Three Strikes & the Tale of Who's Out in Hollywood

Simon Pulman
Catherine Grimley: Can you provide some background on the respective SAG-AFTRA and the writers’ strike? Please explain what the strikes are, and the parties involved.

Simon Pulman:

Certainly. Every three years the Alliance of Motion Picture and Television Producers (AMPTP), which is an industry body that represents the largest movie studios and now also the largest streamers, negotiates new collective bargaining contracts with the major entertainment guilds. The guilds primarily involved are the Directors Guild of America (DGA), the Screen Actors Guild—American Federation of Television and Radio Artists (SAG-AFTRA), which represents the actors, and the WGA, which is the Writers Guild of America. It is important to note that these guilds represent the majority of working directors, actors, and writers in scripted film and television. With respect to SAG-AFTRA, for example, most of the prominent and recognizable actors in the United States are in SAG-AFTRA. Likewise, a huge proportion of professional screenwriters are in the WGA—so those entities very much represent the interests of those entertainment professionals.

Now, the last negotiations took place in 2020 while the world was primarily preoccupied with the COVID-19 pandemic. The priority of the companies and guilds at that time was making it through the pandemic safely (by, for example, implementing COVID protocols on set). Therefore, there were a lot of unaddressed issues that arose out of the changing entertainment landscape that had to be addressed this time. And so, effectively, what happened this year resembles a bit of a perfect storm. The DGA was able to make a deal, and it took around six months of the WGA being on strike before they were able to reach a resolution. And as of today, October 31, 2023, SAG-AFTRA has not yet made a deal and remains on strike.

* Partner and co-chair of Pryor Cashman’s Media + Entertainment and Film, TV + Podcast Groups; he is also co-chair of the M+E Transactions and Financing Practice.
Catherine Grimley: What are some of the underlying motivations of each party that caused this strike for the SAG-AFTRA? What were some of the motivations of the Writers’ Guild?

Simon Pulman:

The major entertainment guilds are concerned about two or three things. One of the primary concerns stems from the changing nature of the entertainment business, particularly the emergence of streaming services. Essentially, the guilds feel that talent and creative contributors do not participate in the same way in the success of a service on platforms such as Apple, Amazon, or Netflix in the same way they would for, for example, in a sitcom that plays in syndication for a long period of time. A lot of the negotiations has implicated the concept of a “streaming bonus” for successful shows and movies on subscription services. The other big sort of existential piece, which is implicated in different ways with the WGA and SAG-AFTRA, is artificial intelligence (AI). AI is something that was a fairly secondary issue even twelve or eighteen months ago. Over the last year, it has caused a lot of concern about what the possible implications could be for contracting parties.

So, if we zoom in and we get a little bit more granular, the WGA was concerned about a few things. The first piece in the negotiation cycle is a negotiation for what we call the minimums, which is the minimum amount that a writer gets for writing a script or being in a writer’s room. The second piece is in part because of streaming and short orders; there has been this phenomenon that has arisen over the past five or six years, which we call “mini rooms” or “pre green light rooms.” And this is the notion that instead of continuously writing a show and being on set and writing as you produce like was done in the days of 22–34 episode procedural shows like “Law and Order,” or sitcoms like “Friends,” writers would basically be put into a short room and asked to write an entire season of television upfront and then not necessarily be engaged for additional services thereafter. What these short rooms created were situations where writers felt that the studios were not committing to them on these shows in the way that perhaps they had previously.

Then, as far as AI goes for the writers, it is largely about credit. What a layperson may not understand is that when you look at the credits on a motion picture, particularly television series, and you see “story by,” “teleplay by,” or “written by,” that is not just about vanity and having

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your name included just so that your friends and family can see it. There are actually real financial implications that stem from that credit, especially with pilot episodes, but also for residuals on other episodes as well. Essentially, the concern is that upon WGA Credit Determination, which occurs on every WGA show or movie, writers might be divested of full writing credit for their work—and the entitlements that come with that—with AI coming into the picture. The WGA’s concern was that that studio executives could either have AI rewrite work by a human writer or use AI to generate an underlying scenario and then require a writer to write a script based on that. Either path could lead to a situation where it would be impossible for writers to receive full writing credit (and therefore full payment) for their work. Because, for example, a writer cannot qualify for created by in television, typically, if the writer is adapting a book because there is underlying material. So, the nightmare scenario would be that something is spat out by AI, is handed to the writer, who is then asked to turn it into a screenplay, and then the writer does that work but would not be able to get all of the entitlements that comes with full writing credit. This was a big issue that was ultimately resolved.

However, one significant piece regarding AI that was not expressly resolved was related to training. This is the notion of feeding copyrighted material into some kind of AI model. For example, if you put all the action movies from the last thirty years into an AI model, you could then ask a large language model like ChatGPT or whatever to spit out an action script. Effectively, they punt on the issue, and the writers sort of reserved their legal rights.

As far as SAG-AFTRA goes, there are very similar types of issues around the implications of streaming, residuals, and actors not being able to get those repeat payments for an exhibition. This was due, in part, to the fact that on streaming, it is very difficult to ascertain what an exhibition is. It is not like Seinfeld being broadcast at 6:00 p.m. and 6:30 p.m. in most major markets all around the country, with Nielsen ratings to support the viewership for those broadcasts. On streaming platforms, there is little data transparency around the number of people viewing a particular series, and therefore it is hard to calculate residuals that should be paid. As far as AI goes with the actors—and I believe this still remains open—there are fascinating issues around the scanning of actors’ digital likenesses—this is what SAG-AFTRA is calling synthesized performance or use of a “digital replica.” The guild is concerned by the notion that by inputting a lot of performances of a particular actor into an AI model, you could then use the model to generate a new performance by that actor. For example, you can ask the model to create a new Brad Pitt movie or, perhaps more germane in the short term, create a crowd
scene so you do not need extras. That was a big, big concern that is still being addressed.

One of the bigger issues was around the timing of consent, and the devil is in the details. The AMPTP, as I understand it, agreed that they would need consent to use this kind of technology, but the question remained with the timing. The AMPTP was proposing that they could get the consent upfront, presumably as part of the initial contract, whereas the SAG-AFTRA was saying no, you have to go back on a case-by-case basis and get informed consent based on the specifics of the desired use.

**Catherine Grimley:** What are the statuses of the two strikes?

**Simon Pulman:**

Thankfully, the WGA strike was resolved, and it was ratified on October 9, 2023, although the writers actually went back to work a couple of weeks earlier.2

As of today, October 31, 2023, we do not yet have a SAG-AFTRA deal. What that means is that unless a production signs something called an interim agreement, the actors cannot appear on set, cannot act, and cannot promote any movies. Yesterday, I saw that the new Hunger Games prequel, *The Ballad of Songbirds and Snakes*, signed up for a SAG-AFTRA interim agreement. That movie is complete, so the controversy was not about shooting, it was about allowing those actors to appear on talk shows or to appear at premiers and to support the promotion of the movie.

**Catherine Grimley:** Some argue that streaming platforms have been largely insulated from the strikes’ impacts. Why are these platforms benefitting from the prolonged delay of traditional network’s content, and what does this mean for the overall effect of the strikes?

**Simon Pulman:**

I don’t know that I 100% agree with this. It is true, and the theory here would be that there are at least a couple types of content that are not subject to SAG-AFTRA. One, obviously, is anything that is produced abroad. And it has been well publicized that the streaming platforms have done a great job importing content from Spanish-speaking territories, South Korea, Japan, other locales, and, therefore, can feed those from the

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United Kingdom (UK) to their audiences. The second piece is that many unscripted productions are also not subject to SAG-AFTA, including documentaries. Finally, they have a pipeline of content that was pre-produced over the last six months.

I believe that most lay people—most members of the public—would not really have noticed a lot of the effects of the strikes. Clearly, there have been things like Dune, for example, being pushed into next year rather than a theatrical release. However, the streaming platforms have been affected, much like everybody else, because we have to look forward into 2024. Right now, there are a lot of movies that have not been able to be completed because post and dubbing has not been completed during the strikes and, moreover, there has been no actual production. So, I think they are potentially going to have the same crunch as everybody else come 2024.

There is another piece to this, which is kind of interesting. Arguably, the streamers are less reliant on promotion from actors to publicize their pieces. This is primarily because these platforms do not have to recruit people via talk shows and premieres and magazine articles to go out to the theater and watch a movie. In theory, the movie is pushed to you via the algorithm. You watch a particular movie, and you are recommended more content that you may like. Moreover, I think now on Netflix a lot of people select programming based on what is on the “Top 10” list on a Friday night. So, while everybody has been affected by the inability to recruit actors to promote content, it may be to varying degrees.

Catherine Grimley: Before the negotiations ceased earlier this month, SAG-AFTRA was proposing to place a per subscriber tax on the AMPTP streaming services. This seems to be where negotiations reached an impasse. What was SAG-AFTRA hoping to achieve with this tax? Was this a realistic and feasible request from SAG-AFTRA?

Simon Pulman:

The first thing to note here is that at no point in time did SAG-AFTRA characterize this as a tax or a levy. That was something that I think came from certain elements of the press and commentators—possibly from the AMPTP. It was noted that effectively and reportedly, SAG-AFTRA was looking for a percentage of the revenues of the streaming platforms. The reason they were doing that, I think, was that they essentially said, “you are huge corporations, you have a lot of cash, you have huge penetration, and you are effectively building your ecosystems based on the content

that we creatives produce, our names and likenesses, and our performances.” The notion was that SAG-AFTRA believed that a lot of value derived from the actors’ performances and creative productions, and that the members were not sharing proportionately in that value.

Now, a direct participation in the revenues of these companies would not be realistic or feasible as characterized for a few reasons. First, if it was accurate that they were looking for a percentage of revenues of, let’s say, Apple; clearly you cannot have a percentage of the revenues of Apple because Apple makes money selling iPhones and tablets and not from selling subscriptions to its TV service, which I am sure is a rounding error in the overall economics of the company. Second, many of these services are not profitable at this stage, so it really would not make sense. Third, this proposal is for a flat percentage. It would not key payment to the actual proportional success of the service or the actual shows in movies and that has always been the key, even with residuals. The shows that have paid out residuals over times were those that were repeated over and over again because they were successful. Conversely, a show that was canceled halfway through season one, and never aired again, did not generate a lot of residuals. And this goes to an accompanying point which is this: a lot of streaming services have actually pulled down original content over the last twelve months. This move is speculated to be partly about tax write-offs, but partly because the residuals formula, as it presently stands, does not distinguish between a successful show and any other show. It is actually based on how long the show has been on the service and, so, we have sort of lost that proportionality on both ends in terms of participation in real success.

Catherine Grimley: Prior to the subscriber tax proposal, the AMPTP was offering SAG-AFTRA the same success-based residual that they gave to the WGA. This would have potentially allowed a performance

4. Why Do TV Shows and Movies Leave Netflix?, NETFLIX, https://help.netflix.com/en/node/60541#:~:text=Though%20we%20strive%20to%20keep,much %20it%20costs%20to%20license [https://perma.cc/C46U-HQ8A] (explaining that TV shows and movies leave Netflix at the conclusion of the licensing agreement between the title and Netflix, though Netflix can renew the licensing agreement if the rights to the title are still available); Henry T. Casey, Disney Plus and Hulu to Lose Content – What’s Going On?, YAHOO FIN. (May 11, 2023), https://finance.yahoo.com/news/disney-plus-hulu-lose-content-142906029.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQA AADH1dgo4U AJEOOunk1che5MotS5Tjv8lpg2mhzN-o1LHRH1VsbQRRRFmrqliK6b4SXLv gBXZQ4FEwq6x0kPiNuJ_Gpe98tBmdmArxXNDBMuzmByUirkfE5XhkbWuQT1_hjr EQ2KJN3RmBv0f090f22bIE7BG6gHTjsuE#:~:text=In%20a%20move%20that%20might,along%20with%20varying%20other%20costs [https://perma.cc/7RBW-ZFQK] (explaining that Disney and Hulu routinely choose to remove titles that do not get enough attention from their service in order to save costs on the residuals, royalties, and licensing agreement payments owed for those titles).
bonus based on domestic subscribers watching the program during the first 90 days of release. Why was this term not accepted by SAG-AFTRA? Was it unreasonable for SAG-AFTRA to rebut with the per subscriber tax?

**Simon Pulman:**

It is important to note that as we talk today, we do not know where SAG-AFTRA will end up on this issue. By the time this Commentary is published, we may very well have those details, and perhaps this will have been resolved.

The performance bonus, as structured for the WGA, was definitely a big win for them. But, as I understand it, it would have applied to a relatively small proportion of shows. The other thing that is interesting about it, which I think is probably a smart thing, is that it tiers success to the actual platform. A show has to be watched a lot more on Netflix to be deemed a success proportionate to its subscription base versus Peacock, for example, which has fewer subscribers. The theory would be, well, yes, that show was watched by fewer people in the aggregate on Peacock, but proportionally, it was a benefit, it drove subscriptions, and it drove value to that platform. I have to imagine that to the extent it has not been accepted; it would be because they did not feel like it was going to benefit members sufficiently. However, in my mind, the WGA proposal would and should have been a signpost for at least some kind of resolution for SAG-AFTRA. So, the fact that it has not been accepted yet is interesting to me.

**Catherine Grimley:** Was there a clear winner of the WGA strike and subsequent agreement? If so, which party won and why?

**Simon Pulman:**

The WGA agreement went much further than I expected in terms of things like minimum staffing in writers’ rooms and the success-based residual, which I never thought would be agreed to in any form. The winner there is the WGA. With that being said, however, they did not get the full data transparency that they were looking for. If you look at the provisions, there are very specific parameters around what kind of data can be shared and with whom within the WGA, but it is certainly a better foothold than they would have gotten. My overall concern with these strikes, when you look five, ten, fifteen years into the future, is that there will be no winners. By effectively crippling the industry for six, seven,
eight months, or more, it has just caused further harm to a business that frankly is already challenged by other forms of entertainment.

I really hope that going into 2024, there is a renaissance in creative filmmaking, risk taking, exciting new productions, exciting new franchises, new writers, and new voices given opportunity. I think that these strikes came at a time when peak TV was already over, already starting to decline, and I think the strikes accelerated that. Now, we are presently in a time of real uncertainty, even when the SAG-AFTRA strike lifts.

Catherine Grimley: In the future, do you expect ongoing debates between the writers and studios on the use of AI-generated content? Will filmmakers and screenwriters be able to secure creative and intellectual property rights in their work?

Simon Pulman:

AI is undoubtedly going to be an evolving issue. Part of the reason why I think it has been challenging to reach resolution around AI is that neither side wanted to rule out its use entirely because everybody recognizes that there are applications of these tools that can be helpful. We are seeing some of these applications in subtitling and dubbing. I know it is being used in animation, previzualization, and post-production. There are ways that AI can be used as a tool for creatives while not necessarily cannabalizing their product. At the same time, as you have seen over the last twelve months, I would imagine when you look at the submissions to journals like yours, just two years ago there were relatively few AI submissions people wanted to write journal articles and now, I have to imagine, there is a surplus. This technology is moving so quickly. It is evolving so quickly. There are practical implications. There are going to be contractual issues around how we address these pieces. Additionally, you have the bigger picture issue around copyright law.

There are at least three fairly major cases that are presently examining the copyright implications of things like training, many of them coming out of the literature in the publishing world. More broadly, you have things like name and likeness usage and how it interacts with the right of publicity laws, which, generally speaking, has been state governed up to


https://scholarship.law.ufl.edu/feslr/vol3/iss1/5
now. Will we see some federal name and likeness or right of publicity type laws? Possibly. I think that this would have to be sort of enmeshed in that, and it is going to be interesting. Will they be able to secure creative and intellectual property rights in their work? Look, I think you would have to counsel anybody presently to be cautious around the use of AI because you do not want to defeat your ability to protect your work, and you do not want to inadvertently infringe on third party work either.

I do think that there is a really interesting application of AI for actors in terms of not only a performance of the modification, but this notion of using AI to posthumously bring people back, you know, back and to act in films. Tom Hanks has spoken about this. We have the notion of James Earl Jones licensing his voice to be used for Darth Vader even after he has retired. That has some interesting implications relating to timing of consent, post-mortem rights of publicity, and trust in the state law that I think is another really interesting piece. We have even seen de-aging, most recently in the last Indiana Jones movie, but we are coming fairly close to a time where it might be possible to have the likes of James Dean or Marilyn Monroe star in a new movie type of concept. That has a lot of implications for working actors, the estates of actors, movie companies, and for everybody else.

I can imagine a world where, outside of entertainment, an advertising agency or a marketing agency would submit some concept designs, and they end up getting used. Then, it comes out in the wash that they have been generated using some ChatGPT prompt, and it was relating to some IP. It is going to get very, very complex. You just have to urge caution around all this stuff because it is so legally unsettled at the moment.

**Catherine Grimley**: Studios have recently suggested that they will start canceling TV show series if the strike continues. Do you think this is merely a scare tactic or something that the studios are legitimately considering?

**Simon Pulman:**

It has already happened. There have been a number of shows that have been cancelled, that were ordered and renewed and then cancelled, or, even in some instances, were produced and then pulled off. What is

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impossible to say is how much of that is directly related to the strikes, and how much of it is a broader industry phenomenon. We have lived through a period of time, because there has been so much competition at the platform level, where there has been almost unfettered hunger to fund and produce content to try to recruit subscribers. For better or worse, we have seen a broader range of television than ever before and probably less scrutiny, in certain respects, at the creative level. I think what we are seeing now is a rollback on spending in general. Some of that will likely be strike related because a lot of these entities do not have the same income, they may be a little fearful, but I think it is more symptomatic of a bigger industry re-examination of economics, streaming, and Wall Street’s desire for profitability rather than sort of a tech-focused notion of investing in potential future profitability via growth.

**Catherine Grimley:** What are some of the conditions and consequences that arise from SAG-AFTRA and similar strikes that may occur in the future?

**Simon Pulman:**

These kinds of high-pressure negotiations are always complex and multifaceted. Time is always a factor in a negotiation, and as the duration of a strike extends, the positions and leverage of the respective parties may shift. I think that on the studio side of things, we are at the point where they need to make a deal. They need their actors to come out and promote their big upcoming holiday movies, and if production doesn’t resume soon the 2024 and 2025 slates will be jeopardized. At the same time, you can see the bigger name actors are also eager to make a deal and get back to work. The challenge with the actors is that something like 86% of SAG-AFTRA members make less than $26,500 a year from acting. So, the majority of SAG-AFTRA members are not working steadily as actors, and it is not their sole source of income. Arguably, that means that they do not have the same urgency to push for a resolution.

However, what is crystal clear is that the industry at large needs a deal, and that it’s not just about the studios and the actors, but also all the other people in the industry who are affected. Millions are without work because of the strikes. They include vendors, below the line crew, and visual effects providers who rely on production, as well as restaurants and other local establishments in Los Angeles and elsewhere. It’s also all of

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the assistants and junior executives who have been laid off right at the start of their careers as cost-cutting measures. Hopefully we will see a resolution soon, and I also hope that this is the last “double strike” that we see in our lifetimes.