifically intended for internet programs now automatically retain a portion of the rights, enabling them to adapt the material into other forms, such as plays or novels, and requiring producers to obtain permission to do the same.

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## **UDRP—Not for Correcting Administrative Errors**

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on the third element of a UDRP—due to lack of registration and use in "bad faith." Since the Respondent had "mistakenly" registered the domain name in his own name, and was Complainant's employee at the time, there was no bad faith at the time of registration. In addition, the Respondent had not accessed the

account since leaving the company, nor ever claimed any personal interest in the domain name. The Panelist held that the Complainant simply wanted to correct its administrative failures through the UDRP, which the UDRP was not designed to do.

This decision provides a lesson of the unnecessary risks and expense that can occur when domain names are allowed to be registered in an individual employee's name, along with the account only accessible by the "key" employee. It is not unusual for employees in positions of responsibility to leave a company, with not all of them as amicable as in the present case. If there had been additional oversight of the domain name portfolio, with contact information resolving to a domain-name-specific email account such as *domains@mycompany.com*, then this scenario and the attendant "handcuffing" of the company website may have been avoided.